

- (i) terminate or agree to the termination of all or part of any Implementing Agreement, except pursuant to Sections 19.3, 39.3 and 41.3 or otherwise to prevent or cure a Project Co Event of Default (provided that commercially reasonable alternative measures would not prevent or cure such Project Co Event of Default);
- (ii) make or agree to any amendment, restatement or other modification or waive or exercise any of its rights under any Implementing Agreement that materially adversely affects Project Co's ability to perform its obligations under this Project Agreement or that has the effect of increasing any liability of CMH, whether actual or potential;
- (iii) breach its obligations (or waive or allow to lapse any rights it may have) or permit others to breach their obligations (or waive or allow to lapse any rights they may have) under any Implementing Agreement, that materially adversely affect Project Co's ability to perform its obligations under this Project Agreement or that have the effect of increasing any liability of CMH, whether actual or potential; or
- (iv) enter into, or permit the entry into by any other person of, any agreement replacing all or part of any Implementing Agreement, except in the circumstances referenced in Section 6.2(a)(i),

without the prior written consent of CMH, not to be unreasonably withheld or delayed, provided that, where consent is requested pursuant to Section 6.2(a)(i) or 6.2(a)(iv), such consent shall not be withheld, and shall be provided within a reasonable time, where the relevant matter referred to in Section 6.2(a)(i) or 6.2(a)(iv) will not materially adversely affect Project Co's ability to perform its obligations under this Project Agreement or have the effect of increasing any liability of CMH, whether actual or potential. In the event of termination or agreement to the termination of all or part of any Implementing Agreement as described in Section 6.2(a)(i), or any agreement replacing all or part of any Implementing Agreement as described in Section 6.2(a)(iv), Project Co shall, to the extent applicable, comply with all provisions herein relating to changes in Subcontractors, including Section 39.3.

- (b) Upon the written request of CMH or the Consultant, Project Co will deliver or cause to be delivered to CMH or the Consultant a copy of any notices delivered or received by Project Co under any of the Implementing Agreements.

### **6.3 Changes to Lending Agreements**

- (a) Subject to the terms of the Lender's Direct Agreement, Project Co shall not terminate, amend or otherwise modify the Lending Agreements, or waive or

exercise any of its rights under the Lending Agreements, if at the time such action is contemplated and effected, it would materially adversely affect Project Co's ability to perform its obligations under this Project Agreement or the Project Documents or have the effect of increasing the liability of CMH whether actual or potential, unless such action is a Permitted Borrowing or a Refinancing effected in accordance with the provisions of Schedule 28 – Refinancing.

#### **6.4 Compliance with Lending Agreements**

- (a) Project Co shall keep the Lending Agreements in good standing to the extent necessary to perform its obligations under this Project Agreement and the Project Documents, and shall ensure that none of the terms and conditions of the Lending Agreements shall prevent Project Co from performing its obligations under this Project Agreement or the Project Documents.

### **7. REPRESENTATIONS AND WARRANTIES**

#### **7.1 Project Co Representations and Warranties**

- (a) Project Co represents and warrants to CMH that as of the date of this Project Agreement:
  - (i) Project Co is a corporation formed and validly existing under the laws of the jurisdiction of its organization and has all the requisite corporate power and authority to own, lease and operate its properties and assets, to carry on its business as it is currently being conducted, to enter into this Project Agreement and the Implementing Agreements to which it is a party, and to perform its obligations hereunder and thereunder;
  - (ii) Project Co is in good standing with the Ministry of Consumer and Business Services of Ontario with respect to the filing of annual returns;
  - (iii) Project Co has the requisite power, authority and capacity to execute and deliver and perform this Project Agreement and the Implementing Agreements to which it is a party, and to do all acts and things, and execute, deliver and perform all other agreements, instruments, undertakings and documents as are required by this Project Agreement to be done, executed, delivered or performed;
  - (iv) Project Co has obtained all necessary Project Co Permits, Licences and Approvals required to commence the Work;
  - (v) no steps or proceedings have been taken or are pending to supersede, repeal or amend its constating documents, articles or by-laws or any shareholders agreement in a manner that would materially impair or limit

its ability to perform its obligations under this Project Agreement or any of the Implementing Agreements to which it is a party, and such documents and agreements are in full force and effect as of the date hereof;

- (vi) this Project Agreement and the Implementing Agreements (when executed and delivered) to which Project Co is a party have been duly authorized, executed, and delivered by Project Co and constitute legal, valid, and binding obligations of Project Co, enforceable against Project Co in accordance with their respective terms, subject only to:
  - (A) limitations with respect to the enforcement of remedies by bankruptcy, insolvency, moratorium, winding-up, arrangement, reorganization, fraudulent preference and conveyance and other laws of general application affecting the enforcement of creditors' rights generally; and
  - (B) general equitable principles and the fact that the availability of equitable remedies is in the discretion of a court and that a court may stay proceedings or the execution of judgments;
- (vii) the authorization, execution, delivery and performance by Project Co of this Project Agreement and the Implementing Agreements to which it is a party does not violate or conflict with, or constitute a default under:
  - (A) its constating, formation or organizational documents, or any agreement relating to voting rights in Project Co or the management or control of the business or affairs of Project Co or any similar rights agreement binding on Project Co;
  - (B) any Applicable Law; or
  - (C) any covenant, contract, instrument, agreement or understanding to which it is a party or by which it or any of its properties or assets is bound or affected;
- (viii) no Project Co Event of Default has occurred and is continuing;
- (ix) all of the information regarding Project Co set out in Schedule 4 – Project Co Information, is true and correct in all material respects;
- (x) there are no actions, suits, proceedings, or investigations pending or, to the knowledge of its senior management, threatened against Project Co or any Project Co Party, at law or in equity, before any Governmental Authority or arbitral body (whether or not covered by insurance) that individually or in the aggregate could result in any material adverse effect on the

- business, properties, or assets, or the condition, financial or otherwise, of Project Co or in any impairment of its ability to perform its obligations under this Project Agreement or any Implementing Agreements to which it is a party, and Project Co has no knowledge of any violation or default with respect to any order, writ, injunction or decree of any Governmental Authority or arbitral body that would result in any such material adverse effect or impairment;
- (xi) Project Co has carefully reviewed the whole of this Project Agreement, including all of the Contract Documents, and all other documents made available to Project Co by or on behalf of CMH, and, to Project Co's knowledge, nothing contained herein or therein inhibits or prevents Project Co from completing the Work in accordance with this Project Agreement in a good and safe manner so as to achieve and satisfy the requirements of this Project Agreement;
  - (xii) Project Co is able to meet its obligations as they generally become due;
  - (xiii) Project Co is registered under Division V of Part IX of the *Excise Tax Act* (Canada) and has been assigned HST Number 807424577RT0001;
  - (xiv) the Scheduled Substantial Completion Date is a realistic date and is achievable by Project Co performing the Work in accordance with this Project Agreement;
  - (xv) Project Co and the Project Co Parties, collectively, have extensive experience in the construction of health facilities and other public buildings and have the necessary high degree of expertise and experience to perform the services required by the Contract Documents, to review and interpret the Contract Documents and to complete the Work in accordance with the standard of care set out in Section 11.2(a)(viii);
  - (xvi) the manager or supervisory personnel Project Co has assigned to the Project are highly experienced;
  - (xvii) Project Co has a sufficient staff of qualified and competent personnel to replace its designated supervisors, subject to CMH's approval, in the event of death, incapacity or resignation;
  - (xviii) Project Co and certain of the Project Co Parties have conducted inspections of the Site during the Request for Proposals process and an investigation and examination of the Contract Documents, and any other documents made available to Project Co by CMH (which include, to the extent made available to Project Co by CMH, equipment lists, a legal

description of the Site, copies of any registered and unregistered agreements affecting the Site, results of tests, reports of independent testing agencies and surveys and documents indicating the location of Utilities and other structures to the extent obtained by CMH) so as to ascertain the nature or location of the Work and the Site, the physical conditions of the Site, the interface with the Existing Facility, and protocols, rules and regulations if any, possible delays in commencing the Work, conditions relating to the transportation, handling and storage of materials and availability of labour and the character and availability of equipment, materials and facilities needed to perform the Work and to identify any Design Issues. Project Co has delivered to the Consultant requests for information in respect of all questions arising out of the foregoing inspections, investigations and examinations and in respect of each Design Issue identified. Based on this review, Project Co has established a Project Co Design Contingency adequate, in its judgement, to fund any change or delay cost that may arise as a result of any further Design Issue that may be identified and properly characterized as a Project Co Design Issue;

- (xix) Project Co has sufficient expertise available to it with the appropriate skills to review the Contract Documents in accordance with the standard of care set out in Section 11.2(a)(viii);
- (xx) Project Co has solicited bids from and will award Subcontracts for the Approved Subcontractor Work only to the applicable Approved Subcontractors and has not solicited bids from and will not award Subcontracts for the Approved Subcontractor Work except to the applicable Approved Subcontractors;
- (xxi) Project Co has secured the Financing and is in a position to implement the Financing on or before the Financial Close Target Date, subject to the satisfaction of reasonable conditions that are customary in closing financing for projects similar to the Project;
- (xxii) no Restricted Person has Direct or Indirect Power or Control over any member of the Project Co Group in relation to the decisions, management, actions or policies of Project Co or in relation to the operation, management and ownership of the Project; and
- (xxiii) to the knowledge of Project Co, no Restricted Person has directly or indirectly, an Economic Interest in Project Co or the Project.

## 7.2 CMH Representations and Warranties

- (a) CMH represents and warrants to Project Co that as of the date of this Project Agreement:
  - (i) CMH is a non-share capital corporation incorporated and validly existing under the laws of the Province of Ontario, is in good standing with the Ministry of Government Services (Ontario) with respect to the filing of annual reports and has all the requisite corporate power and authority to own its properties and assets, to carry on its business as it is currently being conducted, and to enter into this Project Agreement and to perform its obligations hereunder;
  - (ii) CMH has the requisite power, authority and capacity to execute, deliver and perform its obligations under this Project Agreement and to do all acts and things, and execute, deliver and perform all other agreements, instruments, undertakings and documents as are required by this Project Agreement to be done, executed, delivered or performed;
  - (iii) no steps or proceedings have been taken or are pending to supersede or amend CMH's constating documents, letters patent or by-laws in a manner that would impair or limit its ability to perform its obligations under this Project Agreement;
  - (iv) this Project Agreement has been duly authorized, executed, and delivered by CMH and constitutes a legal, valid, and binding obligation of CMH, enforceable against CMH in accordance with its terms, subject only to:
    - (A) limitations with respect to the enforcement of remedies by bankruptcy, insolvency, moratorium, winding-up, arrangement, reorganization, fraudulent preference and conveyance and other laws of general application affecting the enforcement of creditors' rights generally; and
    - (B) general equitable principles and the fact that the availability of equitable remedies is in the discretion of a court and that a court may stay proceedings or the execution of judgments;
  - (v) the execution, delivery, and performance by CMH of this Project Agreement does not and will not violate or conflict with, or constitute a default under:
    - (A) its constating or organizational documents;
    - (B) Applicable Law; or

- (C) any covenant, contract, agreement, or understanding to which it is a party or by which it or any of its properties or assets is bound or affected;
- (vi) no CMH Event of Default has occurred and is continuing;
- (vii) to the knowledge of CMH, there are no actions, suits, proceedings, or investigations pending or threatened (in writing) against CMH or, to CMH's knowledge, any CMH Party at law or in equity before any Governmental Authority or arbitral body (whether or not covered by insurance) of which CMH has received written notice and that individually or in the aggregate could result in any material adverse effect on the business, properties, or assets, or the condition, financial or otherwise, of CMH or in any impairment of its ability to perform its obligations under this Project Agreement, and CMH has no knowledge of any violation or default with respect to any order, writ, injunction, or decree of any Governmental Authority or arbitral body that could result in any such material adverse effect or impairment;
- (viii) CMH is able to meet its obligations as they generally become due; and
- (ix) CMH has rights of use and access to, on and over the Site and the Facility or has the requisite power to obtain such rights that are sufficient to enable CMH to grant or to cause to be granted to Project Co the licence rights contemplated in Section 9.1.

## **8. CONSULTANT AND KEY PERSONNEL**

### **8.1 Authority of the Consultant**

- (a) The Consultant will have authority to act on behalf of CMH only to the extent provided in the Contract Documents, unless otherwise modified by written agreement as provided in Section 8.1(b).
- (b) The duties, responsibilities, and limitations of authority of the Consultant as set forth in the Contract Documents shall be modified or extended only with the written consent of CMH, Project Co and the Consultant.
- (c) If the Consultant's employment is terminated, CMH shall immediately appoint or reappoint a Consultant whose status shall, upon notification to Project Co of such appointment or reappointment, be that of the former Consultant.

## 8.2 Role of the Consultant

- (a) The Consultant will provide administration of this Project Agreement as described in the Contract Documents during construction until issuance of the final certificate for payment, and subject to Section 8.1 and with CMH's concurrence, from time to time until the completion of any correction of defects as provided in Article 36.
- (b) The Consultant will visit the Site at intervals appropriate to the progress of construction to become familiar with the progress and quality of the Work and to determine if the Work is proceeding in general conformity with the Contract Documents.
- (c) If CMH and the Consultant agree, the Consultant will provide at the Site, one or more project representatives to assist in carrying out the Consultant's responsibilities. The duties, responsibilities, and limitations of authority of such project representatives shall be as set forth in writing to Project Co.
- (d) The Consultant will provide to Project Co a complete set of the issued for construction Drawings and Specifications under the Contract Documents incorporating all Addenda issued by the Consultant from November 14, 2013 to the date of execution of this Project Agreement as soon as reasonably practical following such date of execution. The Consultant shall review the progress of the Work and the general conformance of the Work to the requirements of the Contract Documents. The Consultant shall review the submission of Project Co with respect to Work completed for the purposes of a progress payment application by Project Co under Schedule 18 - Payments and Holdbacks, to verify the extent of the completion of the Work in accordance with the schedule of values and shall perform the other responsibilities of the Consultant under Schedule 18 - Payments and Holdbacks.
- (e) The Consultant will not be responsible for and will not have control, charge, or supervision of construction means, methods, techniques, sequences, or procedures, or for safety precautions and programs required in connection with the Work in accordance with Applicable Law or general construction practice. The Consultant will not be responsible for Project Co's failure to carry out the Work in accordance with the Contract Documents. The Consultant will not have control over, charge of, or be responsible for the acts or omissions of Project Co or any Project Co Party or any other persons performing portions of the Work.
- (f) The Consultant will be, in the first instance, the interpreter of the requirements of the Contract Documents and shall make findings as to the performance thereunder by both Parties to this Project Agreement. When making any interpretations or findings or performing any other functions or exercising any right or performing



any obligation under the Contract Documents, the Consultant will act reasonably and in good faith and in accordance with generally accepted professional standards and will not show partiality to either CMH or Project Co. Any dispute between CMH and Project Co as to any decision, determination, direction, interpretation or finding of the Consultant or any other action taken by the Consultant pursuant to or in connection with the Contract Documents shall be resolved in accordance with the provisions of Schedule 14 – Dispute Resolution Procedure.

- (g) Claims, disputes, and other matters in question relating to the performance of the Work or the interpretation of the Contract Documents, shall be referred initially to the Consultant by notice in writing given to the Consultant and to the other Party for the Consultant's interpretation and finding which will be given by notice in writing to the Parties within a reasonable time.
- (h) The Consultant will have authority to reject Work which does not conform to the requirements of the Contract Documents. Whenever the Consultant considers it necessary or advisable, the Consultant will have authority to require inspection or testing of Work in accordance with Section 17.2, whether or not such Work is fabricated, installed, or completed. However, neither the authority of the Consultant to act nor any decision either to exercise or not to exercise such authority shall give rise to any duty or responsibility of the Consultant to Project Co, any Project Co Party, or other persons performing any part of the Work.
- (i) When a request for information is submitted by Project Co in accordance with Section 11.2(a)(i), the Consultant will endeavour to provide a response to Project Co as soon as practical, taking into account the impact of the request for information on the critical path. If the request for information relates to an item on the critical path or is reasonably likely to affect an item on the critical path, the Consultant shall respond within 5 Business Days or such longer period of time mutually agreed to by the Consultant and Project Co. If the request for information does not relate to an item on the critical path and is not reasonably likely to affect an item on the critical path, the Consultant and Project Co shall establish a mutually agreed response time that is consistent with the Construction Schedule.
- (j) The Consultant will review and take appropriate action upon Project Co's submittals such as shop drawings, Product data and samples, as provided in the Contract Documents.
- (k) The Consultant will prepare Contemplated Change Notices, Change Orders and Change Directives as provided in Schedule 11 - Change Procedure.

- (l) The Consultant will conduct reviews of the Work to determine the Interim Completion Date and the Substantial Completion Date, as provided in Section 16.1 and Section 16.2, respectively, and make determinations as required in respect of the Commissioning, as contemplated in Schedule 9.
- (m) All certificates issued by the Consultant shall be to the best of the Consultant's knowledge, information and belief. By issuing any certificate, the Consultant does not guarantee that the Work is correct or complete.
- (n) The Consultant will receive and review written warranties and related documents required by this Project Agreement and provided by Project Co and will forward such warranties and documents to CMH for CMH's acceptance.
- (o) Without limiting the generality of the responsibilities of the Consultant in accordance with this Section 8.2, the Consultant shall be responsible for reviewing and making a finding on Design Issues and issuing all final documentation in accordance with Section 11.18.
- (p) The Consultant shall cooperate with Lender's Consultant on a reasonable basis to facilitate the responsibilities of Lender's Consultant. No activities of Lender's Consultant under this Project Agreement shall limit in any manner the role and responsibility of the Consultant.
- (q) CMH has retained CMH's Project Manager to assist CMH in the overall implementation of the Project. CMH's Project Manager shall provide services and interface with Project Co and the Consultant in relation to coordination of the Work for existing operations, schedule overview, and communicating decisions and directions of CMH. CMH may, upon notification to Project Co, appoint a new CMH Project Manager whose status shall be that of the former CMH Project Manager.
- (r) When CMH, the Consultant or Project Co provides any written notice under this Project Agreement, they shall also provide a copy of the notice to each other and to CMH's Project Manager, the Contractor, Agent and Lender's Consultant.
- (s) Notwithstanding the foregoing or anything to the contrary in this Project Agreement or the Contract Documents, the Consultant will not be responsible for the administration or interpretation of those aspects of this Project Agreement that are not related or do not pertain to the construction, installation, testing, Commissioning and completion of the Facility, and other like activities, and for greater certainty, will not have any responsibility or obligation with respect to the matters set out in Article 2, Article 7, Schedule 3 – Completion Documents, Schedule 4 – Project Co Information, Schedule 5 – Form of Lender's Direct Agreement, Schedule 22 – Form of Performance Guarantee of Construction

Guarantor or Schedule 23 – Form of Assignable Subcontract Agreement for Construction Contract of this Project Agreement, or for any matter related to the Financing.

### 8.3 Supervisors

- (a) Project Co shall employ competent supervisors and necessary assistants who shall be in attendance at the Site while work is being performed, and shall specifically include a competent mechanical and electrical coordinator and equipment coordinator. Project Co acknowledges that the supervisors are Key Personnel in accordance with Section 8.4. Project Co's supervisors shall, subject to Section 8.4, devote their full time during working hours to the Project and remain at the Site until Substantial Completion is achieved and thereafter, such supervisors shall, subject to the provisions of Section 8.4, devote sufficient time and effort to the Project as necessary until the final certificate of payment has been issued by the Consultant and all Minor Deficiencies have been rectified. Project Co shall include in its staff separate qualified mechanical and electrical coordinators who shall be responsible for (i) coordinating the general, mechanical and electrical shop drawings submitted by the Subcontractors and Suppliers for various trades or divisions of the Work; (ii) checking for any conflicts or interferences of the Work of one division or trade with another; (iii) checking for completeness of the shop drawings; and (iv) providing direction on any changes that may be required for compliance with the Contract Documents for submission to the Consultant and review of the shop drawings. The mechanical and electrical coordinators shall be active participants in the Commissioning and shall work closely with the Commissioning Agents in accordance with Schedule 9 – Commissioning Program. The mechanical and electrical coordinators shall be Key Personnel in accordance with Section 8.4.
- (b) The supervisor and project manager appointed by Project Co and identified in Schedule 7 – Key Personnel, shall represent Project Co at the Site and shall have full authority to act on written instructions given by the Consultant, CMH and/or CMH's Project Manager. Instructions given to the supervisor or the project manager shall be deemed to have been given to Project Co and both the supervisor and any project manager shall have full authority to act on behalf of Project Co and bind Project Co in matters related to this Project Agreement.

### 8.4 Key Personnel

- (a) Project Co and the Project Co Parties shall commit as many people and man-hours to the Project as are needed, from time to time, to meet its obligations under this Project Agreement, including the supervisors, project manager and other field management personnel identified in the Contract Documents (the "**Key Personnel**").

- (b) Project Co acknowledges that CMH has relied on Project Co's representations that the Key Personnel will be available to perform their part of the Work throughout the duration of this Project Agreement as provided for in Section 8.3(a). Key Personnel will be dedicated to the Project on a full-time basis unless noted otherwise. Project Co agrees not to undertake other contracts or projects which could adversely affect or be in conflict with its performance of this Project Agreement.
- (c) Project Co represents that the persons identified in Schedule 7 are the Key Personnel.
- (d) Project Co shall not replace any of the Key Personnel identified in Schedule 7 without the prior written approval of CMH. If any of the Key Personnel become unavailable to perform services in connection with this Project Agreement due to revisions to the Construction Schedule or ill health or death or discharge by Project Co, then Project Co shall promptly designate a replacement(s) who shall be subject to CMH's written approval. CMH shall be entitled to complete information on any such replacement of the Key Personnel, including a current resume. Further, CMH shall have the right, acting reasonably, to require Project Co to replace any of the Key Personnel.

## **9. LICENCE AND TITLE**

### **9.1 Licence to Site**

- (a) Effective from Financial Close and subject to this Project Agreement, CMH hereby grants to Project Co and all Project Co Parties such non-exclusive licence rights of use and access to, on and over the Site and the Facility as are required by Project Co to allow Project Co to perform the Work.
- (b) None of the rights granted pursuant to this Section 9.1 shall extend beyond the boundaries of the Site, or to any lands other than the Site, other than easements and similar interests of CMH which benefit the Site, obtained after the date of this Project Agreement, to the extent the same are necessary for the Work.
- (c) The licence provided in this Section 9.1 with respect to the Site shall automatically terminate on the Final Completion Date or upon the earlier termination of this Project Agreement in accordance with its terms.
- (d) Project Co agrees to: (i) provide hoarding around the licensed area outside of the Existing Facility in accordance with the Contract Documents; (ii) cordon off areas within the Existing Facility where Project Co is performing the Work required under the Contract Documents and as approved by the Consultant; and (iii) use such access to the Existing Facility, including loading docks, freight elevators and

access routes as provided in the Contract Documents and as otherwise directed by the Consultant.

## 9.2 Non-Exclusive Licence of Site

- (a) Project Co acknowledges and agrees that the rights granted to Project Co and the Project Co Parties hereunder shall be non-exclusive and that CMH and any person authorized by CMH may occupy and possess the Site and the Facility. In exercising such rights Project Co shall not, and shall require that the Project Co Parties shall not, compromise patient care and safety and, except as permitted under this Project Agreement, disrupt the ongoing operation of the Facility.
- (b) Without limiting Section 9.2(a), Project Co acknowledges that CMH may, from time to time, use or develop (including by way of subdivision), or permit the use or development of, portions of the Site other than those portions of the Site contained within the building footprint of the Facility and those other portions of the Site necessary for the performance of the Work. To the extent that such use or development materially adversely interferes with Project Co's licence rights hereunder or materially adversely interferes with Project Co's ability to perform the Work, such use or development shall, subject to and in accordance with Schedule 11 – Change Procedure, result in a Change Order.

## 9.3 Naming and Signage

- (a) Project Co acknowledges that CMH reserves and retains (i) all rights to designate the name for the Facility and any part of the Facility; (ii) all rights to signage in relation to the Site and the Facility; and (iii) all rights, trade-marks, naming or branding regarding the Facility or any part of the Facility. It is agreed, however, that with the prior written consent of CMH, not to be unreasonably withheld or delayed and which may take into consideration any applicable governmental guidelines including the guidelines set out in Schedule 21 – Communications Protocol, Project Co, the Project Co Parties and the Agent may, for the period prior to Substantial Completion, erect and maintain signage at or on the Site or Project (which may include such parties' logos and trade names) identifying their respective roles in connection with the construction of the Project, in a number and location and having a size and quality previously approved by CMH.

## 9.4 No Interest in Site or Facility

- (a) Project Co acknowledges and agrees that, subject to the provisions of the *Construction Lien Act* (Ontario), in accordance with the principles of the IPFP Framework, neither Project Co nor Agent shall acquire any estate, right, title or ownership interest in the Site or the Facility or any other interest in land pursuant to this Project Agreement, the Implementing Agreements or otherwise.

Notwithstanding any provision herein or in any of the Implementing Agreements to the contrary, CMH shall at all times retain the fee simple interest in and freehold title to the Site and the Project, unencumbered by any interest of Project Co or Agent. Project Co and Agent shall have access to the Site and the Facility under and subject to the licenses granted under this Article 9 and the Lender's Direct Agreement, respectively.

## **9.5 Non-Disturbance Agreement**

- (a) If CMH mortgages, charges or otherwise encumbers the Site, CMH shall notify Project Co and, at the request of Project Co, provide Project Co with an agreement executed by the mortgagee of the Site, permitting Project Co, Agent and Lender's Consultant to access and use the Site under the licence granted pursuant to Section 9.1(a) and the Lender's Direct Agreement, respectively, free from interference from the mortgagee or any person claiming by or through the mortgagee. This Section 9.5 shall not apply in respect of any portion of the Site or the Facility used or developed pursuant to Section 9.2(b) if neither the licence granted pursuant to Section 9.1(a) nor the Work pertain to such portion of the Site.

## **10. CMH RESPONSIBILITIES**

### **10.1 General**

- (a) CMH shall, at its own cost and risk:
  - (i) perform all of its obligations under, and observe all provisions of, this Project Agreement in compliance with Applicable Law;
  - (ii) obtain, maintain, pay for (including all fees and deposits) and as applicable, renew all CMH Permits, Licences and Approvals;
  - (iii) comply with all Permits, Licences and Approvals in accordance with their terms; and
  - (iv) cooperate with Project Co in the fulfillment of the purposes and intent of this Project Agreement, provided, however, that CMH shall not be under any obligation to perform any of Project Co's obligations under this Project Agreement.
- (b) CMH shall, and shall cause all CMH Parties to, take reasonable steps to minimize undue interference with the provision of the Work by Project Co or any Project Co Party.

- (c) Nothing in this Project Agreement or any of the Implementing Agreements (including the Construction Contract) shall in any way fetter the right, authority and discretion of CMH as a public hospital under the *Public Hospitals Act* (Ontario) in fulfilling its statutory or other functions under Applicable Law, and Project Co acknowledges and agrees that nothing in this Project Agreement or any of the Implementing Agreements (including the Construction Contract) shall preclude CMH's board of directors from performing, discharging or exercising its duties, responsibilities and powers under Applicable Law. Project Co further agrees that it shall comply, and shall cause all relevant Project Co Parties to comply, with all written directions issued by or on behalf of CMH's board of directors in furtherance of the board of directors fulfilling its duties, responsibilities and powers under Applicable Law in a manner consistent with the rights of CMH under this Project Agreement, and the cost, if any, of implementing the written directions and the additional time, if any, required to implement such written directions will be implemented by way of a Change Order or Change Directive, as applicable, as provided in Schedule 11 - Change Procedure.

## 11. PROJECT CO RESPONSIBILITIES AND CONSTRUCTION OBLIGATIONS

### 11.1 General Responsibilities, Standards and Contract Time

- (a) Project Co shall perform and complete the Work:
- (i) so as to satisfy and in strict accordance with the Contract Documents;
  - (ii) in accordance with the Construction Schedule and in this regard, shall commence the Work no later than the day following Financial Close and, subject to adjustment as provided for in the Project Agreement,
    - (A) complete the Phases by the applicable Phased Occupancy Dates;
    - (B) achieve Interim Completion by the Scheduled Interim Completion Date;
    - (C) achieve Substantial Completion by the Scheduled Substantial Completion Date; and
    - (D) achieve Final Completion by the Scheduled Final Completion Date;
  - (iii) in compliance with Applicable Law, including giving all required notices;

- (iv) in compliance with all Permits, Licences and Approvals and so as to preserve the existence and continued effectiveness of any such Permits, Licences and Approvals;
  - (v) in accordance with Good Industry Practice and to meet the standards followed by professionals, manufacturers, contractors and trades who are experienced in work on health facilities and other public buildings that are comparable to the Facility;
  - (vi) in a timely and professional manner;
  - (vii) with due regard to the health and safety of persons and property;
  - (viii) subject to the other provisions of this Project Agreement, in a manner that will not impair the ability of and that will enable CMH and the CMH Parties to comply with Applicable Law;
  - (ix) in a manner that does not permit any use of any part of the Site that could constitute a nuisance in, at or on the Site, and that does not allow any waste, damage or disfiguration to the Site;
  - (x) subject to the provisions of this Project Agreement and to the extent reasonably practicable, in a manner which will not impair the on-going operation of the Existing Facility; and
  - (xi) in accordance with all other terms of this Project Agreement and the other Contract Documents.
- (b) Project Co shall furnish necessary certificates as evidence that the Work installed conforms with Applicable Law, including all certificates necessary for the Consultant to certify as required to obtain a permit for CMH's occupancy or partial occupancy. These certificates are to be final certificates giving complete clearance for the portions of the Work for which they are obtained.

## **11.2 General Construction Obligations**

- (a) Without limiting Section 11.1, Project Co shall:
- (i) have complete control of the Work and shall effectively direct and supervise the Work so as to ensure conformance with the Contract Documents, including the phasing or sequencing requirements for the Work set out in the Contract Documents. During the progress of the Work, subject to Section 8.2(i), Project Co shall endeavour to submit any request for information to the Consultant in a timely manner having regard to the Construction Schedule, and to identify in the request for information the



timeframe within which a Supplemental Instruction is needed to ensure there is no impact on the Construction Schedule, including whether and how the information requested affects the critical path. Project Co shall develop and implement protocols in accordance with the Specifications for the phasing or sequencing of the Work as set out in the Contract Documents, including the coordination of the work of CMH's own forces or other contractors with the Work. Without limiting the generality of the foregoing, Project Co is responsible for the intermeshing of the various parts and systems comprising any portions of the Work so that no part shall be left in an unfinished or incomplete condition owing to any disagreement between the Project Co Parties or between any of them and Project Co as to where the Work of one begins and ends in relation to the Work of the other;

- (ii) be solely responsible for all construction means, methods, techniques, sequences and procedures used to undertake the Work and for coordinating the various parts of the Work under this Project Agreement and shall coordinate the Work so as to not interfere, interrupt, obstruct, delay or otherwise affect the work of others;
- (iii) prior to commencing applicable procurement and construction activities, verify, at the Site, all measurements and levels necessary for proper and complete fabrication, assembly and installation of the relevant Work, and shall further carefully compare such field measurements and conditions with the requirements of the Contract Documents. Where dimensions are not included or exact locations are not apparent, Project Co shall immediately notify the Consultant in writing and obtain written instructions from the Consultant before proceeding with any part of the Work affected thereby;
- (iv) ensure that no work other than the Work under this Project Agreement is constructed on the Site by Project Co, any Project Co Party or any person for whom Project Co is responsible at law;
- (v) protect the Work and the Site from all of the elements, casualty and damage in accordance with and subject to the Contract Documents;
- (vi) in respect of plant, equipment, Products and materials incorporated in the Work, use plant, equipment, Products and materials that:
  - (A) are of a kind that are consistent with the Contract Documents;

- (B) are new, of good quality and are used, handled, stored and installed in accordance with Applicable Law, the Contract Documents and Good Industry Practice; and
- (C) where they differ from the Contract Documents, have been substituted with CMH's prior written consent;
- (vii) provide all the labour, Products, tools, construction machinery, equipment, water, heat, light, power, transportation and other facilities and services required for the performance and completion of the Work and carry out, perform, observe, fulfil and abide by all the covenants, agreements, stipulations, provisions and conditions mentioned and contained in the Contract Documents on the part of Project Co to be carried out, performed, observed and fulfilled;
- (viii) exercise the standard of care, skill and diligence that would normally be provided by an experienced and prudent contractor supplying similar services for similar hospital projects, in a timely, good and workmanlike manner, it being acknowledged by Project Co that throughout this Project Agreement, Project Co's obligations, duties and responsibilities shall be interpreted in accordance with this standard and any default or alleged default by Project Co in the performance of its obligations, duties and responsibilities shall similarly be interpreted in accordance with this standard;
- (ix) exercise the same standard of due care and diligence as set out in Section 11.2(a)(viii) in respect of any Products, personnel, or procedures which it may recommend to CMH;
- (x) comply with all requirements of CMH set forth in the Contract Documents, including, for clarity, the Contract Documents referred to in Section 11.7(c);
- (xi) comply with all rules and directives issued by CMH regarding the continued operations of the Existing Facility so as not to disrupt the operations of CMH, and except for any requirements of CMH described in Section 11.2(a)(x), the cost, if any, and the additional time, if any, required to comply with any such rules and directives issued by CMH shall be adjusted and compensated for by way of a Change Order or Change Directive, as applicable as provided in Schedule 11 – Change Procedure; and
- (xii) use such project management software system(s) and/or online collaboration system(s) (including software and system(s) for project

management, change management, request for information control, document management and other communications) as directed by CMH at its Sole Discretion from time to time. Project Co shall be responsible for its costs and expenses with respect to the implementation and use of such system(s).

### **11.3 Liability Unaffected**

- (a) Project Co shall not be relieved of any liability or obligation under this Project Agreement by the retainer or appointment of any Project Co Party, and Project Co shall cause each Project Co Party, to the extent such Project Co Party performs, or is specified hereunder to perform, the Work, to comply with the obligations of Project Co to CMH in the same manner and to the same extent as Project Co.
- (b) No inspection, review, comment, approval, verification, confirmation, certification, acknowledgement or audit pursuant to the provisions of this Project Agreement by CMH, CMH's Project Manager, the Consultant, or Lender's Consultant, or anyone on their behalf, nor any failure of any of them to do so, shall relieve Project Co from performing or fulfilling any of its obligations under this Project Agreement or be construed as an acceptance of the Work or any part thereof.

### **11.4 Project Co Delay**

- (a) It is agreed that one of the reasons Project Co was selected to perform the Work is Project Co's covenant that it will achieve the applicable Phased Occupancy Dates, Interim Completion, Substantial Completion and Final Completion by the dates set out in Section 11.1(a)(ii) of this Project Agreement, and Project Co acknowledges that it is critical to CMH that the applicable Phased Occupancy Dates, Interim Completion, Substantial Completion and Final Completion be achieved by the prescribed dates set out in Section 11.1(a)(ii), and that time is of the essence of this Agreement.

### **11.5 Permits, Licences and Approvals**

- (a) Project Co shall:
  - (i) obtain, maintain, pay for (including all fees and deposits) and, as applicable, renew all Project Co Permits, Licences and Approvals which may be required for the performance of the Work, which payments, fees and deposits which were in force as at the Submission Date are included in the Guaranteed Price; and
  - (ii) give the required notices and comply with all Permits, Licences and Approvals in accordance with their terms.

- (b) Where Project Co Permits, Licences and Approvals have requirements that may impose any conditions, liabilities or obligations on CMH or any CMH Party, Project Co shall not obtain such Project Co Permits, Licences and Approvals without the prior written consent of CMH, not to be unreasonably withheld or delayed, provided that CMH shall not be responsible for obtaining or for the failure of Project Co to obtain any Project Co Permit, Licence or Approval. CMH shall comply, or shall require compliance, with any conditions, liabilities or obligations that are imposed on CMH or any CMH Party by the requirements of any Project Co Permit, Licence or Approval obtained with CMH's consent.
- (c) CMH shall provide Project Co with such information and administrative assistance as Project Co may reasonably require in relation to the Project Co Permits, Licences and Approvals.

#### 11.6 Safety

- (a) From Financial Close until the Substantial Completion Date, Project Co shall:
  - (i) keep the Site, the Work and the Facility in a safe and orderly state, as appropriate in accordance with Good Industry Practice, to avoid danger to persons on the Site, in the Facility and in the immediate vicinity of the Site;
  - (ii) take such measures as are reasonable in accordance with Good Industry Practice to prevent access to the Site and the Facility of any persons or creatures not entitled to be there;
  - (iii) comply with Applicable Law relating to health and safety, including without limitation, the *Occupational Health and Safety Act* (Ontario) and all regulations thereto; and
  - (iv) perform or cause a Project Co Party to perform, all of the obligations of the "constructor", and indemnify each of CMH and any other Government Entity against any and all liabilities of the "constructor" under the *Occupational Health and Safety Act* (Ontario) and all regulations thereto.
- (b) Without limitation, Project Co acknowledges that the security of the occupants of the Existing Facility and the safety of the patients and employees in the Existing Facility is paramount. If any of the employees of Project Co, or any Project Co Party is determined by CMH to be a concern for the security of the Existing Facility or for the safety of the patients or employees in the Existing Facility, in addition to its rights under Article 19, CMH may require that Project Co replace such employee or restrict access to the Site to that employee and Project Co shall find or cause the Project Co Parties to find substitute employees to proceed with

the Work so as not to jeopardize security or safety or cause delay to the progress of the Work contrary to the Construction Schedule.

- (c) Project Co shall perform all of the obligations of the 'constructor', within the meaning of OHSA, and shall be solely responsible for construction safety at the Site and for compliance with the rules, regulations and practices required by OHSA. CMH will contractually require other contractors retained by CMH and CMH's own forces to comply with Project Co's safety program and safety instructions, and Project Co, as constructor, will have the right to remove the other contractors retained by CMH and CMH's own forces from the Site should they not comply with Project Co's safety programs and safety instructions. CMH shall have the right to assign to Project Co the work of other contractors retained by CMH or the work of CMH's own forces solely for the purpose of coordination of such work and safety training and safety compliance for all persons engaged in such work and if such coordination, safety training and safety compliance results in a material increase in Project Co's cost, Project Co shall be compensated for such coordination, safety training and safety compliance in accordance with the provisions of Schedule 11 – Change Procedure. Without limiting Project Co's obligation pursuant to this paragraph, Project Co shall ensure that the Work of all Project Co Parties is in accordance with OHSA and that the Work of all other contractors retained by CMH and the Work of CMH's own forces is in accordance with OHSA where such Work has been assigned to Project Co in accordance with the foregoing.
- (d) Prior to commencement of the Work, Project Co shall submit to CMH:
  - (i) documentation of a valid WSIB clearance certificate and confirmation of Project Co's or Contractor's WSIB CAD-7 performance rating;
  - (ii) documentation of Project Co's insurance coverage;
  - (iii) documentation of Project Co's in-house safety-related programs; and
  - (iv) a copy of the Notice of Project filed with the Ministry of Labour.
- (e) Project Co hereby represents and warrants to CMH that appropriate health and safety instruction and training have been provided to the Project Co Parties (to the extent same have access to the Site), before the Work of such Project Co Party is commenced, including training regarding the infection control procedures set out in the materials referred to in Section 11.7(c) and agrees to provide to CMH, if requested, proof of such instruction and training.
- (f) Project Co shall tour the appropriate area to familiarize itself with the Site prior to commencement of the Work.

- (g) Project Co shall perform the Work in accordance with its corporate safety-related programs, the requirements of Section 11.7(c) and Applicable Law. Project Co shall have a competent supervisor on the Site as required under OHSA at all times.
- (h) Prior to commencing the Work and prior to receiving payment on each of Interim Completion, Substantial Completion, Final Completion and the final certificate for payment, and for each application for payment, Project Co shall provide a clearance certificate, obtained by the applicable Project Co Parties from the WSIB, indicating compliance with workers' compensation legislation, including payments due thereunder. At any time during the term of this Project Agreement, when requested by CMH, Project Co shall provide such evidence of compliance by Project Co and/or the applicable Project Co Parties.

### **11.7 Minimize Disturbance and Work in Existing Facility**

- (a) Project Co recognizes and understands that CMH is a public hospital under the *Public Hospitals Act* (Ontario) and is therefore subject to a highly regulated legal and operational environment. Project Co acknowledges that in addition to the use of Good Industry Practice, the Contract Documents, including the Contract Documents referred to in Section 11.7(c), include instructions as to the manner in which the Work is to be performed in order to minimize disturbance to the Existing Facility, including with respect to noise, dust control, access to the Site and the particular requirements in respect of those portions of the Work which are to be carried out within the Existing Facility and in respect of those portions of the Work where connections are being made to the Existing Facility. In addition, Project Co acknowledges that it has familiarized itself with the facility and/or building operations of the Existing Facility and will perform the Work taking into account the requirements of CMH to maintain normal facility and/or building operations of the Existing Facility. Project Co further acknowledges that the Cost of the Work includes all premium time and overtime that may be required to perform the Work in accordance with the Contract Documents, the instructions contained in the Contract Documents referred to in Section 11.7(c) and Good Industry Practice. Project Co shall develop and implement protocols in furtherance of the foregoing in accordance with the Specifications.
- (b) Project Co recognizes that part of the Work consists of the renovation of existing buildings and structures or the addition of a structure to an existing building and that the provision of patient care during construction is a priority for CMH and acknowledges that it has reviewed the Contract Documents, including those referred to in Section 11.7(c). Project Co shall use all methods required to comply with the instructions set out in the Contract Documents, including those referred to in Section 11.7(c), during the performance of the Work. Project Co shall fully cooperate with CMH in complying with said instructions during the performance

of the Work. Any costs incurred by Project Co in complying with said instructions shall be part of the Guaranteed Price.

- (c) Project Co acknowledges that the Contract Documents, including the Phasing Requirements and Specifications, have been posted to e-Builder and included instructions respecting CMH's use of the Existing Facility and infection control procedures. Project Co acknowledges having read and understood the said instructions and agrees to comply with the procedures set out therein. Project Co shall be responsible for any costs and expenses resulting from its failure to comply with these procedures.

## **11.8 Subcontractors and Suppliers**

- (a) Project Co shall preserve and protect the rights of the parties under this Project Agreement with respect to Work to be performed under Subcontract, and shall:
  - (i) enter into Subcontracts or written agreements with Project Co Parties to require them to perform their Work as provided in the Contract Documents and without limiting the generality of the foregoing, shall advise the Project Co Parties of the transfer to Project Co of the design coordination, design errors and omissions and design completion risk as set out in Section 11.17;
  - (ii) incorporate the relevant terms and conditions of the Contract Documents into all contracts or written agreements with Project Co Parties, including those specified in Article 36; and
  - (iii) be as fully responsible to CMH for acts and omissions of the Project Co Parties as for acts and omissions of persons directly employed by Project Co.
- (b) Attached as Schedule 19 – List of Project Co Parties is a list of all Project Co Parties which Project Co has engaged or caused to be engaged for the performance of the Work as of the date of execution of this Project Agreement. Project Co agrees to update such list from time to time as additional Project Co Parties are engaged. Any of these named Project Co Parties listed by Project Co may be changed by Project Co upon prior notice to (but without the approval of) the Consultant, provided however, that if the Consultant reasonably objects to any change to a mechanical or electrical Subcontractor that is a Project Co Party, then Project Co shall select an alternative replacement mechanical or electrical Subcontractor to which the Consultant does not reasonably object.
- (c) Project Co shall not be required to employ as a Project Co Party, a person to whom Project Co may reasonably object, provided CMH may require Project Co

to use particular persons as specified in the Contract Documents for specific building systems of CMH to ensure CMH does not lose the benefit of any warranty in respect to such building systems, including building automation, fire alarm and nurse call. CMH shall have the right to assign to Project Co the work of CMH's other contractors or the work of CMH's own forces related to the Project and, if such assignment results in an increase in Project Co's cost or a delay in the Construction Schedule, the same shall be addressed or compensated for in accordance with the provisions of Schedule 11 – Change Procedure. Notwithstanding the foregoing provisions of this Section 11.8(c), Project Co shall use the Project Co Parties that have been identified in the Contract Documents for specific portions of the Work and with respect to such Project Co Parties there shall be no increase in Project Co's cost or allowance for any delay in the Construction Schedule.

- (d) Project Co hereby agrees to contractually obligate the Contractor to enter into the Assignable Subcontract Agreement for Construction Contract and, subject to Section 11.8(e), to cause the Contractor to cause each of the other Project Co Parties, including Suppliers leasing any construction machinery and equipment, to enter into the Assignable Subcontract Agreement, to evidence that (i) Agent or CMH shall have the right to cure any default by the Contractor under the Subcontract and, (ii) each such Subcontract shall be assignable without the further consent of such Project Co Party and without the payment of any penalty or other amount, at CMH's or Agent's option, to CMH or to Agent or to such other contractor as CMH or Agent may designate, which rights of assignment shall only be exercised by CMH, such Agent or such other contractor in the event that this Project Agreement is terminated as a result of Project Co's default.
- (e) With the exception of the Subcontracts specifically listed in Part 2 of Schedule 19 – List of Project Co Parties, none of Project Co nor the Contractor is obliged to enter into an Assignable Subcontract Agreement in respect of a Subcontract having a total estimated cost of \$1,000,000 or less, provided that Project Co shall cause the Contractor to ensure that each Subcontract entered into with a Project Co Party is assignable without such Project Co Party's further consent and without the payment of any penalty or other amount at CMH's option, to CMH or Agent or to such other contractor as CMH or Agent may designate, which rights shall only be exercised by CMH, Agent or such other contractor in the event that this Project Agreement is terminated as a result of Project Co's default.
- (f) Subject to Section 11.8(e), Project Co agrees to deliver to CMH the Assignable Subcontract Agreements by the applicable due dates set out in Part 2 of Schedule 19 – List of Project Co Parties. If, following 90 days after Financial Close, Project Co or the Contractor is required to enter into any additional Assignable Subcontract Agreement pursuant to this Section 11.8, Project Co shall



deliver such Assignable Subcontract Agreement to CMH within 30 days of execution.

- (g) Notwithstanding Section 1.2(c), in the case of any item of the Work being specified under the heading of more than one trade section, Project Co shall decide which of these trades is to perform the Work.

## 11.9 Labour and Products

- (a) Unless otherwise stipulated elsewhere in the Contract Documents or in other documents made available to Project Co by CMH, Project Co shall, as appropriate, provide separate metering for all services and facilities necessary for the performance of the Work. Project Co shall arrange for delivery of materials and equipment to the Project in accordance with the Construction Schedule.
- (b) Products shall be free from faults, improper workmanship and defects and in conformance with the Contract Documents. Products which are not specified shall be of a quality best suited to the purpose required and their use shall be subject to the approval of the Consultant.
- (c) Project Co shall (i) maintain good order and discipline among all personnel engaged in respect of the Work and shall promote and maintain a good relationship with all such personnel; (ii) not employ any persons to perform the Work who is/are incompatible with other labour employed by Project Co in connection with the Work; and (iii) act promptly on all problems of labour relations including grievances and jurisdictional disputes. Project Co shall not employ on the Work anyone not skilled in the task assigned to him and shall adopt and enforce regulations with respect to safety, fire prevention, smoking, the use of alcoholic beverages, illegal drugs and other controlled substances and other activities that will or may constitute a danger to life, health or property.
- (d) At CMH's instruction, Project Co shall promptly remove from the Site any employee who represents a threat to the safety or progress of the Project or persons on the Project who are not following the control procedures referred to in Section 11.7(c) or whose conduct may be considered as harassment in the workplace of any person who is an employee of CMH under the *Human Rights Code* (Ontario).
- (e) Project Co is responsible for the safe on-site storage of Products and their protection (including Products supplied by CMH and other contractors) in such a way so as to avoid dangerous conditions or contamination to the Products or other persons or property, and in locations at the Site satisfactory to CMH.

- (f) Title to the Products shall pass to CMH upon payment thereof or upon incorporation into the Project, whichever occurs first. For greater certainty, title to Products delivered but not installed, shall pass to CMH when paid for.
- (g) Project Co shall promptly execute and deliver to CMH from time to time, as CMH may require, any further documentation required to identify, evidence, perfect or protect CMH's interest in the Products, including any registrations pursuant to the *Personal Property Security Act* (Ontario). Subject to Section 11.19(d), notwithstanding the foregoing, Project Co shall continue to bear the risk of loss or damage with respect to each applicable Phase of the Work until the relevant applicable Phased Occupancy Date, with respect to the Work until the date of issuance by the Consultant of its certificate under Section 16.2(e) stating the Substantial Completion Date.

#### 11.10 Documents at the Site

- (a) Project Co shall keep one copy of the current digital files of the Contract Documents, Construction Schedule, submittals, reports, Supplemental Instructions, Change Orders, Contemplated Change Notices, Change Directives, Design Issue resolution documents, partnering documents, records of meetings and all other documents necessary for the administration of the Project at the Site, all in good order and available to CMH, Lender's Consultant and the Consultant. Project Co shall keep a daily log available to CMH, Lender's Consultant and the Consultant at all times.
- (b) Project Co shall, where practical, keep one copy of current standards and manufacturers' literature specified in the Contract Documents at the Site in good order and available to the Consultant and Lender's Consultant and their representatives for the duration of the Work.

#### 11.11 Shop Drawings

- (a) Project Co shall provide shop drawings as described in the Contract Documents or as the Consultant may reasonably request.
- (b) Project Co shall review all shop drawings prior to submission to the Consultant. Project Co represents by this review that:
  - (i) Project Co has determined and verified all field measurements, field construction conditions and Product requirements, or will do so; and
  - (ii) Project Co has checked and coordinated each shop drawing with the requirements of the Work and of the Contract Documents.

Project Co shall confirm this review of each shop drawing by stamp, date and signature of the person responsible. At the time of submission, Project Co shall notify the Consultant in writing of any deviations in the shop drawings from the requirements of the Contract Documents.

- (c) At the commencement of the Work, Project Co shall prepare, for the review and acceptance of the Consultant, a schedule (the “**Shop Drawing Schedule**”) of the dates for submission and return (which, in no event, will be less than 10 Business Days following submission and 5 Business Days following any re-submission or such shorter period as may be mutually agreed between Project Co and the Consultant) of shop drawings to ensure there is no impact on the Construction Schedule, including, on a reasonable basis, in respect of the work of CMH’s own forces or CMH’s other contractors, as set out in the Contract Documents or as CMH has otherwise advised Project Co. The Shop Drawing Schedule shall provide for the submission of shop drawings in an orderly sequence and sufficiently in advance to allow for the Consultant’s proper review and so as to cause no delay to the Work or the work of CMH’s other contractors or CMH’s own forces which has been incorporated in the Construction Schedule. Project Co shall submit shop drawings to the Consultant and the Consultant shall review and return shop drawings in accordance with the Shop Drawing Schedule. If, at any time, Project Co submits an unusually large number of shop drawings not contemplated by the Shop Drawing Schedule, such that the Consultant cannot process these drawings within the time permitted in the Shop Drawing Schedule, the Consultant will, within 5 Business Days of receipt of such shop drawings, provide Project Co with an estimate of the time necessary for processing such shop drawings. Project Co shall periodically re-submit the Shop Drawing Schedule to correspond to changes in the Construction Schedule for the review and acceptance of the Consultant. Shop drawings which require approval of a Governmental Authority having jurisdiction shall be submitted first to the Consultant for its approval in accordance with the approval process set out in this Section 11.11(c) prior to submission by Project Co to such authority. Should the Consultant’s review of such shop drawings require significant changes to such shop drawings, Project Co shall revise same and resubmit to the Consultant prior to submitting to the Governmental Authority having jurisdiction in accordance with the Shop Drawing Schedule.
- (d) Project Co shall submit shop drawings in the form specified or as the Consultant may direct. The Consultant will review and return shop drawings in accordance with the provisions of Section 11.11(c). The Consultant’s review is for conformity to the design concept and for general arrangement only. The Consultant’s review shall not relieve Project Co of responsibility for errors or omissions in the shop drawings or for meeting all requirements of the Contract Documents.

- (e) Upon the Consultant's request, Project Co shall revise and resubmit shop drawings which the Consultant rejects as inconsistent with the Contract Documents unless otherwise directed by the Consultant. Project Co shall notify the Consultant in writing of any revisions to the re-submission other than those requested by the Consultant.
- (f) Only shop drawings indicated as 'Reviewed' or 'Reviewed as Noted', or words of similar intent, and bearing the Consultant's review date and initials, shall be used at the Site or for the manufacture or fabrication of Products.
- (g) The review of shop drawings by the Consultant does not authorize a change in the Guaranteed Price or Contract Time.
- (h) Project Co shall prepare and maintain record drawings which shall consist of the shop drawings and Specifications revised by Project Co during the Work, showing changes to the shop drawings and Specifications, which record drawings shall be kept current by Project Co and made available to the Consultant and Lender's Consultant for review with each application for a progress payment.
- (i) All required actions by Project Co under this Section 11.11 shall be taken promptly so as not to cause any delay in the Construction Schedule.

#### **11.12 Use of the Work**

- (a) Project Co shall confine construction machinery and equipment, storage of Products, and operations of employees to limits indicated by Applicable Law or the Contract Documents and shall not unreasonably encumber the Work with Products.
- (b) Project Co shall not load or permit to be loaded any part of the Work with a weight or force that will endanger the safety of the Work.
- (c) CMH shall have the right to occupy Phases as set out in the Contract Documents and to enter and occupy the Work in whole or in part for the purpose of placing fittings, furniture and equipment or for other uses, including the intended use of CMH before Substantial Completion, as provided for in the Construction Schedule. Project Co shall cooperate with CMH, the CMH's Project Manager and the Consultant, so as to permit CMH to occupy and to place such fittings, furniture and equipment in the most efficient manner possible. Such entry and occupation shall not be considered an acceptance of the Work or in any way relieve Project Co from responsibility to complete this Project Agreement. Subject to Section 11.19(d), Project Co is responsible to ensure the completion of the Phases in accordance with the applicable Phased Occupancy Dates, the Scheduled Interim Completion Date and the Scheduled Substantial Completion

Date and that the Phases are ready for occupancy by CMH in accordance with the Contract Documents including the requirements of paragraphs (b), (c) and, to the extent applicable, paragraph (d) of the definitions of "Interim Completion" and "Substantial Completion" in Schedule 1 – Definitions and Interpretation, as applicable, to the respective Phase. Project Co acknowledges that Substantial Completion is only achieved in respect of the Work as a whole and not in respect of any Phase.

### **11.13 Cutting and Remedial Work**

- (a) Project Co shall do the cutting and remedial work required to integrate the several parts of the Work in a cohesive manner.
- (b) Project Co shall coordinate the Work to ensure that this requirement is kept to a minimum.
- (c) Cutting and remedial work shall be performed by specialists familiar with the Products affected and shall be performed in a manner to neither damage nor endanger the Work.

### **11.14 Cleanup**

- (a) Project Co shall maintain the Work in a tidy condition and free from the accumulation of waste products and debris, other than that caused by CMH, CMH's other contractors or their employees.
- (b) Project Co shall remove waste products and debris, other than that resulting from the work of CMH, CMH's other contractors or their employees, and shall leave the Interim Work clean and suitable for occupancy by CMH on the Interim Completion Date and, in the case of the balance of the Work, on the Substantial Completion Date. Project Co shall remove products, tools, construction machinery, and equipment not required for the performance of the remaining Work.
- (c) Prior to application for the final certificate for payment, Project Co shall remove products, tools, construction machinery and equipment, and waste products and debris, other than that resulting from the work of CMH, CMH's other contractors or their employees.
- (d) In the event of any dispute regarding the removal of waste products, debris, tools, equipment, and the like, CMH shall provide a written notice to Project Co to remove the said waste and debris and allow a reasonable period of time for Project Co to remove the said materials. If Project Co fails to remove the materials within the time specified, CMH may remove the waste products and

debris and withhold an amount equal to such cost, in an amount that the Consultant shall determine to be reasonable.

#### **11.15 Project Co Attending Meetings**

- (a) Project Co shall attend meetings with respect to the Work as may be directed by the Consultant. Project Co shall not claim any extra compensation for attendance at these meetings. Each of Project Co and CMH shall designate a representative to attend such meetings who is able to make decisions on each of their respective behalfs.

#### **11.16 Defective Work**

- (a) Project Co shall promptly remove from the Site and replace or re-execute defective Work that fails to conform to the Contract Documents whether or not the defective Work has been incorporated in the Work and whether or not the defect is the result of poor workmanship, use of defective Products or damage through carelessness or other act or omission of Project Co. The correction of defective Work shall be at Project Co's expense. Project Co shall rectify, in a manner acceptable to the Consultant, all defective Work and deficiencies throughout the Work, whether or not they are specifically identified by the Consultant, and Project Co shall prioritize the correction of any defective Work so as not to interfere with or derogate from the Construction Schedule, provided that Project Co shall prioritize the correction of any defective Work that in the Sole Discretion of CMH is determined to adversely affect the day to day operation of CMH.
- (b) Project Co shall Make Good promptly other contractors' work destroyed or damaged by such rectifications at Project Co's expense.
- (c) If in the opinion of the Consultant it is not expedient to correct defective Work or Work not performed as provided in the Contract Documents, CMH may deduct from the amount of the Guaranteed Price the difference in value between the work as performed and that called for by the Contract Documents. If CMH and Project Co do not agree on the difference in value, they shall refer the matter to the Consultant for a determination and the determination will be issued as a Change Order.

#### **11.17 Project Co Design Contingency**

- (a) The Cost of the Work and the Guaranteed Price include the Project Co Design Contingency.
- (b) Subject to CMH's responsibilities under Section 11.17(c), the Project Co Design Contingency shall apply to any and all changes, extras or costs attributable to:

- (i) Design Issues which are properly inferable, readily apparent or readily discoverable from the Contract Documents as forming part of the Work or contrary to Good Industry Practice as it relates to the constructability of the Work which Design Issues shall, for greater certainty, be limited to those Design Issues arising under, or with respect to, or in connection with, matters requiring clarification, information and/or further instruction in the Contract Documents that do not constitute negligent design or engineering;
  - (ii) Design Issues which are related to design coordination and are caused by inconsistencies, conflicts, exclusions, interferences or gaps that are properly inferable, readily apparent or readily discoverable from the Contract Documents, and particularly, the plans, Drawings and Specifications; and
  - (iii) Design Issues which are related to design completion and where the design intent is properly inferable, readily apparent or readily discoverable from the Contract Documents and has not been fully detailed or specified,  
  
(collectively, the “**Project Co Design Issues**”). The terms “properly inferable”, “readily apparent” and “readily discoverable” as used in this Project Agreement, shall be interpreted by taking into consideration Project Co’s and Contractor’s experience and the investigations, inspections and examinations of the Site carried out by Project Co or by any Project Co Party during the Request for Proposals process prior to the Submission Date, as represented by Project Co to CMH in Sections 7.1 and 5.2(a) and having regard to the standard of care required under Section 11.2(a)(viii).
- (c) CMH shall, as between itself and Project Co, assume full responsibility and liability for the use of the design by Project Co, in all respects other than Project Co Design Issues, including the core efficacy and functionality of the design, both in terms of ability and capacity to:
- (i) produce the desired effect in terms of the building systems, including the structural, mechanical, electrical and information technology systems;
  - (ii) meet the requirements of the Building Code in effect at the time the Building Permit was issued, but this shall not relieve Project Co of the obligation to provide for all standard Building Code requirements applicable to the installation of the Work, whether or not set out in the Specifications; and/or
  - (iii) conform to the functional programming needs of CMH.

In assessing whether a Design Issue is properly characterized as the responsibility of CMH, the Consultant shall have regard to the Risk Assessment Guidelines, which provide examples of the types of issues that may be encountered and the findings the Consultant would make regarding the categorization of each as a Project Co Design Issue or a Design Issue for which CMH is responsible. The Contractor and CMH acknowledge that the Risk Assessment Guidelines are provided for information purposes only and are not complete or exhaustive.

- (d) Subject to and without limiting CMH's responsibilities under Section 11.17(c) and provided that CMH fulfills its responsibilities under Section 11.17(c), Project Co shall deliver fully functional and operational systems and all components shown in the Drawings shall be provided as fully complete and fully functional systems in accordance with the Contract Documents. Project Co shall verify the dimensions shown in the drawings before the layout of the Work.

#### **11.18 Procedure for Addressing Design Issues**

- (a) When Project Co identifies a Design Issue, Project Co shall promptly notify the Consultant in writing, under a request for information, of such Design Issue and may propose a resolution to the Design Issue. Upon receipt of Project Co's notification and proposed resolution, if any, the Consultant shall:
  - (i) if a proposed resolution is provided by Project Co, proceed to review the proposed resolution and either:
    - (A) confirm that such resolution is acceptable (and a resolution will be considered acceptable if such resolution meets the requirements of the first sentence of Section 11.18(c));
    - (B) reject the proposed resolution and request that additional information be provided or request that an alternative resolution be proposed by Project Co; or
    - (C) reject the proposed resolution and provide instructions to Project Co setting out an acceptable resolution;
  - (ii) if no resolution is proposed by Project Co, provide instructions to Project Co setting out an acceptable resolution.

As soon as the Consultant has confirmed to Project Co an acceptable resolution to the Design Issue, Project Co shall proceed to implement such acceptable resolution. If the Consultant characterizes the Design Issue as a Project Co Design Issue, the Consultant shall issue a Supplemental Instruction and the cost, if any, of implementing the acceptable resolution to the Design Issue shall form part of the Project Co Design Contingency. If the Consultant characterizes the Design Issue



as a matter that is not a Project Co Design Issue, the Consultant shall request that CMH issue a Contemplated Change Notice or a Change Directive, as applicable in the circumstances, and the cost, if any, of implementing the acceptable resolution to the Design Issue and the additional time, if any, required to implement the acceptable resolution to the Design Issue shall be documented in a Change Order. If either CMH or Project Co is of the view that the Design Issue is not properly characterized by the Consultant, or if either CMH or Project Co does not agree with the Consultant's decision regarding what constitutes an acceptable resolution to the Design Issue, then either CMH or Project Co may dispute the characterization of the Design Issue or the Consultant's decision regarding what constitutes an acceptable resolution to the Design Issue, pursuant to Section 11.18(d). The Consultant's response to any Design Issue will be provided in accordance with Section 8.2(i). Any professional design services of the Consultant, whether to issue the Supplemental Instruction, Contemplated Change Notice, Change Directive or otherwise, will be an CMH cost. In assessing whether a Design Issue is properly characterized as a Project Co Design Issue, CMH and Project Co shall have regard to the Risk Assessment Guidelines. Project Co and CMH acknowledge that the Risk Assessment Guidelines are provided for information purposes only and are not complete or exhaustive.

- (b) When the Consultant identifies a Design Issue, the Consultant shall promptly notify Project Co of such Design Issue in writing as a Supplemental Instruction or by providing a Contemplated Change Notice or a Change Directive, as applicable in the circumstances. If issued as a Supplemental Instruction, Project Co may review the Design Issue and propose an alternative resolution to the Consultant. Upon receipt of Project Co's proposed alternative resolution, the Consultant shall proceed to review the proposed alternative resolution and either:
  - (i) confirm that such resolution is acceptable (and a resolution will be considered acceptable if such resolution meets the requirements of the first sentence of Section 11.18(c));
  - (ii) reject the proposed resolution, request that additional information be provided or request a further alternative resolution be proposed by Project Co; or
  - (iii) reject the proposed resolution and provide instructions to Project Co setting out an acceptable resolution.

As soon as the Consultant has confirmed to Project Co an acceptable resolution to the Design Issue, Project Co shall proceed to implement such acceptable resolution. If the Consultant characterizes the Design Issue as a Project Co Design Issue, the Consultant shall issue a Supplemental Instruction and the cost, if any, of implementing the acceptable resolution to the Design Issue shall form part of the

Project Co Design Contingency. If the Consultant characterizes the Design Issue as a matter that is not a Project Co Design Issue, the Consultant shall request that CMH issue a Contemplated Change Notice or a Change Directive, as applicable in the circumstances, and the cost, if any, of implementing the acceptable resolution to the Design Issue and the additional time, if any, required to implement the acceptable resolution to the Design Issue shall be documented in a Change Order. If either CMH or Project Co is of the view that the Design Issue is not properly characterized by the Consultant or if either CMH or Project Co does not agree with the Consultant's decision regarding what constitutes an acceptable resolution to the Design Issue, either CMH or Project Co may dispute the characterization of the Design Issue or the Consultant's decision regarding what constitutes an acceptable resolution to the Design Issue, pursuant to Section 11.18(d). The Consultant's response shall be provided in accordance with the provisions of Section 8.2(i). Any professional design services of the Consultant, whether to issue the Supplemental Instruction, Contemplated Change Notice or Change Directive or otherwise, will be an CMH cost. In assessing whether a Design Issue is properly characterized as a Project Co Design Issue, CMH and Project Co shall have regard to the Risk Assessment Guidelines. Project Co and CMH acknowledge that the Risk Assessment Guidelines are provided for information purposes only and are not complete or exhaustive.

- (c) An acceptable resolution to a Design Issue shall be a resolution that (i) in all respects is consistent with the design intent and quality standards of the Contract Documents; (ii) will not interfere with the efficient operations of CMH; and (iii) will not increase the life cycle costs of the Facility. If the resolution to a Design Issue proposed by the Consultant is of a higher quality, not consistent with the design intent and quality standards of the Contract Documents, Project Co will, subject to and in accordance with Schedule 11 – Change Procedure, be entitled to a Change in the Scope of the Work.
- (d) If either CMH or Project Co is of the view that a Design Issue is not properly characterized by the Consultant or does not agree with the Consultant's decision regarding what constitutes an acceptable resolution to the Design Issue, either CMH or Project Co may dispute the characterization of the Design Issue or the Consultant's decision regarding what constitutes an acceptable resolution to the Design Issue, and such issues will be determined in accordance with Schedule 14 – Dispute Resolution Procedure. Project Co acknowledges that notwithstanding any such dispute, the Consultant may issue a Supplemental Instruction to Project Co for a resolution to the Design Issue and Project Co shall proceed to implement such resolution to the Design Issue in accordance with the Supplemental Instruction issued by the Consultant, pending resolution of the dispute and subject to Section 1.3 of Schedule 14 – Dispute Resolution Procedure.

- (e) The Project Co Design Contingency is included in the Cost of the Work and the Guaranteed Price and Project Co is solely responsible for all costs to remedy all Design Issues that are properly characterized as Project Co Design Issues, and Project Co will not be entitled to any additional compensation or change in the Contract Time with respect to any and all Design Issues that are properly characterized as Project Co Design Issues, subject, in each case, to Section 11.18(c), and to the responsibility of CMH, at CMH's cost, for the provision of professional design services as specifically provided in Sections 11.18(a) and 11.18(b). Subject to the preceding sentence, and notwithstanding anything to the contrary in this Project Agreement, Project Co acknowledges and agrees that it shall have no recourse against CMH in respect of any Project Co Design Contingency or any costs directly or indirectly arising out of a Design Issue that is properly characterized as a Project Co Design Issue. Project Co is not accountable to CMH for the expenditure of the amount Project Co has carried as the Project Co Design Contingency and CMH has no entitlement to claim the unused portion, if any, of the Project Co Design Contingency. Payment of the Guaranteed Price to Project Co (which, for greater certainty, shall include any unused portion of the Project Co Design Contingency) shall fully satisfy Project Co in respect of its costs to carry the Project Co Design Contingency and all costs of Project Co to remedy all Design Issues that are properly characterized as Project Co Design Issues. Further to and without limiting the foregoing, but, subject to the limitations set out in Section 35.2(b), Project Co acknowledges and agrees that it shall have no recourse against the Consultant in respect of any Design Issue, except for claims arising in relation to the professional negligence or errors and omissions of the Consultant.
- (f) Project Co shall provide the Consultant, CMH and CMH's Project Manager with a detailed weekly update report in form and substance satisfactory to the Consultant and CMH, on the status of all outstanding Design Issues.

#### **11.19 Construction by CMH or Other Contractors**

- (a) CMH reserves the right to award separate contracts in connection with work related to the Project to other contractors and to perform work related to the Project with its own forces. CMH may assign the coordination and scheduling of the work and the safety training in respect of the work of CMH's other contractors or CMH's own forces to Project Co.
- (b) When separate contracts are awarded for work related to the Project, or when such work is performed by CMH's own forces, CMH shall:
  - (i) cause CMH's other contractors or CMH's own forces to comply with:
    - (A) the instructions of Project Co relating to coordination and scheduling of the activities and work of such contractors or CMH's own forces with

- the Work to be performed under this Project Agreement; and (B) all directions of Project Co in respect of any matter regarding site safety or health and safety;
- (ii) **[Intentionally Deleted];**
  - (iii) ensure that insurance coverage is provided as would be required by a prudent owner similarly situated and coordinate such insurance with the insurance coverage of Project Co as it affects the Work and in any event, such insurance shall provide for liability insurance of not less than \$5,000,000; and
  - (iv) take all necessary steps to avoid labour disputes or other disputes on the Project arising from the work of CMH's other contractors or CMH's own forces.
- (c) When separate contracts are awarded for work related to the Project, or when work is performed by CMH's own forces, Project Co shall:
- (i) provide for the coordination and scheduling of the activities and work of CMH's other contractors and CMH's own forces with the Work to be performed under this Project Agreement;
  - (ii) afford CMH and CMH's other contractors reasonable opportunity to introduce and store their products and use their construction machinery and equipment to execute their work;
  - (iii) participate with CMH's other contractors and CMH in reviewing their construction schedules when directed to do so by CMH, CMH's Project Manager and/or the Consultant;
  - (iv) where part of the Work is affected by or depends upon, for its proper execution, the work of CMH's other contractors or CMH's own forces, promptly report to the Consultant in writing and prior to proceeding with that part of the Work, any readily apparent deficiencies in such work. Failure by Project Co to so report shall invalidate any claims against CMH by reason of such readily apparent deficiencies;
  - (v) subject to Section 11.6, for CMH's own forces and for CMH's other contractors, assume overall responsibility for compliance with all aspects of Applicable Law relating to health and safety, including all the responsibilities of the 'constructor' under OHSA; and

- (vi) respond to and support CMH and CMH's own forces or contractors in a timely manner so as not to delay their work relating to planning, scheduling or implementation of their work relating to the Project.
- (d) Project Co shall not be responsible for any failure in the performance of the work of CMH's other contractors or CMH's own forces. If:
  - (i) any of CMH's other contractors or CMH's own forces cause any damage to the Work;
  - (ii) Project Co incurs any additional costs or there is any delay in the Construction Schedule as a result of any of CMH's other contractors or CMH's own forces not complying with the coordination, scheduling and safety instructions of Project Co; or
  - (iii) Project Co incurs any additional costs or there is any delay in the Construction Schedule as a result of any work done by CMH's other contractors or CMH's own forces (other than work that is described in the Contract Documents and performed by such other contractors or CMH's own forces in accordance with Good Industry Practice and in accordance with the terms of their respective contracts or engagements with CMH),

Project Co shall be entitled to compensation in respect of such damage or for such increased costs and to an extension of time for such delay, in each case, authorized and valued as a Change Order in the manner set forth in Schedule 11 – Change Procedure.

- (e) Claims, disputes, and other matters in question between Project Co and CMH's other contractors shall be dealt with in substantially the same manner as contemplated in Schedule 14 – Dispute Resolution Procedure, provided CMH's other contractors have reciprocal obligations and CMH has made commercially reasonable efforts to ensure that such provisions are included in the contracts with CMH's other contractors. Project Co shall be deemed to have consented to arbitration of any dispute with any other contractor whose contract with CMH contains a similar agreement to arbitrate.
- (f) Placing, installing, application and connection of the work performed by CMH's own forces or by CMH's other contractors, on and to the Work performed by Project Co will not relieve Project Co from the responsibility to provide and maintain the specified warranties with respect to the Work, except to the extent that the placing, installing, application or connection of such work by CMH's own forces or by CMH's other contractors on and to the Work performed by Project Co gives rise to a claim under warranties provided by Project Co, in which case such warranties shall not apply to such claim.

## 11.20 Temporary Supports, Structures and Facilities

- (a) Project Co shall have the sole responsibility for the design, erection, operation, maintenance, and removal of temporary supports, structures, and facilities and the design and execution of construction methods required in their use. Any review of Project Co's temporary supports, structures, or facilities or any shop drawings related thereto by CMH or Consultant does not relieve Project Co of its "sole responsibility" under this Section 11.20.
- (b) Project Co shall engage registered professional engineering personnel skilled in the appropriate disciplines to perform those functions referred to in Section 11.20(a) where required by law or by the Contract Documents and in all cases, where such temporary supports, structures, and facilities and their method of construction are of such a nature that professional engineering skill is required to produce safe and satisfactory results.
- (c) Subject to Section 11.17, but notwithstanding the provisions of Sections 11.2, 11.20(a) and 11.20(b) or provisions to the contrary elsewhere in the Contract Documents, where such Contract Documents include designs for temporary supports, structures and facilities or specify a method of construction in whole or in part, such facilities and methods shall be considered to be part of the design of the Work and Project Co shall not be held responsible for that part of the design or the specified method of construction. Project Co shall, however, be responsible for the execution of such design or specified method of construction in the same manner as for the execution of the Work.

## 11.21 Protection of Work and Property

- (a) Project Co shall protect the Work and CMH's property at the Site, including the Existing Facility and the property adjacent to the Site, from damage which may arise as a result of Project Co's operations under this Project Agreement, and shall be responsible for such damage, except damage which occurs as a result of:
  - (i) Design Issues (other than Design Issues which are properly characterized as Project Co Design Issues under Section 11.17); or
  - (ii) acts or omissions by CMH, the Consultant or any contractor retained by CMH directly and whose contract is not assigned to Project Co, their respective agents and employees.
- (b) Should Project Co, in the performance of this Project Agreement, damage the Work, CMH's property at the Site, including the Existing Facility or property adjacent to the Site, Project Co shall be responsible to Make Good such damage at Project Co's expense.

- (c) Should damage occur to the Work or CMH's property at the Site, including the Existing Facility for which Project Co is not responsible, as provided in Section 11.21(a), Project Co shall Make Good such damage to the Work and, if CMH so directs, to CMH's property and the Guaranteed Price and Contract Time shall be adjusted (including on account of the Overhead and Profit Fee) as provided in Schedule 11 – Change Procedure.
- (d) Project Co shall not undertake to repair and/or replace any damage whatsoever to adjoining property or acknowledge the same was caused or occasioned by Project Co, without first consulting CMH and receiving written instructions as to the course of action to be followed.
- (e) Notwithstanding Section 11.21(d), where there is danger to life or property which arises out of or in connection with the performance of the Work, either Party may, but Project Co shall, take such emergency action as is necessary to remove the danger.
- (f) If any Project Co Party has caused damage to the work of another contractor related to the Project, Project Co agrees upon due notice to settle with the other contractor by negotiation or arbitration in accordance with Section 11.19(e) and Schedule 14 – Dispute Resolution Procedure. If the other contractor makes a claim against CMH on account of damage alleged to have been so sustained, the dispute shall be dealt with in substantially the same manner as contemplated in Section 11.19(e) and Schedule 14 – Dispute Resolution Procedure.

#### **11.22 No Site Encumbrances**

- (a) Project Co shall not create, incur, permit or suffer to exist any Encumbrance to be filed, issued or registered against the Site or any part thereof or any interest therein due to an act or omission of Project Co or any Project Co Party.
- (b) Subject to Encumbrances that Project Co shall remove pursuant to Section 11.22(c) and Section 3 of Schedule 18 – Payments and Holdbacks, the performance of the Work shall not give rise to a right for any person to obtain title to or any interest in the Site, the Facility or the Existing Facility or any part of it or them except in accordance with the terms of this Project Agreement.
- (c) In the event that the Site or any part thereof or any interest therein becomes subject to any Encumbrance arising in relation to the performance of the Work which has not been consented to in writing by CMH, Project Co shall immediately take all steps necessary to remove, vacate or discharge such Encumbrance. If such Encumbrance is not removed, vacated or discharged within 10 Business Days of the filing, issuance or registration of such Encumbrance then, without prejudice to any other rights or remedies it may have, CMH will be at

liberty to take whatever steps it deems necessary and appropriate to remove, vacate or discharge the Encumbrance, including payment of any amount owing or claimed thereunder, and seek immediate recovery from Project Co of the amount of any such payment and any associated costs, including legal costs, all of which shall be payable on demand.

- (d) Notwithstanding the provisions of this Section 11.22, the Parties acknowledge that the provisions of Section 3 of Schedule 18 – Payments and Holdbacks shall apply to claims for lien made against the Site, the Facility or the Existing Facility pursuant to the *Construction Lien Act* (Ontario) and shall also apply to claims made against the Legislative Holdback.

### 11.23 CMH Assigned Contracts

- (a) On Financial Close, Project Co shall cause the Contractor to execute and deliver an Assignment and Assumption Agreement in respect of each of the CMH Assigned Contracts and the Contractor shall assume all of the obligations of CMH thereunder, and thereafter shall execute and deliver such supporting documentation as may reasonably be required by the counterparty Supplier or by CMH from time to time. For greater certainty, Project Co acknowledges and agrees that any and all costs associated with the assumption and performance of CMH's obligations under the CMH Assigned Contracts, including the obligations with respect to payment thereunder, are included in and form part of the Guaranteed Price.

### 11.24 Apprenticeship Plan and Program

- (a) No later than six months after Financial Close, Project Co shall provide a plan setting out Project Co's Project-specific approach to maximizing apprenticeship opportunities on the Project (the "**Apprenticeship Plan**") for review and approval by CMH. The Apprenticeship Plan shall include,
  - (i) specific objectives for apprenticeship opportunities for the Project on a trade-by-trade basis;
  - (ii) apprenticeship opportunities for each trade required on the Project;
  - (iii) a confirmation that apprenticeships will be registered with the Ministry of Training, Colleges and Universities and the Ontario College of Trades, as applicable;
  - (iv) a program to ensure the required supply of apprentices to meet Project Co's Apprenticeship Plan targets and requirements;



- (v) a program to support apprentices on the Project, to complete their apprenticeships during the Project Term and, for those whose apprenticeships are not complete by the end of the Project Term a program to support apprentices to complete their apprenticeships after the end of the Project Term; and
- (vi) a focused program for youth-at-risk, local communities, and military veterans.
- (b) Project Co shall implement the approved Apprenticeship Plan.
- (c) Project Co shall provide an annual report to CMH on the implementation of the Apprenticeship Plan, which report shall include,
  - (i) statistics on the number of apprentices involved in the Project relative to the number of journeypersons, for each month of the Project; and
  - (ii) detailed information setting out Project Co's progress toward achieving the objectives set out in the Apprenticeship Plan, including an identification of any barriers that prevented Project Co from achieving its objectives.
- (d) CMH may require Project Co to amend its Apprenticeship Plan if, in CMH's opinion, acting reasonably, Project Co is failing to maximize apprenticeship opportunities on the Project pursuant to the then current Apprenticeship Plan.
- (e) CMH may, in its Sole Discretion, release Project Co's Apprenticeship Plan to the public. Project Co's Apprenticeship Plan shall not be Confidential Information.

#### **11.25 Procurement Monitoring and Implementation Plan**

- (a) Project Co shall implement the Procurement Monitoring and Implementation Plan.
- (b) A director of Project Co shall submit, annually, on each anniversary of Commercial Close, a completed and executed declaration in the form attached as Appendix 1 to Schedule 15 – Procurement Monitoring and Implementation Plan that Project Co has made the proper inquiries and has determined that the requirements of the Procurement Monitoring and Implementation Plan have been complied with by Project Co and its Subcontractors in the immediately previous year.

## 12. CONSTRUCTION SCHEDULE

### 12.1 The Construction Schedule

- (a) Project Co shall:
  - (i) review the proposed schedules and deadlines of CMH for each Phase and where CMH has not specified particular dates for occupancy of Phases, Project Co shall set those dates so as to achieve occupancy of such Phases on an as early as achievable basis and include them in its proposed Construction Schedule under Section 12.1(a)(ii);
  - (ii) prepare and submit to CMH and the Consultant as soon as practical and in any event within 45 days of Financial Close, a detailed computerized Construction Schedule (in both hard paper copy and computer readable soft copy) using a critical path method (“CPM”) network and a Construction Schedule dependent cash flow forecast, each in a form approved by CMH. The planning and schedule software shall be “Primavera” with the most current release available to be used. The Construction Schedule and any other schedule related reporting requirements of Project Co shall conform to the phasing and sequencing requirements for the Work as set out in the Contract Documents, including the work to be completed by CMH’s own forces or by other contractors, the applicable Phased Occupancy Dates, the Scheduled Interim Completion Date, the Scheduled Substantial Completion Date, the Scheduled Final Completion Date, the Specifications included in Division 1 of the Contract Documents, including, the sequencing requirements, the schedule for Commissioning of the Work and for achieving the applicable Phased Occupancy Dates, the Scheduled Interim Completion Date, the Scheduled Substantial Completion Date and the Scheduled Final Completion Date. CMH and the Consultant will respond to Project Co, in writing, within 10 Business Days of receipt of each Construction Schedule, with either its detailed comments or acceptance of such Construction Schedule as complete;
  - (iii) in the event that CMH and the Consultant do not accept Project Co’s initial Construction Schedule submission as complete, Project Co shall re-submit such Construction Schedule as many times as necessary, revised in accordance with CMH’s and the Consultant’s detailed comments and each re-submission shall be provided within 5 Business Days of receipt of the Consultant’s and CMH’s detailed comments, who in turn shall also respond within 5 Business Days. When the Construction Schedule has been accepted as complete by CMH and the Consultant, it shall be the

baseline Construction Schedule against which Project Co shall monitor progress of the Work for the Project;

- (iv) advise the Consultant promptly of any error or omission in the Construction Schedule and correct such error or omission;
- (v) continuously monitor the progress of the Work in relation to the Construction Schedule and the cash flow and update the Construction Schedules and the cash flow forecast with the monthly construction status report under Section 18.2(a), maintain the continuity of the Construction Schedule's CPM network for all updates and revisions and immediately notify CMH of any variance or potential variance in the scheduled completion dates;
- (vi) advise the Consultant of any revisions required to the Construction Schedule as a result of extension of the Contract Time in accordance with Schedule 11 – Change Procedure;
- (vii) identify potential variances between scheduling and scheduled completion dates, review the schedule of Work not started or incomplete and implement necessary adjustments in the Construction Schedule in order to meet the Scheduled Interim Completion Date, the Scheduled Substantial Completion Date and the Scheduled Final Completion Date set out in such Construction Schedule, including the movement of manpower and equipment in response to availability of work areas;
- (viii) comply with the Construction Schedule so as not to interfere with the activities of CMH in the Existing Facility;
- (ix) monitor the Subcontractors' personnel staffing and equipment and the availability of materials and supplies in order to meet the Construction Schedules and take appropriate courses of action when the requirements of a Subcontract with any Project Co Party are not met;
- (x) obtain from Project Co Parties a schedule showing the order number, vendor's name, shop drawing status, manufacturing lead time and delivery date of all critical material and equipment required for the Work;
- (xi) pre-order equipment, materials and supplies where necessitated by cost and/or time factors and expedite delivery of critical items; and
- (xii) in consultation with CMH's Project Manager and the Consultant, include in the Construction Schedule the integration of the equipment specifications, rough-in requirements, supply and installation, including of

CMH's equipment to ensure that the ordering, delivery, receiving and supply of equipment does not impact on the Construction Schedule.

## 12.2 Changes to Critical Path

- (a) Any changes to the critical path of the Construction Schedule initiated by Project Co which affect the applicable Phased Occupancy Dates, the Scheduled Interim Completion Date, the Scheduled Substantial Completion Date or the Scheduled Final Completion Date must be approved in writing by CMH. Subject to the terms of Schedule 11 – Change Procedure, any CMH approval of such changes to the critical path does not entitle Project Co to a Change Order, an extension of the Contract Time or an addition to the Guaranteed Price.
- (b) At any time during the Project Term, Project Co shall, no later than 2 Business Days following the written request of CMH, deliver to CMH a copy of the most current version of the Construction Schedule and/or any past version of the Construction Schedule requested by CMH in electronic (non-PDF) software format.

## 12.3 Failure to Maintain Schedule

- (a) If Project Co is not meeting the deadlines set out in the Construction Schedule consistent with its obligations under this Project Agreement, then at the written request of CMH or the Consultant, Project Co, and the Project Co Parties as required, shall promptly increase efforts on the Project, including the addition of more personnel to the Project during regular times and during periods of time for which overtime may be required, and if the delay is for any reason other than as described in Sections 22.1(a) and 28.1(a), all expenses and costs incurred as a result shall be borne by Project Co. Any dispute between the parties as to whether Project Co is meeting the deadlines set out in the Construction Schedule shall be resolved in accordance with the provisions of Schedule 14 – Dispute Resolution Procedure.
- (b) Project Co shall notify CMH's Project Manager if, at any time, the actual progress of the Work is significantly ahead of the Construction Schedule.

## 13. WORK COMMITTEE AND EQUIPMENT

### 13.1 Establishment of Work Committee

- (a) The Parties shall, within 30 days following Financial Close, establish a committee (the "**Work Committee**") consisting of:
  - (i) 1 representative appointed by Infrastructure Ontario, from time to time;

- (ii) the Consultant;
- (iii) the following 2 representatives appointed by CMH:
  - (A) CMH's Project Manager; and
  - (B) any individual appointed by CMH;
- (iv) the following 2 representatives appointed by Project Co:
  - (A) Project Co's project manager identified in Schedule 7 – Key Personnel; and
  - (B) Project Co's site superintendent identified in Schedule 7 – Key Personnel.
- (b) Members of the Work Committee may, on prior notice to all members, invite such advisors and consultants as they require from time to time to attend meetings and to provide briefings to the Work Committee.
- (c) CMH's Project Manager shall be the chairperson of the Work Committee.

### 13.2 Function and Role

- (a) The Work Committee shall assist the Parties by:
  - (i) promoting cooperative and effective communication;
  - (ii) performing a consultative and advisory role to facilitate decisions; and
  - (iii) making recommendations as to the optimum or preferred course of action, in each case, with respect to matters related to the Work.
- (b) The Work Committee shall be responsible for receiving and reviewing all matters related to the Work, including:
  - (i) any construction and Commissioning issues;
  - (ii) the identification and resolution of Project Co Design Issues pursuant to Section 11.18;
  - (iii) the Construction Schedule;
  - (iv) any issues arising from reports or documents provided by Project Co or the Consultant, including, but not limited to, the monthly construction

status reports referred to in Section 18.2(a) and the weekly reports referred to in Section 18.2(b);

- (v) any quality assurance and safety issues;
- (vi) the recommendations of the Equipment Subcommittee;
- (vii) any special matters referred to the Work Committee by CMH, any CMH Party, Project Co or any Project Co Party;
- (viii) any community and media relations issues in accordance with Schedule 21 – Communications Protocol; and
- (ix) any other issues pertaining to the Work.

### **13.3 Term of Work Committee**

- (a) Unless otherwise agreed, the Work Committee shall operate only until the Final Completion Date.

### **13.4 Replacement of Committee Members**

- (a) Infrastructure Ontario and CMH shall be entitled to replace any of their respective representatives on the Work Committee by written notice to the other and to Project Co. CMH will use commercially reasonable efforts to deliver prior written notice of any such replacement to Project Co. Project Co may replace any of its representatives on the Work Committee with the prior written consent of CMH, not to be unreasonably withheld or delayed.

### **13.5 Procedures and Practices**

- (a) The members of the Work Committee may:
  - (i) adopt such procedures and practices for the conduct of the activities of the Work Committee and establish such subcommittees of the Work Committee, as they consider appropriate from time to time;
  - (ii) invite to any meeting of the Work Committee such other persons as the members of the Work Committee may agree;
  - (iii) exclude from any meeting of the Work Committee such persons as the members of the Work Committee may agree; and
  - (iv) receive and review reports from any person or organization agreed to by the members of the Work Committee.

- (b) Once established, the Work Committee shall meet at least once each month from the date of this Project Agreement until the Final Completion Date, unless otherwise agreed by the members of the Work Committee or the Parties.
- (c) The Consultant may convene a special meeting of the Work Committee at any time. Special meetings of the Work Committee may be convened on not less than 5 Business Days' notice to all members of the Work Committee, identifying the agenda items to be discussed at the special meeting, provided that, in an Emergency, a meeting may be called at any time on such notice as may be reasonable in the circumstances.
- (d) Unless otherwise agreed by the members of the Work Committee, the Work Committee shall meet at the Site, the Facility or another location in Cambridge, Ontario. Meetings of the Work Committee may be held by means of such telephonic, electronic or other communication facilities as permit all persons participating in the meeting to communicate with each other simultaneously and instantaneously. A person participating in a meeting by such means will be deemed to be present at such meeting, provided that each member of the Work Committee must attend in person at least once each calendar quarter.
- (e) Minutes of all meetings, recommendations and decisions of the Work Committee, including those made by telephone or other form of communication, shall be recorded and maintained by the Consultant. The Consultant shall circulate copies of such minutes within 5 Business Days of the holding of the meeting. Unless Project Co notifies the Consultant within 5 Business Days of receipt of the minutes that Project Co disagrees with the contents of the minutes, Project Co, CMH and Infrastructure Ontario shall be deemed to have approved such minutes. The Consultant shall maintain a complete set of all minutes of the meetings of the Work Committee and shall make such minutes available for inspection by Project Co during regular business hours.

### 13.6 Equipment Subcommittee

- (a) The Parties shall, within 30 days after the date of this Project Agreement, establish an equipment subcommittee of the Work Committee (the "**Equipment Subcommittee**") consisting of 3 representatives of each Party.
- (b) The Equipment Subcommittee shall assist the Parties by promoting cooperative and effective communication with respect to matters related to the Equipment.
- (c) The primary role of the Equipment Subcommittee shall be to oversee and coordinate the procurement and installation of all Equipment in a timely and efficient manner and in accordance with the Construction Schedule. Project Co

and the Equipment Subcommittee shall work co-operatively with the Consultant, CMH and any equipment consultant retained by CMH.

- (d) The Equipment Subcommittee shall be responsible for receiving and reviewing all matters related to the Equipment and shall make recommendations to the Work Committee in connection therewith, which the Work Committee may accept or reject in their Sole Discretion.
- (e) The members of the Equipment Subcommittee may adopt such procedures and practices for the conduct of the activities of the Equipment Subcommittee as they consider appropriate from time to time.

### 13.7 Project Co Equipment Responsibilities

- (a) For each item of Type A Equipment and Type C Equipment, that is also designated "1" or "2" in the "Architectural Impact" column in the Equipment Lists, Project Co shall:
  - (i) provide, in accordance with the Contract Documents, mechanical, electrical and information technology rough-ins, as applicable, for such Equipment;
  - (ii) with CMH and/or CMH's own forces, coordinate the decommissioning, uninstallation, transfer, delivery, reinstallation, installation and commissioning of, as well as associated training in respect of such Equipment;
  - (iii) be responsible for ensuring that the decommissioning, uninstallation, transfer, delivery, reinstallation, installation, commissioning and training in respect of such Equipment is included in the Construction Schedule and all such activities (save and except for the training) are scheduled to occur prior to the applicable Phased Occupancy Date, the Interim Completion Date or the Substantial Completion Date, so that such Equipment may be installed and commissioned in the applicable rooms in accordance with the Construction Schedule; and
  - (iv) provide access to such portions of the Work, as may be required by CMH and/or CMH's own forces to allow the delivery, reinstallation, installation, commissioning and training in respect of such Equipment, all in accordance with the Construction Schedule.

For greater certainty, Project Co is only responsible for coordinating and scheduling the decommissioning, uninstallation, transfer, delivery, reinstallation, installation, commissioning, and/or training in respect of such Equipment with CMH and/or CMH's own forces and is not responsible for actually performing



such decommissioning, uninstallation, transfer, delivery, reinstallation, installation, commissioning, and/or training.

- (b) For each item of Type B Equipment, Project Co shall:
- (i) provide, in accordance with the Contract Documents, mechanical, electrical and information technology rough-ins, as applicable, for such Equipment;
  - (ii) complete and coordinate the delivery, installation and commissioning of such Equipment; and
  - (iii) for Type B Equipment that is also designated either “1” or “2” or “3” in the “Architectural Impact” column in the Equipment Lists, be responsible for ensuring that the delivery, installation, and commissioning in respect of such Equipment is included in the Construction Schedule and is scheduled to occur prior to the applicable Phased Occupancy Date, the Interim Completion Date or the Substantial Completion Date, so that such Equipment may be installed and commissioned in the applicable rooms in accordance with the Construction Schedule.

For greater certainty, Project Co is not only responsible for coordinating and scheduling the delivery, reinstallation, installation, and commissioning in respect of such Equipment, it is also responsible for actually performing the reinstallation, installation, and commissioning.

- (c) For each item of Type D Equipment, Project Co shall:
- (i) provide, in accordance with the Contract Documents, mechanical, electrical and information technology rough-ins, as applicable, with respect to the Type D Equipment;
  - (ii) be responsible for co-ordinating, scheduling and completing the procurement, delivery, installation, commissioning, and associated training with respect to all such Type D Equipment; and
  - (iii) for Type D Equipment that is also designated either “1” or “2” or “3” in the “Architectural Impact” column in the Equipment Lists, be responsible for ensuring that such procurement, delivery, installation and commissioning in respect of such Equipment is included in the Construction Schedule and is scheduled to occur prior to the Phased Occupancy Date, the Interim Completion Date or the Substantial Completion Date, as applicable, so that such Equipment may be installed and commissioned in the applicable rooms in accordance with the Construction Schedule.

- (d) For each item of Type E Equipment, Project Co shall:
- (i) provide, in accordance with the Contract Documents, mechanical, electrical and information technology rough-ins, as applicable, for such Equipment;
  - (ii) complete and coordinate the decommissioning, uninstallation, transfer, reinstallation, and commissioning of, as well as associated retraining (as required by CMH) in respect of such Equipment; and
  - (iii) for Type E Equipment that is also designated either “1” or “2” or “3” in the “Architectural Impact” column in the Equipment Lists, be responsible for ensuring that the decommissioning, uninstallation, transfer, reinstallation, commissioning and training in respect of such Equipment is included in the Construction Schedule and all such activities up to and including commissioning are scheduled to occur prior to the applicable Phased Occupancy Date, the Interim Completion Date or the Substantial Completion Date, so that such Equipment may be installed and commissioned in the applicable rooms in accordance with the Construction Schedule.

For greater certainty, Project Co is not only responsible for coordinating and scheduling the decommissioning, uninstallation, transfer, delivery, reinstallation, commissioning, and training in respect of such Equipment, it is also responsible for actually performing such decommissioning, uninstallation, transfer, delivery, reinstallation, commissioning, and training.

- (e) Project Co shall supervise delivery of all Equipment in accordance with this Section 13 and provide monthly reports thereon to the Equipment Subcommittee.
- (f) Project Co shall coordinate the installation of all Equipment in accordance with this Section 13 and provide periodic reports thereon to the Equipment Subcommittee.

### **13.8 CMH’s Equipment Responsibility**

- (a) For Type A Equipment and Type C Equipment, that is also designated either “1” or “2” in the “Architectural Impact” column in the Equipment Lists, CMH shall procure such Equipment and complete, or have completed by CMH’s own forces, the decommissioning (as applicable), uninstallation (as applicable), transfer (as applicable), delivery, installation or reinstallation, commissioning and associated training regarding such Equipment in accordance with the Construction Schedule. In the event that CMH cannot complete, or have completed by CMH’s own forces, through no fault of Project Co, the decommissioning (as applicable),

uninstallation (as applicable), transfer (as applicable), delivery, installation or reinstallation, commissioning or training on such Equipment, as per the Construction Schedule, Project Co shall coordinate with CMH to reschedule the decommissioning (as applicable), uninstallation (as applicable), transfer (as applicable), installation or reinstallation, commissioning or training on such Equipment, such that this rescheduling has no effect on Project Co's ability to complete the Work in accordance with the Construction Schedule. For greater certainty, in the event that CMH cannot complete, or have completed by CMH's own forces, through no fault of Project Co, the decommissioning (as applicable), uninstallation (as applicable), transfer (as applicable), installation or reinstallation, commissioning or associated training on such Equipment, such failure to complete shall not prevent the Consultant from issuing the certificate of Interim Completion or the certificate of Substantial Completion.

- (b) Save and except for those circumstances contemplated by Section 13.13, CMH's obligations with respect to the Type A Equipment and the Type C Equipment, that is also designated either "3" or "4" in the "Architectural Impact" column in the Equipment Lists, do not form part of this Project Agreement. For greater certainty, Project Co has no responsibility with respect to such Equipment.
- (c) For each item of Type B Equipment, CMH shall procure and deliver to Project Co such Equipment, for installation by Project Co as contemplated hereunder, in accordance with the Construction Schedule. CMH shall also be responsible for coordinating and scheduling the associated training in respect of such Equipment.
- (d) For greater certainty, CMH has no obligations in Section 13 with respect to the Type D Equipment.
- (e) For each item of Type E Equipment, CMH shall provide access to such Equipment in the Existing Facility, to allow Project Co to perform its responsibilities in Section 13.7(d) in accordance with the Construction Schedule.

### **13.9 Substitutions of Equipment by Project Co**

- (a) Project Co shall not make any substitutions of any Equipment without the prior written consent of CMH, in its Sole Discretion. Project Co shall provide CMH with sufficient information to allow CMH to determine whether the proposed substitute is at least equivalent to the item it is to replace and the impact of such substitution on the Construction Schedule.

### **13.10 Standards for Type D Equipment**

- (a) Project Co shall ensure that all purchase orders or other legal documentation for the purchase of Type D Equipment shall require that such Equipment be:

- (i) new and undamaged;
  - (ii) manufactured and able to generate in compliance with all Applicable Law; and
  - (iii) delivered and installed on or before a date to be specified by Project Co in accordance with the Construction Schedule, as more particularly dealt with in Section 13.12.
- (b) Project Co shall, as soon as practicable after receiving a request from CMH's Project Manager, supply to CMH's Project Manager evidence to demonstrate its compliance with this Section 13.10.

### **13.11 Training on Type D Equipment**

- (a) For and in respect of each item of Type D Equipment which requires CMH's own forces (including its staff) to be trained in its proper operation and/or maintenance, Project Co shall ensure that the purchase documentation requires the vendors of such Equipment to provide or, at vendor's cost, arrange for adequate, appropriate and timely training with respect to the proper operation and maintenance of such Equipment for all CMH's own forces (including its staff).
- (b) CMH is responsible for making its own forces including its staff available for the training described in Section 13.11(a) in accordance with the schedule incorporated into the Construction Schedule. Project Co shall be responsible to coordinate such training and for ensuring the schedule addresses the time periods required for such training, but Project Co shall not be responsible for any delay resulting from the failure of CMH to have CMH's own forces (including its applicable staff) available for training in accordance with such schedule nor for the unavailability of training personnel to be supplied by the respective Equipment vendors in accordance with Section 13.11(a).

### **13.12 Scheduling of Equipment Installation and Commissioning**

- (a) Project Co shall prepare a schedule in consultation with CMH for the decommissioning, uninstallation, transfer, delivery, reinstallation, installation, commissioning and training, each as applicable, in respect of all Equipment, as provided in Section 13.7, and shall incorporate the timing of decommissioning, uninstallation, transfer, delivery, reinstallation, installation, commissioning and training in respect of such Equipment into the Construction Schedule.

### **13.13 Change Orders in the Event of Delay**

- (a) In the event of any delay in the performance of any of its obligations by CMH under Section 13.7 to 13.12 or any delay in the performance of any of its

obligations by an Equipment vendor or manufacturer of Type A Equipment, Type B Equipment, or Type C Equipment, providing installation services under any purchase order or contract with CMH and to the extent any such delay did not result from the failure of Project Co to perform any of its obligations set out in this Section 13 including, without limitation, its obligations regarding the coordination and scheduling of the decommissioning, uninstallation, transfer, delivery, reinstallation, installation, commissioning and training, each as applicable, in respect of the Equipment then:

- (i) Project Co will, subject to and in accordance with Schedule 11 – Change Procedure, be entitled to a Change Order for any costs which specifically relate to and are directly attributable to such delay and would not have otherwise been incurred (including amounts attributable to the Overhead and Profit Fee, if any, as determined in accordance with Schedule 11 – Change Procedure); and
- (ii) CMH may elect to proceed in one of the following manners:
  - (A) CMH may request Project Co to maintain the Scheduled Interim Completion Date and/or the Scheduled Substantial Completion Date and will compensate Project Co for the acceleration of the Work to achieve Interim Completion and/or Substantial Completion on the Scheduled Interim Completion Date and/or Scheduled Substantial Completion Date, as applicable, and Project Co will, subject to and in accordance with Schedule 11 – Change Procedure, be entitled to a Change Order for any costs which specifically relate to and are directly attributable to such acceleration and would not have otherwise been incurred; or
  - (B) CMH may elect to except the decommissioning, uninstallation, transfer, delivery, reinstallation, installation, commissioning and training, each as applicable, in respect of a particular item of Equipment out of Interim Completion and/or Substantial Completion provided that to the extent any such delay in the decommissioning, uninstallation, transfer, delivery, reinstallation, installation, commissioning and training in respect of such item of Equipment results in increased costs, Project Co will, subject to and in accordance with Schedule 11 – Change Procedure, be entitled to a Change Order for any costs which specifically relate to and are directly attributable to such delay and would not have otherwise been incurred.

## 14. CONTAMINATION

### 14.1 Contamination

- (a) For the purposes of applicable environmental legislation, CMH shall be deemed to have control and management of the Site with respect to Pre-Existing Environmental Site Conditions.
- (b) Prior to Project Co commencing the Work, CMH has:
  - (i) taken all reasonable steps to determine whether any Hazardous Substances are present at the Site; and
  - (ii) provided the Consultant, Lender's Consultant and Project Co with a report on any such Hazardous Substances, which report Project Co acknowledges is included in the Site Information.
- (c) Project Co shall take all reasonable steps to ensure that:
  - (i) no person suffers injury, sickness or death and no property is injured or destroyed as a result of exposure to or the presence of Hazardous Substances which were at the Site prior to Project Co commencing the Work, which are described in or are properly inferable, readily apparent or readily discoverable from the Site Information or would have been properly inferable, readily apparent or readily discoverable from inspections of the Site carried out by Project Co or by any Project Co Party during the Request for Proposals process prior to the Submission Date ("**Disclosed Hazardous Substances**");
  - (ii) all necessary steps are taken under Applicable Law, to dispose of, store or otherwise render harmless Disclosed Hazardous Substances, save and except those not found on or affecting the area of the Work on the Site, unless otherwise expressly required pursuant to the Contract Documents; and
  - (iii) there is no discharge, escape, emission, leak, deposit, dispersion or migration into the environment ("**Release**") or threatened Release of any Disclosed Hazardous Substances at or from the Site which has or may have an adverse effect upon the environment or human health or safetyas a result of the performance of the Work by Project Co.
- (d) Project Co shall take reasonable steps to ensure that:

- (i) no person suffers injury, sickness or death and no property is injured or destroyed as a result of exposure to or the presence of Hazardous Substances brought to the Site by Project Co or any Project Co Party ("**Project Co Hazardous Substances**");
  - (ii) Project Co and each Project Co Party is responsible to comply with all Applicable Law relating to Project Co Hazardous Substances; and
  - (iii) there is no Release or threatened Release of any Project Co Hazardous Substances at or from the Site which has or may have an adverse effect upon the environment or human health or safety.
- (e) If Project Co:
- (i) encounters Hazardous Substances at the Site, or
  - (ii) has reasonable grounds to believe that Hazardous Substances are present at the Site,
- which were not disclosed by CMH, as required under Section 14.1(b) or which were not properly inferable, readily apparent or readily discoverable from the Site Information or would have been properly inferable, readily apparent or readily discoverable from inspections of the Site carried out by Project Co or by any Project Co Party during the Request for Proposals process prior to the Submission Date (the "**Undisclosed Hazardous Substances**"), Project Co shall:
- (iii) take all reasonable steps, including stopping the Work, to ensure that no person suffers injury, sickness or death and that no property is injured or destroyed as a result of exposure to or the presence of the Hazardous Substances; and
  - (iv) immediately report the circumstances to the Consultant, Lender's Consultant and CMH in writing.
- (f) If Project Co is delayed in performing the Work or incurs additional costs as a result of taking steps required under Section 14.1(e)(iii) (except where a Release or threatened Release is caused by a default by Project Co in the performance of its obligations under this Article 14), the Consultant shall issue appropriate instructions for a Change in the Scope of the Work as provided in Schedule 11 – Change Procedure, and the Contract Time shall be extended for such reasonable time as the Consultant may recommend in consultation with CMH and Project Co, and the Guaranteed Price shall be adjusted by a reasonable amount for costs incurred by Project Co as a result of the delay and as a result of taking those steps.

- (g) Notwithstanding Sections 8.2(f), 8.2(g) and Schedule 14 – Dispute Resolution Procedure, the Consultant may select and rely upon the advice of an independent expert in a dispute under Section 14.1(f) and, in that case, the expert shall be deemed to have been jointly retained by CMH and Project Co and shall be jointly paid by them.
- (h) In the event of any Release or threatened Release of any Hazardous Substances at or from the Site, Project Co shall immediately, upon becoming aware of same, notify the Consultant and CMH of such event.
- (i) This Section 14.1, together with the corresponding indemnities in Section 33.1(a)(viii) and Section 33.2(a)(iv), shall govern over the provisions of Sections 26.3(a)(v) and 27.2(a)(iii);
- (j) If Project Co causes or permits:
  - (i) any Project Co Hazardous Substances to be dealt with by Project Co or any Project Co Party in a manner which does not comply with Applicable Law or which threatens human health and safety or the environment or causes material damage to the Site or the Facility or the property of CMH or others; or
  - (ii) any Disclosed Hazardous Substances which were already at the Site but which were then harmless or stored, contained or otherwise dealt with in accordance with Applicable Law, to be dealt with by Project Co or any Project Co Party in a manner which does not comply with Applicable Law or which threatens human health and safety or the environment or causes material damage to the property of CMH or others,

Project Co, upon becoming aware of same shall:

- (iii) take all reasonable steps, including stopping the Work, to ensure that no person suffers injury, sickness or death and that no property is injured or destroyed as a result of exposure to or the presence of the Hazardous Substances; and
- (iv) upon becoming aware of same, report the circumstances to the Consultant and CMH by telephone, confirmed in writing.
- (k) In the circumstances contemplated in Sections 14.1(c), 14.1(d), 14.1(e) or 14.1(j), Project Co shall perform its obligations thereunder, at Project Co's sole cost and expense (except in the circumstances contemplated by Section 14.1(e), which shall be at CMH's sole cost and expense in accordance with the provisions of Section 14.1(f)). Project Co shall perform its obligations under Sections 14.1(c), 14.1(d), 14.1(e) or 14.1(j), including, as applicable, any clean up, removal,



containment, storage or other dealing with relevant Hazardous Substances and any remediation of damage caused thereby, in a manner which the Governmental Authorities determine will:

- (i) meet all Applicable Law, including the applicable Table of the Soil Groundwater and Sedimentary Standards for use under Part XV.I of the *Environmental Protection Act* (Ontario), dated March 9, 2004, and ensure compliance with any applicable Permits, Licences and Approvals; and
- (ii) rectify all material damage to the property of CMH and/or others.

## 15. ITEMS OF GEOLOGICAL, HISTORICAL OR ARCHAEOLOGICAL INTEREST OR VALUE

### 15.1 Objects Property of CMH

- (a) As between the Parties, all fossils, artefacts and other objects having artistic, historic, archaeological or monetary value, including human remains and burial sites, which may be found on or at the Site are or shall be the sole and absolute property of CMH.

### 15.2 Procedure Upon Discovery of Objects

- (a) Upon the discovery of any item referred to in Section 15.1(a) during the course of the Work, Project Co shall:
  - (i) immediately inform the Consultant of such discovery;
  - (ii) take all steps not to disturb the item and, if necessary, cease any Work in so far as performing such Work would endanger the item or prevent or impede its excavation;
  - (iii) take all necessary steps to preserve and ensure the preservation of the item in the same position and condition in which it was found; and
  - (iv) comply, and ensure compliance by all Project Co Parties, with Applicable Law and all requirements of Governmental Authorities with respect to such discovery, including the requirements under the *Funeral, Burial and Cremation Services Act, 2002* (Ontario).
- (b) In the event that CMH wishes Project Co to perform actions which are in addition to any required pursuant to Section 15.2(a), then CMH shall issue an instruction to Project Co specifying what action CMH requires Project Co to take and Project Co shall promptly and diligently comply with all such instructions.

### 15.3 Compensation Event

- (a) If Sections 15.2(a) and 15.2(b) require Project Co to perform any alteration, addition, demolition, extension or variation in the Work or to suspend or delay performance of the Work as a result of such discovery and which would not otherwise be required under this Project Agreement, then any such alteration, addition, demolition, extension or variation in the Work, or suspension or delay in the performance of the Work, shall, subject to and in accordance with Article 22, be treated as a Delay Event and, subject to and in accordance with Article 23, be treated as a Compensation Event, provided however that the foregoing shall not apply to the extent that any item referred to in Section 15.1(a) was disclosed in or properly inferable, readily apparent or readily discoverable from the Site Information or would have been properly inferable, readily apparent or readily discoverable from inspections of the Site carried out by Project Co or by any Project Co Party during the Request for Proposals process prior to the Submission Date.

## 16. COMMISSIONING AND COMPLETION

### 16.1 Interim Completion

- (a) Project Co shall deliver a notice of the date anticipated to be the Interim Completion Date to CMH and the Consultant at least 90 days prior to the date anticipated by Project Co to be the Interim Completion Date. Project Co acknowledges that CMH needs a minimum of 90 days' notice prior to the anticipated Interim Completion Date to prepare for Commissioning. Project Co shall advise CMH and the Consultant of any change in the anticipated date. Project Co shall, by the date which is 20 days prior to the anticipated Interim Completion Date as set out in Project Co's notice, prepare a list, in electronic format on software that identifies deficiencies by division, trade and location ("**Interim Preliminary Minor Deficiencies List**") of Minor Deficiencies, including an estimate of the cost of and the time for rectifying such Minor Deficiencies.
- (b) Project Co shall reconfirm the anticipated Interim Completion Date in a notice given to CMH and to the Consultant 20 days prior to the anticipated Interim Completion Date which notice shall include a copy of the Interim Preliminary Minor Deficiencies List. Project Co shall plan for start-up and verification of all systems to be completed no later than 7 days prior to the anticipated Interim Completion Date. Project Co shall reconfirm the anticipated Interim Completion Date and when Project Co is satisfied that it has completed all the requirements for Interim Completion, Project Co shall apply to CMH and the Consultant for certification of Interim Completion in a notice to CMH and the Consultant by the date which is 10 days prior to the anticipated Interim Completion Date. The

Consultant shall in the next following 10 days, proceed to review and inspect the Interim Work and, taking into account the Interim Preliminary Minor Deficiencies List, prepare its own list of Minor Deficiencies (the “**Interim Minor Deficiencies List**”) and its estimate of the cost of and the time for rectifying the Interim Minor Deficiencies set out in the Interim Minor Deficiencies List.

- (c) When the Consultant is satisfied that Interim Completion has been achieved, the Consultant shall provide to CMH and to Project Co a report confirming the Interim Minor Deficiencies List and the date on which the Consultant determines that Interim Completion was achieved. Failure to include an item on the Interim Minor Deficiencies List does not alter the responsibility of Project Co to complete the Interim Work.
- (d) The Consultant shall state the Interim Completion Date as set out in its report delivered under Section 16.1(c) in a certificate.
- (e) The Consultant shall prepare the Interim Minor Deficiencies List before a certificate of Interim Completion is issued, but the Consultant shall not withhold the certificate of Interim Completion by reason solely that there are such Interim Minor Deficiencies in respect of the Interim Work.
- (f) CMH may withhold from the payment otherwise due on the Interim Completion Payment Date a holdback amount that is 200% of the amount estimated by the Consultant for CMH to complete and rectify the Interim Minor Deficiencies. The Consultant shall inspect the completion of the Interim Minor Deficiencies and shall provide a monthly progress report to CMH describing the Interim Minor Deficiencies which have been completed to the satisfaction of the Consultant, and CMH shall release from such holdback the amount of any holdback allocated to the Interim Minor Deficiencies which have been completed. If, at any time after the 120 day period for completion of the Interim Minor Deficiencies referred to in Section 5.2 of Schedule 18 – Payments and Holdbacks, any of the Interim Minor Deficiencies are not completed in 10 Business Days following Project Co’s receipt of a written notice from CMH to correct the deficient work, or Project Co is not diligently working towards completion of the deficient work to the satisfaction of the Consultant, and unless CMH otherwise agrees, or the reasons for any delay are acceptable to CMH, or the delay is caused by CMH or a CMH Party, CMH may engage others to perform the work necessary to complete and rectify the Interim Minor Deficiencies at the risk and cost of Project Co and CMH may deduct such cost from the holdback amount or any other amount remaining owing by CMH to Project Co. If the cost of completion and rectification of any Interim Minor Deficiencies exceeds the amount held back by CMH, then Project Co shall reimburse CMH for all such excess costs.

- (g) Project Co shall assign to CMH and submit with the application for Interim Completion, all guarantees, warranties (whether from manufacturers, or Project Co Parties), certificates, preliminary testing and balancing reports, distribution system diagrams, maintenance and operation instructions, maintenance manuals and materials and any other materials or documentation required to be submitted under this Project Agreement and otherwise required for the proper use and operation of the Interim Work which for greater certainty, but without limitation, shall include as and when directed, all documentation in connection with any LEED certification as required by the Drawings and Specifications (collectively, the “**Interim Deliverables**”). If Project Co requests, Project Co and the Consultant shall, within 60 days following the request of Project Co, settle and agree upon a list specifying in reasonable detail the items to be assigned and submitted under the foregoing sentence. If Project Co is unable to provide any of the Interim Deliverables for any reason, Project Co may submit a list of the outstanding Interim Deliverables and if a delay in the delivery of such outstanding Interim Deliverables will not impair the safety, security or health of the occupants of the Project, such outstanding Interim Deliverables shall be included as Interim Minor Deficiencies. Failure to submit any of the Interim Deliverables that are required for the safe occupation and use of the Interim Work and as may be necessary for the security and health of the occupants of the Project, shall be grounds for the Consultant to state in its report that Interim Completion has not been achieved. For the purposes of Section 16.1(f), and any holdback to be taken as contemplated thereunder, the value of such outstanding Interim Deliverables shall, without regard to the degree or quantum of such outstanding Interim Deliverables, be set at \$250,000. The assignment by Project Co of all guarantees and warranties shall expressly reserve the right of Project Co to make any claims under such guarantees and warranties for the repair or replacement of any Work and such assignment shall in no way prejudice any rights of or benefits accruing to Project Co pursuant to such guarantees and warranties. For greater certainty, nothing herein is intended to constitute a release or waiver of the obligation of Project Co to submit and assign (as applicable) to CMH all of the Interim Deliverables.

## 16.2 Substantial Completion

- (a) Project Co shall deliver a notice of the date anticipated to be the Substantial Completion Date to CMH and the Consultant at least 90 days prior to the date anticipated by Project Co to be the Substantial Completion Date. Project Co acknowledges that CMH needs a minimum of 90 days’ notice prior to the anticipated Substantial Completion Date to prepare for Commissioning. Project Co shall advise CMH and the Consultant of any change in the anticipated date. Project Co shall, by the date which is 20 days prior to the anticipated Substantial Completion Date as set out in Project Co’s notice, prepare a list, in electronic format on software that identifies deficiencies by division, trade and location

- (“**Project Co’s Preliminary Minor Deficiencies List**”) of Minor Deficiencies, including an estimate of the cost of and the time for rectifying such Minor Deficiencies.
- (b) Project Co shall reconfirm the anticipated Substantial Completion Date in a notice given to CMH and to the Consultant 20 days prior to the anticipated Substantial Completion Date which notice shall include a copy of Project Co’s Preliminary Minor Deficiencies List. Project Co shall plan for start-up and verification of all systems to be completed no later than 7 days prior to the anticipated Substantial Completion Date. Project Co shall reconfirm the anticipated Substantial Completion Date and when Project Co is satisfied that it has completed all of the requirements for Substantial Completion, Project Co shall apply to CMH and the Consultant for certification of Substantial Completion in a notice to CMH and the Consultant by the date which is 10 days prior to the anticipated Substantial Completion Date. The Consultant shall in the next following 10 days, proceed to review and inspect the Work for the purpose of: (i) confirming the achievement of Substantial Completion and providing its report with respect thereto pursuant to Section 16.2(d); (ii) certifying substantial performance of the Work in accordance with the *Construction Lien Act* (Ontario) pursuant to Section 16.2(c); and (iii) taking into account Project Co’s Preliminary Minor Deficiencies List, preparing its own list of Minor Deficiencies (the “**Minor Deficiencies List**”) and its estimate of the cost of and the time for rectifying the Minor Deficiencies set out in the Minor Deficiencies List.
  - (c) When the Consultant is satisfied that substantial performance of the Work in accordance with the *Construction Lien Act* (Ontario) has been achieved, the Consultant shall provide Project Co and CMH with a certificate of substantial performance in accordance with the *Construction Lien Act* (Ontario).
  - (d) When the Consultant is satisfied that Substantial Completion has been achieved, the Consultant shall provide to CMH and to Project Co a report confirming the Minor Deficiencies List and the date on which the Consultant determines that Substantial Completion was achieved. Failure to include an item on the Minor Deficiencies List does not alter the responsibility of Project Co to complete the Work.
  - (e) The Consultant shall state the Substantial Completion Date as set out in its report delivered under Section 16.2(d) in a certificate.
  - (f) The Consultant shall prepare the Minor Deficiencies List before a certificate of Substantial Completion is issued, and if the certificate referred to in Section 16.2(c) has been issued, then the Consultant shall not withhold the certificate of Substantial Completion by reason solely that there are such Minor Deficiencies.

- (g) Project Co shall publish in a construction trade newspaper in the area of the location of the Work, a copy of the certificate of substantial performance in accordance with the *Construction Lien Act* (Ontario) and Project Co shall provide suitable evidence of the publication to the Consultant and CMH.
- (h) CMH may withhold from the payment otherwise due on the Substantial Completion Payment Date a holdback amount that is 200% of the amount estimated by the Consultant for CMH to complete and rectify the Minor Deficiencies. The Consultant shall inspect the completion of the Minor Deficiencies and shall provide a monthly progress report to CMH describing the Minor Deficiencies which have been completed to the satisfaction of the Consultant, and CMH shall release from such holdback the amount of any holdback allocated to the Minor Deficiencies which have been completed. If, at any time after the 120 day period for completion of the Minor Deficiencies referred to in Section 5.2 of Schedule 18 – Payments And Holdbacks, any of the Minor Deficiencies are not completed in 10 Business Days following Project Co's receipt of a written notice from CMH to correct the deficient work, or Project Co is not diligently working towards completion of the deficient work to the satisfaction of the Consultant, and unless CMH otherwise agrees, or the reasons for any delay are acceptable to CMH, or the delay is caused by CMH or an CMH Party, CMH may engage others to perform the work necessary to complete and rectify the Minor Deficiencies at the risk and cost of Project Co and CMH may deduct such cost from the holdback amount or any other amount remaining owing by CMH to Project Co. If the cost of completion and rectification of any Minor Deficiencies exceeds the amount held back by CMH, then Project Co shall reimburse CMH for all such excess costs.
- (i) Project Co shall assign to CMH and submit with the application for Substantial Completion, all guarantees, warranties (whether from manufacturers, or Project Co Parties), certificates, preliminary testing and balancing reports, distribution system diagrams, maintenance and operation instructions, maintenance manuals and materials and any other materials or documentation required to be submitted under this Project Agreement and otherwise required for the proper use and operation of the Work for the Project (collectively, the "**Project Deliverables**"). If Project Co requests, Project Co and the Consultant shall, within 60 days following the request of Project Co, settle and agree upon a list specifying in reasonable detail the items to be assigned and submitted under the foregoing sentence. If Project Co is unable to provide any of the Project Deliverables for any reason, Project Co may submit a list of the outstanding Project Deliverables and if a delay in the delivery of such outstanding Project Deliverables will not impair the safety, security or health of the occupants of the Project, such outstanding Project Deliverables shall be included as Minor Deficiencies. Failure to submit any of the Project Deliverables that are required for the safe occupation and use of the Work and as may be necessary for the security and health of the

occupants of the Project, shall be grounds for the Consultant to reject Project Co's application for Substantial Completion. For the purposes of Section 16.2(h), and any holdback to be taken as contemplated thereunder, the value of such outstanding Project Deliverables shall, without regard to the degree or quantum of such outstanding Project Deliverables, be set at \$250,000, provided that if there has been a holdback established on account of outstanding Interim Deliverables under Section 16.1(f) and on the Substantial Completion Payment Date such holdback amount has not been released then the holdback amount of \$250,000 set in respect to outstanding Project Deliverables shall be deemed included without duplication in the holdback on account of outstanding Interim Deliverables under Section 16.1(f) and the provisions of Section 16.1(f) shall apply to such outstanding Project Deliverables *mutatis mutandis*. The assignment by Project Co of all guarantees and warranties shall expressly reserve the right of Project Co to make any claims under such guarantees and warranties for the repair or replacement of any Work and such assignment shall in no way prejudice any rights of or benefits accruing to Project Co pursuant to such guarantees and warranties. For greater certainty, nothing herein is intended to constitute a release or waiver of the obligation of Project Co to submit and assign (as applicable) to CMH all of the Project Deliverables.

- (j) The submission of an application for payment upon Substantial Completion shall constitute a waiver by Project Co of all claims whatsoever against CMH under this Project Agreement, whether for a change in the Guaranteed Price, extension of the Contract Time or otherwise, except (i) those made in writing prior to Project Co's application for payment upon Substantial Completion and still unsettled; (ii) any third party claim which Project Co was not aware of at such time and with respect to which Project Co is entitled to indemnification from CMH in accordance with this Project Agreement; and (iii) subject to any subsequent waiver under Section 34.1, claims arising out of any act or omission of CMH or any CMH Party after the date of the waiver, and third-party claims arising after the date of the waiver. For greater certainty, for the purposes of clauses (i) and (ii) above, a third party claim does not include any claim by a Project Co Party.

### 16.3 Final Completion Countdown Notice

- (a) Project Co shall deliver a notice (the "**Final Completion Countdown Notice**") to CMH and the Consultant specifying the date (which, for greater certainty, will be on or before the Scheduled Final Completion Date) on which Project Co anticipates that Final Completion will be achieved (the "**Anticipated Final Completion Date**").
- (b) The Final Completion Countdown Notice shall be delivered not less than 60 days prior to the Anticipated Final Completion Date. If Project Co fails to deliver the

Final Completion Countdown Notice not less than 60 days prior to the Scheduled Final Completion Date, the Anticipated Final Completion Date shall be deemed to be the same date as the Scheduled Final Completion Date.

#### 16.4 Final Completion Certificate

- (a) Project Co shall give the Consultant and CMH's Project Manager at least 10 Business Days' notice prior to the date upon which Project Co anticipates all requirements for Final Completion shall be satisfied.
- (b) Project Co shall then give the Consultant and CMH's Project Manager a subsequent notice (the "**Final Completion Notice**") upon the satisfaction of all requirements for Final Completion, which Final Completion Notice shall describe, in reasonable detail, the satisfaction of the requirements for Final Completion, including the completion and rectification of all Minor Deficiencies, together with Project Co's opinion as to whether the conditions for issuance of the Final Completion Certificate have been satisfied. The Final Completion Notice shall also include the following documentation:
  - (i) Project Co's written request for release of holdback, including a declaration that no written notices of lien arising from the performance of the Work have been received by it;
  - (ii) Project Co's Statutory Declaration CCDC 9A;
  - (iii) Project Co's WSIB Certificate of Clearance; and
  - (iv) a written statement that the Work has been performed to the requirements of the Contract Documents, itemizing approved changes in the Work, the Consultant's written instructions, and modifications required by Governmental Authorities.
- (c) CMH shall, within 5 Business Days after receipt of the Final Completion Notice, provide the Consultant and Project Co with CMH's opinion as to whether the conditions for issuance of the Final Completion Certificate have been satisfied and, if applicable, any reasons as to why it considers that the Final Completion Certificate should not be issued.
- (d) Within 5 Business Days after Project Co's receipt of CMH's opinion pursuant to Section 16.4(c), the Parties shall cause the Consultant to determine whether the conditions for issuance of the Final Completion Certificate have been satisfied, having regard for the opinions of both Project Co and CMH, and to issue to CMH and to Project Co either:



- (i) the Final Completion Certificate, setting out in such certificate the Final Completion Date; or
  - (ii) a report detailing the matters that the Consultant considers are required to be performed by Project Co to satisfy the conditions for issuance of the Final Completion Certificate.
- (e) Where the Consultant has issued a report in accordance with Section 16.4(d)(ii) and Project Co has not referred a dispute in relation thereto for resolution in accordance with Schedule 14 – Dispute Resolution Procedure, Project Co shall, within 5 Business Days after receipt of such report, provide the Consultant and CMH's Project Manager with:
- (i) a detailed list indicating the rectification actions proposed for all matters raised in such report;
  - (ii) the schedule for completion of all such rectification actions; and
  - (iii) any additional Project Co Commissioning that needs to be undertaken as a result of the rectification actions,

and Project Co shall perform all such additional rectification actions and Project Co Commissioning in a timely manner. Upon completion thereof, Project Co may give a further Final Completion Notice and Sections 16.4(c) to 16.4(e), inclusive, shall be repeated until the Final Completion Certificate has been issued pursuant to Section 16.4(d)(i).

## **17. CMH ACCESS, INSPECTION AND MONITORING**

### **17.1 CMH Access**

- (a) Subject to Section 17.1(b) but without limiting any of CMH's rights in respect of the Site, Project Co acknowledges and agrees that CMH, the CMH Parties and Lender's Consultant shall have unrestricted access to the Site, the Facility and any workshop where materials, plant or equipment are being manufactured, prepared or stored, at all reasonable times, during normal working hours. Project Co shall provide sufficient, safe and proper facilities at all times for the review of the Work by the Consultant and the inspection of the Work by authorized agencies. If parts of the Work are in preparation at locations other than the Site, CMH and the Consultant, CMH's Project Manager and Lender's Consultant shall be given access to such Work wherever it is in progress upon reasonable notice and during normal business hours.
- (b) In exercising their access rights under Section 17.1(a), CMH and the CMH Parties shall comply with all relevant safety procedures and any reasonable directions

with regard to site safety that may be issued by or on behalf of Project Co from time to time.

- (c) If Work is designated for tests, inspections, or approvals in the Contract Documents, or by the Consultant's instructions, or pursuant to Applicable Law, Project Co shall give the Consultant reasonable notice of when the Work will be ready for review and inspection. Project Co shall arrange for and shall give the Consultant reasonable notice of the date and time of inspections by other authorities.
- (d) Project Co shall furnish promptly to the Consultant 2 copies of certificates and inspection reports relating to the Work.

## **17.2 Right to Open Up**

- (a) CMH and the Consultant shall have the right, at any time prior to the Final Completion Date, to request Project Co to open up and inspect (or allow CMH or the Consultant, as applicable, to inspect) any part or parts of the Work, or to require testing of any part or parts of the Work, where CMH or the Consultant, as applicable, reasonably believes that such part or parts of the Work is or are defective or that Project Co has failed to comply with the requirements of this Project Agreement (including the Contract Documents) relevant to such part or parts of the Work, and Project Co shall comply with such request. When CMH makes such a request, CMH shall include reasonably detailed reasons with such request.
- (b) If the inspection shows that the relevant part or parts of the Work is or are defective or that Project Co has failed to comply with the requirements of this Project Agreement (including the Contract Documents) relevant to such part or parts of the Work, Project Co shall rectify all such defects and non-compliance diligently (including any re-testing) at no cost to CMH and Project Co shall not be entitled to any additional compensation (and for clarity, such Work shall not form part of the Cost of the Work) or extension of the Contract Time in relation thereto.
- (c) If the inspection shows that the relevant part or parts of the Work is or are not defective and that Project Co has complied with the requirements of this Project Agreement (including the Contract Documents and the requirements of Sections 17.1(a) and 17.1(c)) relevant to such part or parts of the Work, the exercise by CMH or the Consultant, as applicable, of its rights pursuant to this Section 17.2 shall, subject to and in accordance with Article 22, be treated as a Delay Event and, subject to and in accordance with Article 23, be treated as a Compensation Event. For greater certainty, if Project Co has failed to comply with the requirements of Sections 17.1(a) or 17.1(c), the provisions of

Section 17.2(b) shall apply as if the relevant part or parts of the Work is or are defective.

- (d) Where inspection and testing services are specified, the firm employed for such services shall be the firm named and paid by CMH, or named by CMH and paid through a Cash Allowance Disbursement Authorization by Project Co and others (unless otherwise indicated) or named and paid by Contractor. Such inspection shall be identified in the Construction Schedule and Project Co shall give the Consultant timely notice requesting on-site inspection when required.

### **17.3 No Relief from Obligations**

- (a) The Parties acknowledge that the exercise by CMH or the Consultant of the rights under this Article 17 shall in no way affect the obligations of Project Co under this Project Agreement except as set out in this Article 17.

### **17.4 Admittance of Personnel**

- (a) CMH shall have the right to refuse admittance to, or order the removal from the Site, of any person employed by (or acting on behalf of) Project Co or any Project Co Party, whose presence, in the reasonable opinion of CMH, is likely to have an adverse effect on the performance of the Work or who, in the reasonable opinion of CMH, is not a fit and proper person to be at the Site for any reason, including a failure to comply with any policy or any immediate obligation of CMH to ensure the safety and well-being of persons at the Site.

### **17.5 Confirmation of Action**

- (a) Any action taken under Section 17.4 shall promptly be confirmed by CMH to Project Co and, for greater certainty, shall not relieve Project Co of any of its obligations under this Project Agreement.

### **17.6 Notification of Personnel**

- (a) If and when so requested by CMH, Project Co shall, within 3 Business Days of such request, provide a list of the names of all persons it expects may require admission, in connection with this Project Agreement, to any premises occupied by CMH, specifying the capacities in which those persons are concerned with this Project Agreement and, subject to Applicable Law, giving such other particulars as CMH may reasonably require.

### **17.7 Finality as to Admission**

- (a) Any decision of CMH made pursuant to Section 17.4 shall be final and conclusive.

## 18. RECORDS, AUDIT AND REPORTING

### 18.1 Accounting and Audit

- (a) Project Co shall maintain and keep accurate records for the Facility (which means all tangible records, documents, computer printouts, electronic information, books, plans, drawings, specifications, accounts or other information) relating to the Work for a period of 7 years from the Final Completion Date. Project Co shall maintain the original Project records in its office at 407 Basaltic Road, Concord, Ontario L4K 4W8 until all claims have been settled as required by Applicable Law.
- (b) In addition to other rights of inspection contemplated in the Contract Documents, Project Co shall allow CMH, the Consultant, Lender's Consultant or other persons authorized by CMH access to the Project records as they pertain to Work performed on a reimbursable basis pursuant to Section 2.3.2 of Schedule 11 – Change Procedure, or unit price basis, pursuant to Section 2.3.3 of Schedule 11 – Change Procedure, during the course of the Work and for such period of time that Project Co is required to maintain the records set out in Section 18.1(a). Project Co shall be provided with 48 hours prior notice for such access. Project Co shall promptly provide, at the sole cost of CMH, a certified copy of any part of the Project records required by CMH when requested by CMH.
- (c) Subject to Section 18.1(d), Project Co shall ensure that equivalent provisions to those provided in Section 18.1(a) and 18.1(b) are made in the Construction Contract (and shall require the Contractor to incorporate same into every level of contract thereunder with a Project Co Party) for any part of the Work in order, among other things, to provide CMH with access to Project records as contemplated herein.
- (d) The provisions of Section 18.1(b) shall only apply with respect to Change Orders and items under cash allowances.

### 18.2 Reporting

- (a) Project Co shall submit 7 copies of a monthly construction status report to CMH by the 10<sup>th</sup> day after the last day of the relevant monthly reporting period which shall include an update of the Construction Schedule prepared in accordance with the requirements of Section 12.1. Project Co shall use the project management software system directed by CMH if CMH elects, in its Sole Discretion, to utilize such software. The construction status report will appropriately address significant aspects of, and variances in, the progress of the Work, and shall include (i) an executive bar chart summary of the Construction Schedules; (ii) the current schedule performance index (developed in accordance with Good Industry

Practice); (iii) Project Co's narrative report addressing any significant problems, decisions and pending claims; (iv) a detailed report showing the costs to complete the balance of the Work; (v) an executive summary of the progress to date of the building systems; (vi) a financial status report together with a report of any pending or other matters or claims that could have a financial impact on the Project, including a report on any labour disruptions or strikes that may have occurred or are pending; (vii) an updated cash flow report and projections in conjunction with the monthly Construction Schedule update including a cash flow graph that depicts actual cash flow against projected cash flow. The initial cash flow projection shall be based on the baseline Construction Schedules as referenced in Section 12.1(a)(iii), cost loaded by key trades for each division based on the accepted schedule of values, and properly reflective of the true value of each of the components of the schedule over time and shall provide cost loading of the schedule to demonstrate cost allocation by division for all major subtrades and vendors, including all milestones and Phases at a level of detail acceptable to CMH. For additional clarity, the cash flow used for the basis of this report is different from a lender's drawdown schedule which is used for financial purposes. Subsequent monthly cash flow projections shall be based on the true value of the Work remaining in accordance with the Construction Schedule updates. This report shall also include an explanation for variances in actual cash flow against projected cash flow each period; (viii) progress photos from different views to indicate the progress of the Work in digital format, indicating the date and location of the photograph; (ix) a safety report addressing any incidents or accidents; (x) approved Change Orders, priced change notices awaiting approval and Contemplated Change Notices; and (xi) the status of Project Co Design Issues. Items of immediate concern are to be highlighted, noting when decisions must be reached in order to keep the Project on schedule.

- (b) Project Co shall prepare and deliver a weekly report to CMH by end of business on Friday of every week between the date of this Project Agreement and the Final Completion Date. The weekly report shall summarize the Work completed by Project Co during the week to which it relates and set out the Work planned to be completed over the two weeks that follow the date of the report. The weekly report shall include the following information:
- (i) Construction activities by major trade that occurred during the week and those planned over the two (2) weeks that follow;
  - (ii) Major equipment deliveries that occurred during the week and planned major deliveries over the two weeks that follow; and
  - (iii) The workforce average for the week.

- (c) Project Co shall cause Agent to cause, in accordance with Section 5.2 of Schedule 5 – Form of Lender’s Direct Agreement, the Lender’s Consultant to provide CMH and Infrastructure Ontario a copy of any written assessment or report prepared by the Lender’s Consultant in relation to the status or progress of the Work under the Construction Contract, including but not limited to, any certificate of payment, concurrently with its delivery to Agent and/or Project Co.

## **19. CMH’S REMEDIAL RIGHTS**

### **19.1 Exercise of Remedial Rights**

- (a) CMH may exercise all rights set out in this Article 19 at any time and from time to time if:
  - (i) CMH, acting reasonably, considers that a breach by Project Co of any obligation under this Project Agreement, or any act or omission on the part of Project Co or any Project Co Party:
    - (A) does or can reasonably be expected to create a serious threat to the health or safety of any user of any part of or the whole of the Facility, including employees of or patients, volunteers and visitors to the Facility and members of the public; or
    - (B) may potentially compromise the reputation or integrity of CMH or the nature of the Province’s health care system, so as to affect public confidence in that system.

provided that:

- (C) in respect of a breach by Project Co of any obligation under this Project Agreement or any act or omission on the part of Project Co or any Project Co Party which can reasonably be expected to cause any of the consequences set out in Section 19.1(a)(i)(A), CMH shall not exercise its rights under this Article 19 unless Project Co has failed to cure the relevant breach, act or omission within 5 Business Days of notice from CMH or, if such breach, act or omission cannot reasonably be cured within such 5 Business Day period, Project Co thereafter fails to diligently and continuously pursue such cure and to cure such breach, act or omission within a reasonable period thereafter, provided that Project Co shall not be entitled to a cure period if any of the consequences set out in Section 19.1(a)(i)(A) actually occur; and
- (D) in respect of Section 19.1(a)(i)(B), CMH shall not exercise its rights under this Article 19 unless Project Co has failed to cure the

relevant breach, act or omission within 5 Business Days of notice from CMH or, if such breach, act or omission cannot reasonably be cured within such 5 Business Day period, Project Co thereafter fails to diligently and continuously pursue such cure and to cure such breach, act or omission within a reasonable period thereafter; or

- (ii) subject to Section 10.1(b), Project Co has failed to comply with any written direction issued by or on behalf of CMH's board of directors.

## 19.2 Emergency

- (a) Notwithstanding that Project Co is not in breach of its obligations under this Project Agreement, CMH may exercise all of the rights set out in this Article 19 at any time and from time to time if CMH, acting reasonably, considers the circumstances to constitute an Emergency.

## 19.3 Rectification

- (a) Without prejudice to CMH's rights under Article 26 and any other rights under this Project Agreement, in any of the circumstances set out in Sections 19.1 or 19.2, CMH may, by written notice, require Project Co to take such steps as CMH, acting reasonably, considers necessary or expedient to mitigate, rectify or protect against such circumstance, including, if applicable, the termination and replacement of any Project Co Party, and Project Co shall use commercially reasonable efforts to comply with CMH's requirements as soon as reasonably practicable.
- (b) If CMH gives notice to Project Co pursuant to Section 19.3(a) and either:
  - (i) Project Co does not either confirm, within 5 Business Days of such notice or such shorter period as is appropriate in the case of an Emergency that it is willing to take the steps required in such notice or present an alternative plan to CMH to mitigate, rectify and protect against such circumstances that CMH may accept or reject acting reasonably; or
  - (ii) Project Co fails to take the steps required in such notice or accepted alternative plan within such time as set out in such notice or accepted alternative plan or within such longer time as CMH, acting reasonably, shall think fit,

then CMH may take such steps as it considers to be appropriate, acting reasonably, requiring the termination and replacement of Project Co Parties, either itself or by engaging others (including a third party) to take any such steps.

- (c) Notwithstanding the foregoing provisions of this Section 19.3, in the event of an Emergency, the notice under Section 19.3(a) shall be given as promptly as possible having regard to the nature of the Emergency and CMH may, prior to Project Co's confirmation under Section 19.3(b)(i), take such steps as are appropriate having regard to the nature of the Emergency.

#### 19.4 Costs and Expenses

- (a) Subject to CMH's obligations pursuant to Sections 19.5 and 19.6:
  - (i) Project Co shall bear all costs and expenses incurred by Project Co in relation to the exercise of CMH's rights pursuant to this Article 19; and
  - (ii) Project Co shall reimburse CMH for all reasonable costs and expenses incurred by CMH in relation to the exercise of CMH's rights pursuant to this Article 19, including in relation to CMH taking such steps, either itself or by engaging others (including a third party) to take any such steps as CMH considers appropriate and as are in accordance with this Article 19.

#### 19.5 Reimbursement Events

- (a) In this Section 19.5, a "Reimbursement Event" means:
  - (i) an act or omission of Project Co or any Project Co Party or a breach of any obligation under this Project Agreement, but only to the extent such act, omission or breach is caused by CMH or an CMH Party; or
  - (ii) an Emergency that is not caused or contributed to by an act or omission of Project Co or any Project Co Party or a breach by Project Co or any Project Co Party of any obligation under this Project Agreement.
- (b) If CMH either takes steps itself or requires Project Co to take steps in accordance with this Article 19 as a result of a Reimbursement Event:
  - (i) CMH shall reimburse Project Co for the reasonable costs and expenses incurred by Project Co in relation to the exercise of CMH's rights pursuant to this Article 19 that would not otherwise have been incurred by Project Co in the proper performance of its obligations under this Project Agreement; and
  - (ii) CMH shall bear all costs and expenses incurred by CMH in relation to the exercise of CMH's rights pursuant to this Article 19.



## **19.6 Reimbursement if Improper Exercise of Rights**

- (a) If CMH exercises its rights pursuant to this Article 19, but CMH was not entitled to do so, CMH shall reimburse Project Co for the reasonable costs and expenses directly incurred by Project Co over and above those that would otherwise have been incurred by Project Co in the proper performance of its obligations under this Project Agreement and that are directly and reasonably incurred by Project Co in complying with those written requirements of CMH issued as a result of CMH having exercised such rights.
- (b) Project Co acknowledges and agrees that Project Co has no right to require a determination of whether or not CMH is entitled to exercise its rights pursuant to this Article 19 before taking any such action that CMH may require and Project Co shall comply with all of CMH's requirements. Only concurrently with or after complying with CMH's requirements shall Project Co be entitled to refer any dispute for resolution in accordance with Schedule 14 – Dispute Resolution Procedure.

## **20. CHANGES**

### **20.1 Change Procedure**

- (a) Except as otherwise expressly provided in this Project Agreement, Schedule 11 – Change Procedure shall apply with respect to Changes in the Scope of the Work.

## **21. CHANGES IN LAW**

### **21.1 Performance after Change in Law**

- (a) Following any and all Changes in Law, Project Co shall perform the Work in accordance with the terms of this Project Agreement, including in compliance with Applicable Law.

### **21.2 Relevant Change in Law**

- (a) On the occurrence of a Relevant Change in Law, either Party shall be entitled to seek compensation for any increase or decrease (as the case may be) in the net cost to Project Co of performing the Work so as to put such Party in no better and no worse position than it would have been in had the Relevant Change in Law not occurred. Any such compensation shall be calculated in accordance with this Section 21.2.
- (b) On the occurrence of a Relevant Change in Law:

- (i) either Party may give notice to the other and to the Consultant of the need for a Change Order as a result of such Relevant Change in Law;
- (ii) the Parties and the Consultant shall meet within 10 Business Days of such notice to consult with respect to the effect of the Relevant Change in Law and to reach an agreement on whether a Change Order is required as a result of such Relevant Change in Law, and if within 10 Business Days of this meeting an agreement has not been reached, either Party may refer the question of whether a Relevant Change in Law has occurred or the effect of any Relevant Change in Law for resolution in accordance with Schedule 14 – Dispute Resolution Procedure; and
- (iii) within 10 Business Days of agreement or determination that a Change Order is required, the Consultant shall issue a Change Order and the relevant provisions of Schedule 11 – Change Procedure shall apply except that:
  - (A) the Parties shall, without prejudice to their respective general obligations to comply with the terms of this Project Agreement:
    - (I) use commercially reasonable efforts to mitigate the adverse effects of any Relevant Change in Law and take commercially reasonable steps to minimize any increase in costs arising from such Relevant Change in Law; and
    - (II) use commercially reasonable efforts to take advantage of any positive or beneficial effects of any Relevant Change in Law and take commercially reasonable steps to maximize any reduction in costs arising from such Relevant Change in Law; and
  - (B) any entitlement to compensation payable shall be in accordance with this Section 21.2, and any calculation of compensation shall take into consideration, *inter alia*:
    - (I) any failure by a Party to comply with Section 21.2(b)(iii)(A);
    - (II) any increase or decrease in its costs resulting from such Relevant Change in Law; and
    - (III) any amount which Project Co recovers under any insurance policy (or would recover if it complied with its obligations to insure under this Project Agreement or the terms of any policy of insurance required under this Project Agreement)

which amount, for greater certainty, shall not include the amount of any excess or deductibles or any amount above the maximum insured amount applicable to any such insurance policy.

- (c) Project Co shall not be entitled to any payment or compensation or, except as provided in Article 22 or otherwise in this Project Agreement, relief, in respect of any Relevant Change in Law, or the consequences thereof, other than in accordance with this Section 21.2, and Article 23 shall be construed accordingly.

## 22. DELAY EVENTS

### 22.1 Definition

- (a) For the purposes of this Project Agreement, “**Delay Event**” means any of the following events or circumstances only to the extent, in each case, that it causes a delay in achieving Interim Completion by the Scheduled Interim Completion Date or Substantial Completion by the Scheduled Substantial Completion Date:
  - (i) if Project Co is delayed in the performance of the Work by,
    - (A) acts or omissions of CMH or any CMH Party contrary to the provisions of this Project Agreement, except to the extent that any act or omission is caused or contributed to by Project Co or a Project Co Party; or
    - (B) a direction from CMH to Project Co to suspend the performance of the Work or a portion thereof as a result of a public health issue arising in connection with or affecting the Project, provided that such health issue is not otherwise dealt with in Article 19;
  - (ii) if Project Co is delayed in the performance of the Work by a lack of access to the Site as a result of an order or direction issued by CMH or by a Governmental Authority to CMH, but not issued as a result of Project Co not performing its obligations under this Project Agreement, including where such non-performance is caused by a Project Co Party or by an event of Force Majeure, Project Co acknowledges that in performing the Work paramountcy of access must be given at all times to emergency vehicles and no claim may be made by Project Co for any delay in the performance of the Work as a result of any temporary lack of access to the Site resulting from this paramountcy of access by emergency vehicles, provided that CMH will use reasonable efforts to avoid and to limit the duration of any temporary lack of access for this reason;

- (iii) an opening up of the Work pursuant to Section 17.2 where such Work is not subsequently found to be defective or not in compliance with the requirements of this Project Agreement (including the Contract Documents), unless such opening up of the Work was reasonable in light of other defects or non-compliance previously discovered by CMH or the Consultant, as applicable, in respect of the same or a similar component of the Work or subset of the Work;
- (iv) a requirement pursuant to Section 14.1(e) for Project Co to take any steps upon the discovery of Contamination, which steps would not otherwise be required under this Project Agreement;
- (v) a requirement pursuant to Sections 15.2(a) or 15.2(b) for Project Co to perform any alteration, addition, demolition, extension or variation in the Work, or to suspend or delay performance of the Work, upon the discovery of any fossils, artefacts and other objects having artistic, historic, archaeological or monetary value, including human remains and burial sites, which alteration, addition, demolition, extension or variation in the Work, or suspension or delay in the performance of the Work, would not otherwise be required under this Project Agreement, provided however that the foregoing shall not apply to the extent that any item referred to in Section 15.1(a) was disclosed in or properly inferable, readily apparent or readily discoverable from the Site Information or would have been properly inferable, readily apparent or readily discoverable from inspections of the Site carried out by Project Co or by any Project Co Party during the Request for Proposals process prior to the Submission Date;
- (vi) subject to Section 11.19, the execution of works on the Site not forming part of this Project Agreement by CMH, any CMH Party or any other person permitted to execute such works by CMH or any CMH Party;
- (vii) a requirement pursuant to Schedule 14 – Dispute Resolution Procedure, for Project Co to proceed in accordance with the direction of CMH during the pendency of a dispute, which dispute is subsequently determined in Project Co's favour, for such period of time, if any, as has been determined as an appropriate time period for delay in the final determination of the dispute;
- (viii) a Relief Event;
- (ix) an event of Force Majeure; or
- (x) a Relevant Change in Law.

## 22.2 Consequences of a Delay Event

- (a) Upon the occurrence of a Delay Event, the Contract Time will be extended for such reasonable time as the Consultant recommends in consultation with CMH in accordance with the procedure set out in Schedule 11 – Change Procedure.
- (b) Should Project Co contend that it is entitled to an extension of the Contract Time for completion of any portion of the Work, Project Co shall, subject to Section 25.3(c):
  - (i) as soon as reasonably possible but in any event within 15 days of the occurrence of the Delay Event, provide CMH with written notice setting forth the cause of the Delay Event, a description of the impact the Delay Event will have on the Scheduled Interim Completion Date and/or the Scheduled Substantial Completion Date (including an order of magnitude estimate of the cost of the Delay Event), and a description of the portions of the Work affected thereby, together with all pertinent details;
  - (ii) as soon as reasonably possible but in any event within 15 days after the cause of the Delay Event has ceased to exist, submit a written application to CMH for the specific Contract Time extension requested, and if the Delay Event has arisen as a result of an event described in Sections 22.1(a)(i), 22.1(a)(ii), 22.1(a)(iii), 22.1(a)(iv), 22.1(a)(v), 22.1(a)(vi), 22.1(a)(vii), and 22.1(a)(x), submit a breakdown of the actual costs, without mark-up, incurred by Project Co as a result of the Delay Event; and
  - (iii) use all reasonable efforts to anticipate the occurrence of any Delay Event and take appropriate measures to avoid its potential occurrence or minimize the potential effects of its occurrence.
- (c) Project Co acknowledges that the provisions of Section 22.2(b)(i) and Section 22.2(b)(ii) are required by CMH to ensure CMH is provided with timely and sufficient information respecting any alleged Delay Event and is not prejudiced in dealing with the claim by Project Co for an extension of the Contract Time or increase to the Guaranteed Price as a consequence of the occurrence of the Delay Event. If Project Co fails to comply with the requirements to provide the information under either Section 22.2(b)(i) or Section 22.2(b)(ii) within the time periods therein provided, it shall be disentitled to claim an extension to the Contract Time or increase to the Guaranteed Price, but only to the extent that CMH has been prejudiced by the failure. The onus shall be on Project Co to establish substantial compliance with the said requirements, and to establish that CMH has not been prejudiced by the failure to provide the required information within the required time period.

- (d) If the Work should be behind schedule for a reason other than a Delay Event, or if a Project Co Party delays the progress of any portion of the Work necessary to complete the Work on schedule, Project Co shall use all reasonable measures to bring the Work back on schedule. Project Co shall exercise all means within its discretion, such as directing any Project Co Party creating delays to increase their labour forces and equipment, to improve the organization and expediting of the Work, or to work overtime as may be necessary. Project Co shall provide any additional supervision, coordination and expediting, including overtime by its own personnel as may be required to achieve this end. The costs and expenses incurred by the use of such measures and overtime shall be borne by Project Co and/or the Project Co Parties and there shall be no adjustment to the Guaranteed Price as a result of such costs and expenses and for clarity, no extension of the Contract Time.
- (e) Costs (as defined in Section 2.3.2 of Schedule 11 – Change Procedure) due to delays caused by non-availability of specified items, when such delays could have been avoided or substantially mitigated by Project Co, shall be the responsibility of Project Co.
- (f) Where there are concurrent delays, some of which are caused by CMH or others for whom CMH is responsible, and some of which are caused by Project Co or others for whom Project Co is responsible, Project Co shall not be entitled to either an extension in the Contract Time or additional compensation to the extent of the concurrent delays. Concurrent delays are those that are caused by two or more independent events which affect the Scheduled Interim Completion Date and/or the Scheduled Substantial Completion Date where the time period over which such delays occur overlap in time, but only for the duration of the overlap.
- (g) Project Co acknowledges that subject to any extension of the Contract Time that may arise in connection with the Consultant's failure to respond to any Design Issue in accordance with Section 8.2(i), as it applies to the circumstances of either Section 11.18(a) or 11.18(b), or if there is any extension of the Contract Time allowed in the circumstances of a Change in the Scope of the Work under Section 11.18(c), no extension of the Contract Time shall be made for delays caused by a Design Issue properly characterized as a Project Co Design Issue under Sections 11.17 and 11.18 of this Project Agreement.
- (h) CMH shall provide Project Co with access to and use of the Site as required pursuant to Article 9 of this Project Agreement in a manner consistent with the Construction Schedule and in accordance with the notification requirements and restrictions set out in the Contract Documents, including the Contract Documents referred to in Section 11.7(c), provided that Project Co agrees that the inability of CMH to provide Project Co with access to an area for construction activities not on the critical path for reasons generally outlined in Sections 11.7(b) and 11.7(c)

will not result in the occurrence of a Delay Event (and, for greater certainty, there shall be no change to the Phased Occupancy Dates, the Scheduled Interim Completion Date or the Scheduled Substantial Completion Date, no entitlement to a Compensation Event and no change to the Guaranteed Price).

- (i) Project Co acknowledges and agrees that the Contract Time includes a Schedule Cushion in each Construction Schedule at no additional cost to CMH. Project Co shall separately identify the extent of the Schedule Cushion in each Construction Schedule.
- (j) Project Co acknowledges and agrees that in the event that an extension of the Contract Time is allowed under any provision of this Project Agreement, CMH may, in its Sole Discretion, elect to apply any portion of the Schedule Cushion with the result that such extension of the Contract Time shall be reduced or eliminated, as the case may be, by the number of days of the Schedule Cushion CMH has elected to apply.
- (k) In no event shall the extension of the Contract Time for a Delay Event be more than the necessary extension of the critical path as a result of the Delay Event.

### **22.3 Mitigation**

- (a) If Project Co is (or claims to be) affected by a Delay Event, Project Co shall, and shall require all Project Co Parties to, take and continue to take commercially reasonable steps in accordance with Good Industry Practice to:
  - (i) eliminate, mitigate, overcome or minimize the consequences of such event;
  - (ii) continue to perform its obligations under this Project Agreement to the extent possible notwithstanding the Delay Event;
  - (iii) resume performance of its obligations under this Project Agreement affected by the Delay Event as soon as practicable; and
  - (iv) remedy any failure to perform.
- (b) To the extent that Project Co does not comply with its obligations under this Section 22.3, such failure shall be taken into account in determining Project Co's entitlement to an extension of the Contract Time pursuant to this Article 22.

## 23. COMPENSATION EVENTS

### 23.1 Definition

- (a) For the purposes of this Project Agreement, “**Compensation Event**” means any event referred to in Sections 22.1(a)(i), 22.1(a)(ii), 22.1(a)(iii), 22.1(a)(iv), 22.1(a)(v), 22.1(a)(vi) and 22.1(a)(vii) and as a direct result of which Project Co has incurred loss or expense.

### 23.2 Consequences of a Compensation Event

- (a) If a Compensation Event occurs, Project Co’s sole right to compensation shall be as set out in this Article 23. For greater certainty, except as aforesaid, no other Delay Event shall entitle Project Co to receive any compensation, except as otherwise provided in:
  - (i) Schedule 11 – Change Procedure;
  - (ii) Article 24, in the case of a Delay Event referred to in Section 22.1(a)(viii);
  - (iii) Article 25, in the case of a Delay Event referred to in Section 22.1(a)(ix); and
  - (iv) Article 21, in the case of a Delay Event referred to in Section 22.1(a)(x).
- (b) Subject to Sections 23.3 and 23.4, if it is agreed or determined in accordance with Schedule 14 – Dispute Resolution Procedure, that there has been a Compensation Event, Project Co shall be entitled to such compensation as would place Project Co in no better or no worse position than it would have been in had the relevant Compensation Event not occurred. For greater certainty, in respect of a Compensation Event that is also a Delay Event, such compensation will include amounts which, but for the Delay Event, would have been paid by CMH to Project Co. Project Co shall promptly provide CMH’s Project Manager with any information CMH’s Project Manager may require in order to determine the amount of such compensation.
- (c) Notwithstanding any other provision in this Project Agreement, including Section 23.2(b), where CMH elects to apply all or any portion of the number of days of Schedule Cushion, Project Co shall not be entitled to any Direct Losses or any other additional compensation related to the time that is reduced or eliminated by the Schedule Cushion except as otherwise provided in Section 2.11 of Schedule 11 – Change Procedure.



- (d) If CMH is required to compensate Project Co pursuant to this Section 23.2, then CMH may either pay such compensation as a lump sum payment or payments at times and in a manner to be agreed with Project Co, acting reasonably.

### 23.3 Mitigation

- (a) If Project Co is (or claims to be) affected by a Compensation Event, Project Co shall, and shall require all Project Co Parties to, take and continue to take commercially reasonable steps to minimize the amount of compensation due in accordance with this Article 23 in relation to any Compensation Event.
- (b) To the extent that Project Co does not comply with its obligations under this Section 23.3, such failure shall be taken into account in determining Project Co's entitlement to relief pursuant to this Article 23.

### 23.4 Insured Exposure

- (a) The compensation payable to Project Co pursuant to this Article 23 shall be reduced by any amount which Project Co or a Project Co Party recovers, or is entitled to recover, under any insurance policy, or would have recovered if it had complied with the requirements of this Project Agreement in respect of insurance or the terms of any policy of insurance required under this Project Agreement, which amount, for greater certainty, shall not include any excess or deductibles or any amount over the maximum amount insured under any such insurance policy.

## 24. RELIEF EVENTS

### 24.1 Definition

- (a) For the purposes of this Project Agreement, "**Relief Event**" means any of the following events or circumstances to the extent, in each case, that it causes any failure by a Party to perform any of its obligations under this Project Agreement:
  - (i) fire, explosion, lightning, storm, tempest, hurricane, tornado, flood, bursting or overflowing of water tanks, apparatus or pipes, ionizing radiation (to the extent it does not constitute Force Majeure), earthquake, riot or civil commotion;
  - (ii) failure by any Utility Company, local authority or other like body to perform works or provide services;
  - (iii) accidental loss or damage to the Work and/or the Facility or any roads servicing the Site;

- (iv) without prejudice to any obligation of Project Co to provide stand-by power facilities in accordance with this Project Agreement, failure or shortage of power, fuel or transport;
- (v) blockade or embargo falling short of Force Majeure;
- (vi) any official or unofficial strike, lockout, work to rule or other labour-related action generally affecting the hospital or construction industry (or a significant sector of that industry) in the Province of Ontario; or
- (vii) any civil disobedience or protest action, including any action taken by any person or persons protesting or demonstrating against the carrying out of any part of the Work or the construction and/or operation of hospitals in general,

provided, in each case, that such event does not arise (directly or indirectly) as a result of any act or omission of the Party claiming relief and/or (i) in the case of Project Co claiming relief, as a result of any act or omission of any Project Co Party and (ii) in the case of CMH claiming relief, as a result of any act or omission of any CMH Party.

## **24.2 Consequences of a Relief Event**

- (a) Subject to Section 24.3, no right of termination, other than either Party's right to terminate this Project Agreement pursuant to Section 28.2, shall arise under this Project Agreement by reason of any failure by a Party to perform any of its obligations under this Project Agreement, but only to the extent that such failure to perform is caused by the occurrence of a Relief Event (it being acknowledged and agreed by the Parties that all other rights and obligations of the Parties under this Project Agreement remain unaffected by the occurrence of a Relief Event).
- (b) In respect of a Relief Event that is also a Delay Event pursuant to Section 22.1(a)(viii):
  - (i) Project Co shall only be relieved of its obligations under this Project Agreement to the extent, if any, provided for in Section 22; and
  - (ii) in respect of a Relief Event referred to in Section 24.1(a)(v), 24.1(a)(vi), 24.1(a)(vii), on the earlier of (A) the Substantial Completion Date and (B) the date of payment of the Non-Default Termination Sum (and as a part thereof) in accordance with Schedule 12 – Compensation on Termination, CMH shall pay to Project Co an amount equal to the Debt Service Amount accrued and paid or that became payable in accordance with the Lending Agreements during the period of delay by Project Co or any Project Co Party to the Senior Lenders up to and including such date, together with

interest thereon at the rate payable on the Debt Amount, which, but for the Delay Event, would have been paid by Project Co to the Senior Lenders.

- (c) If a Relief Event occurs, Project Co shall not be entitled to receive any compensation other than as expressly provided in Sections 24.2(b)(ii) and 30.
- (d) Subject to Section 30, Project Co's sole right to payment or otherwise in relation to the occurrence of a Relief Event shall be as provided in this Article 24.

### **24.3 Mitigation and Process**

- (a) Where a Party is (or claims to be) affected by a Relief Event, such Party shall take commercially reasonable steps to mitigate the consequences of the Relief Event upon the performance of its obligations under this Project Agreement, shall resume performance of its obligations affected by the Relief Event as soon as practicable and shall use commercially reasonable efforts to remedy its failure to perform.
- (b) To the extent that the Party claiming relief does not comply with its obligations under this Section 24.3, such failure shall preclude such Party's entitlement to relief pursuant to this Article 24.
- (c) The Party claiming relief shall give written notice to the other Party within 5 Business Days of such Party becoming aware of the relevant Relief Event. Such initial notice shall give sufficient details to identify the particular event claimed to be a Relief Event.
- (d) A subsequent written notice shall be given by the Party claiming relief to the other Party within a further 5 Business Days of the initial notice, which notice shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including, without limitation, the effect of the Relief Event on the ability of the Party to perform, the action being taken in accordance with Section 24.3(a), the date of the occurrence of the Relief Event, and an estimate of the period of time required to overcome the Relief Event and/or its effects.
- (e) The Party claiming relief shall notify the other as soon as the consequences of the Relief Event have ceased and of when performance of its affected obligations can be resumed.
- (f) If, following the issue of any notice referred to in Section 24.3(d), the Party claiming relief receives or becomes aware of any further information relating to the Relief Event and/or any failure to perform, such Party shall submit such further information to the other Party as soon as reasonably possible.

#### 24.4 Insured Exposure

- (a) The compensation payable to Project Co pursuant to this Article 24 shall be reduced by any amount which Project Co or a Project Co Party recovers, or is entitled to recover, under any insurance policy, or would have recovered if it had complied with the requirements of this Project Agreement in respect of insurance or the terms of any policy of insurance required under this Project Agreement, which amount, for greater certainty, shall not include any excess or deductibles or any amount over the maximum amount insured under any such insurance policy.

### 25. FORCE MAJEURE

#### 25.1 Definition

- (a) For the purposes of this Project Agreement, “**Force Majeure**” means any of the following events or circumstances which directly causes either Party to be unable to perform all or a material part of its obligations under this Project Agreement:
  - (i) war, civil war, armed conflict, terrorism, acts of foreign enemies or hostilities;
  - (ii) nuclear or radioactive contamination of the Work, the Facility and/or the Site, unless Project Co or any Project Co Party is the source or cause of the contamination;
  - (iii) chemical or biological contamination of the Work, the Facility and/or the Site from any event referred to in Section 25.1(a)(i);
  - (iv) pressure waves caused by devices traveling at supersonic speeds; or
  - (v) the discovery of any fossils, artefacts and other objects having artistic, historic, archaeological or monetary value, including human remains and burial sites, which, as a result of Applicable Law, requires the Work to be abandoned.

#### 25.2 Consequences of Force Majeure

- (a) Subject to Section 25.3, the Party claiming relief shall be relieved from liability under this Project Agreement to the extent that, by reason of the Force Majeure, it is not able to perform its obligations under this Project Agreement.
- (b) In respect of an event of Force Majeure that is also a Delay Event pursuant to Section 22.1(a)(ix):

- (i) Project Co shall only be relieved of its obligations under this Project Agreement to the extent, if any, provided for in Article 22; and
- (ii) on the earlier of (A) the Substantial Completion Date and (B) the date of payment of the Non-Default Termination Sum (and as a part thereof) in accordance with Schedule 12 – Compensation on Termination, CMH shall pay to Project Co an amount equal to the Debt Service Amount accrued and paid or that accrued in accordance with the Lending Agreements during the period of delay by Project Co or any Project Co Party to the Lenders up to and including such date, together with interest thereon at the rate payable on the Debt Amount, which, but for the Delay Event, would have been paid by Project Co to the Senior Lenders.
- (iii) If an event of Force Majeure occurs prior to the Substantial Completion Date, Project Co shall not be entitled to receive any compensation other than as expressly provided in Section 25.2(b)(ii) and Article 30.
- (iv) Subject to Section 30, Project Co's sole right to payment or otherwise in relation to the occurrence of an event of Force Majeure shall be as provided in this Article 25.

### 25.3 Mitigation and Process

- (a) Where a Party is (or claims to be) affected by an event of Force Majeure, such Party shall take commercially reasonable steps to mitigate the consequences of such event of Force Majeure upon the performance of its obligations under this Project Agreement, shall resume performance of its obligations affected by the event of Force Majeure as soon as practicable, and shall use commercially reasonable efforts to remedy its failure to perform, including efforts to minimize any negative impact of the event of Force Majeure on the Construction Schedule.
- (b) To the extent that the Party claiming relief does not comply with its obligations under Section 25.3(a), such failure shall be taken into account in determining such Party's entitlement to relief pursuant to this Article 25.
- (c) The Party claiming relief shall give written notice to the other Party within 5 Business Days of such Party becoming aware of the relevant event of Force Majeure. Such initial notice shall give sufficient details to identify the particular event claimed to be an event of Force Majeure.
- (d) A subsequent written notice shall be given by the Party claiming relief to the other Party within a further 5 Business Days of the initial notice, which notice shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including, without limitation, the effect of the event of

Force Majeure on the ability of the Party to perform, the action being taken in accordance with Section 25.3(a), the date of the occurrence of the event of Force Majeure, and an estimate of the period of time required to overcome the event of Force Majeure and its effects.

- (e) The Party claiming relief shall notify the other as soon as the consequences of the event of Force Majeure have ceased and of when performance of its affected obligations can be resumed.
- (f) If, following the issue of any notice referred to in Section 25.3(d), the Party claiming relief receives or becomes aware of any further information relating to the event of Force Majeure and/or any failure to perform, such Party shall submit such further information to the other Party as soon as reasonably possible.

#### 25.4 Insured Exposure

- (a) The compensation payable to Project Co pursuant to this Article 25 shall be reduced by any amount which Project Co or a Project Co Party recovers, or is entitled to recover, under any insurance policy, or would have recovered if it had complied with the requirements of this Project Agreement in respect of insurance or the terms of any policy of insurance required under this Project Agreement, which amount, for greater certainty, shall not include any excess or deductibles or any amount over the maximum amount insured under any such insurance policy.

#### 25.5 Modifications

- (a) The Parties shall use commercially reasonable efforts to agree to any modifications to this Project Agreement which may be equitable having regard to the nature of an event or events of Force Majeure. Schedule 14 – Dispute Resolution Procedure shall not apply to a failure of CMH and Project Co to reach agreement pursuant to this Section 25.5.

### 26. PROJECT CO DEFAULT

#### 26.1 Project Co Events of Default

- (a) For the purposes of this Project Agreement, “**Project Co Event of Default**” means any one or more of the following events or circumstances:
  - (i) the occurrence of any of the following events other than as a consequence of a breach by CMH of its payment obligations hereunder:
    - (A) Project Co admits in writing its inability to pay its debts generally as they become due, or makes a general assignment for the benefit of creditors, or a receiver, manager, administrator, administrative

receiver, receiver and manager, trustee, custodian or other similar official or any other like person is appointed by or on behalf of or at the instance of a creditor of Project Co with respect to Project Co or any of the property, assets or undertaking of Project Co, or any creditor of Project Co takes control or takes steps to take control of Project Co or any of Project Co's assets, or any proceedings are instituted against Project Co that result in Project Co being declared or ordered bankrupt, or any proceedings are instituted against Project Co for the administration, liquidation, winding-up, reorganization, compromise, arrangement, adjustment, protection, relief or composition of it or with respect to it or its debts or obligations, or any such proceedings are instituted by Project Co seeking any such result, or any such proceedings are instituted by a person other than Project Co, CMH, an CMH Party or a person related to any of them seeking such result and such proceedings have or will have a material adverse effect on the performance of the Work (where such proceedings have not been withdrawn, stayed, discharged, or are otherwise of no further effect, within 90 days of being instituted), under any Applicable Law (including the *Bankruptcy and Insolvency Act* (Canada) and the *Companies' Creditors Arrangement Act* (Canada)) relating to bankruptcy, insolvency or reorganization of or relief with respect to debtors or debtors' obligations or assets or other similar matters, or seeking the appointment of a receiver, manager, administrator, administrative receiver, receiver and manager, trustee, custodian or other similar official or like person for it or with respect to any of its assets, or any resolutions are passed or other corporate actions of Project Co are taken to authorize any of the actions set forth in this Section 26.1(a)(i)(A);

- (B) Project Co ceases performing a substantial portion of its business, or a substantial portion of such business is suspended or is not being performed, whether voluntarily or involuntarily, that has or will have a material adverse effect on Project Co's ability to perform its obligations under this Project Agreement;
- (C) if any execution, sequestration, extent or other process of any court becomes enforceable against Project Co or if a distress or analogous process is levied against any property of Project Co that materially adversely affects Project Co's ability to perform its obligations hereunder; or
- (D) Project Co shall suffer any event, or any event or set of circumstances occurs or comes about, analogous to the foregoing

events or sets of circumstances set out in this Section 26.1(a)(i) in any jurisdiction in which it is incorporated or resident and such event or set of circumstances would, if set out in Sections 26.1(a)(i)(A), (B) or (C), constitute a Project Co Event of Default;

- (ii) subject to the occurrence of a Delay Event, Project Co failing to achieve Substantial Completion within 180 days after the Scheduled Substantial Completion Date (the “Longstop Date”);
- (iii) Project Co making any representation or warranty herein that is false or misleading when made, and that has or will have at any time a material adverse effect on the performance of the Work, or that may compromise the reputation or integrity of CMH or the nature of the Province’s health care system, so as to affect public confidence in that system, and, in the case of a false or misleading representation or warranty that is capable of being remedied, such breach is not remedied within 10 Business Days of receipt of notice of the same from CMH;
- (iv) Project Co committing a breach of its obligations under this Project Agreement which has or will have a material adverse effect on CMH or the ability of CMH to operate the Facility (other than a breach that is otherwise referred to in this Section 26.1 and other than as a consequence of a breach by CMH of its obligations under this Project Agreement), and upon receiving notice of such breach from CMH, Project Co failing to remedy such breach in accordance with all of the following:
  - (A) Project Co shall:
    - (I) immediately commence and thereafter diligently continue to remedy the breach and to mitigate any adverse effects on CMH;
    - (II) put forward, within 5 Business Days of receipt of notice of such breach from CMH, a reasonable plan and schedule for diligently remedying the breach and mitigating its effect, which plan and schedule shall specify in reasonable detail the manner in which, and the latest date by which, such breach is proposed to be remedied, which latest date shall, in any event, be within 60 days of notice of such breach, or if such breach is not capable of being rectified in such period, then such longer period as is reasonable in the circumstances; and



- (III) thereafter, perform its obligations to achieve all elements of such plan and schedule in accordance with its terms within the time for the performance of its obligations thereunder;
- (v) Project Co wholly abandoning the Work for a period which exceeds 3 Business Days from receipt by Project Co of a written request to return to the Site, other than as a consequence of a Delay Event or a breach by CMH of its obligations under this Project Agreement;
- (vi) Project Co failing to comply with Sections 39.1 or 39.3;
- (vii) the occurrence of any Change in Ownership or Change in Control which is prohibited by Section 39.4;
- (viii) subject to the provisions of Section 3.1 of Schedule 18 – Payments and Holdbacks, Project Co failing to remove an Encumbrance that arose due to an act or omission of Project Co or any Project Co Party (other than any Encumbrances derived through CMH) within 30 days of the earlier of:
  - (A) the registration of such Encumbrance against title to the Site or any part thereof; and
  - (B) the date on which Project Co or any Project Co Party knew, or ought to have known, about the existence of the Encumbrance;
- (ix) Project Co failing to pay any sum or sums due to CMH under this Project Agreement, which sum or sums are not being disputed by Project Co in accordance with Schedule 14 – Dispute Resolution Procedure, and which sum or sums, either singly or in aggregate, exceed(s) \$250,000, and such failure continues for 30 days from receipt by Project Co of a notice of non-payment from CMH;
- (x) Project Co failing to comply with Article 41;
- (xi) Project Co failing to comply with Section 6.3 or Schedule 28 – Refinancing;
- (xii) Project Co failing to obtain any bond, security or insurance required to be obtained by or on behalf of Project Co pursuant to this Project Agreement, or any such bond, security or insurance being vitiated or otherwise ceasing to be in full force and effect or in material compliance with the requirements set out in this Project Agreement, other than as a consequence of a breach by CMH of its obligations under this Project Agreement, and:

- (A) in respect of insurance, such breach by Project Co is not remedied within 10 Business Days of the occurrence of the breach; and
- (B) in respect of a bond or security, such breach by Project Co is not remedied within 5 Business Days of Project Co becoming aware of such breach;
- (xiii) Project Co failing to comply with any determination, order or award made against Project Co in accordance with Schedule 14 – Dispute Resolution Procedure; and/or
- (xiv) a default by Project Co or any Project Co Party under any of the Implementing Agreements following the expiry of any applicable notice and cure periods thereunder.

## **26.2 Notification of Occurrence**

- (a) Project Co shall, promptly upon Project Co becoming aware of the occurrence, notify CMH of the occurrence and details of any Project Co Event of Default and of any event or circumstance which is likely, with the passage of time, giving of notice, determination of any condition or otherwise, to constitute or give rise to a Project Co Event of Default.

## **26.3 Remedies**

- (a) Upon the occurrence of a Project Co Event of Default under this Project Agreement and subject to the Lender's Direct Agreement, and provided CMH has given notice to Project Co of the occurrence of a Project Co Event of Default, CMH may do any or all of the following as it in its Sole Discretion shall determine:
  - (i) terminate this Project Agreement in its entirety by written notice having immediate effect, such notice to be given to Project Co, and to any person specified in the Lender's Direct Agreement to receive such notice;
  - (ii) if Project Co is in default under this Project Agreement by reason of its failure to pay any monies, CMH may (without obligation to do so) make payment on behalf of Project Co of such monies and any amount so paid by CMH plus the Payment Compensation Amount;
  - (iii) without termination of this Project Agreement, cure or attempt to cure the Project Co Event of Default (but this shall not obligate CMH to cure or attempt to cure the Project Co Event of Default, or after having commenced to cure or attempt to cure such Project Co Event of Default, to continue to do so or to cure or attempt to cure any subsequent Project Co

Event of Default) and all costs and expenses incurred by CMH in curing or attempting to cure the Project Co Event of Default, together with the Payment Compensation Amount, shall be payable by Project Co to CMH on demand. No such action by CMH shall be deemed to be a termination of this Project Agreement and CMH shall not incur any liability to Project Co for any act or omission of CMH in the course of curing or attempting to cure any such Project Co Event of Default. Without limiting the foregoing, CMH may deduct the cost and expense of curing or attempting to cure the Project Co Event of Default, plus the Payment Compensation Amount thereon, from any payment then or thereafter due to Project Co, provided the Consultant has certified such cost to CMH and Project Co;

- (iv) bring any proceedings in the nature of specific performance, injunction or other equitable remedy, it being acknowledged that damages at law may be an inadequate remedy for a Project Co Event of Default;
- (v) bring any action at law as may be necessary or advisable in order to recover damages and costs, subject to Section 35.2;
- (vi) make demand on the Surety in accordance with the terms of the Bonds;
- (vii) take possession of the Work and Products, utilize the construction machinery and equipment (subject to the rights of third parties and to the payment of reasonable rental fees in respect of construction machinery and equipment owned by Project Co), and finish the Work by whatever method CMH may consider expedient; and
- (viii) exercise any of its other rights and remedies provided for under this Project Agreement or otherwise available to it.

#### **26.4 CMH's Costs**

- (a) Project Co shall reimburse CMH for all reasonable costs (including all applicable Taxes and all legal or professional services, legal costs being on a substantial indemnity basis) properly incurred by CMH in exercising its rights under this Article 26, including any relevant increased administrative expenses. CMH shall take commercially reasonable steps to mitigate such costs.

#### **26.5 No Other Rights to Terminate**

- (a) CMH shall have no right or entitlement to terminate this Project Agreement, or to accept any repudiation of this Project Agreement, and shall not purport to exercise any such right or entitlement except as expressly set forth in this Project Agreement.

## 27. CMH DEFAULT

### 27.1 CMH Events of Default

- (a) For the purposes of this Project Agreement, “**CMH Event of Default**” means any one or more of the following events or circumstances:
- (i) CMH failing to pay any sum or sums due to Project Co under this Project Agreement, which sum or sums have been certified by Consultant or awarded by arbitration or court, and such failure continues for a period of 20 Business Days from receipt by CMH of a notice of non-payment from or on behalf of Project Co; and/or
  - (ii) CMH committing a material breach of its obligations under this Project Agreement (other than a breach that is otherwise referred to in this Section 27.1 and other than as a consequence of a breach by Project Co of its obligations under this Project Agreement), and upon becoming aware of such breach, CMH failing to remedy such breach in accordance with all of the following:
    - (A) CMH shall:
      - (I) immediately commence and thereafter diligently continue to remedy the breach and to mitigate any adverse effects on Project Co;
      - (II) put forward, within 5 Business Days of receipt of notice of such breach from Project Co, a reasonable plan and schedule for diligently remedying the breach and mitigating its effect, which plan and schedule shall specify in reasonable detail the manner in which, and the latest date by which, such breach is proposed to be remedied, which latest day shall in any event be within 60 days of notice of such breach, or if such breach is not capable of being rectified in such period, then such longer period as is reasonable in the circumstances; and
      - (III) thereafter, perform its obligations to achieve all elements of such plan and schedule in accordance with its terms within the time for the performance of its obligations thereunder,

provided that any withholding of holdback and final payments by CMH or otherwise effecting any set off permitted or contemplated hereunder shall not constitute an CMH Event of Default permitting Project Co to claim that CMH is in default of CMH’s contractual obligations.

## **27.2 Remedies**

- (a) On the occurrence of an CMH Event of Default and while the same is continuing, Project Co may give notice to CMH of the occurrence of such CMH Event of Default, which notice will specify the details thereof, and at Project Co's option and without prejudice to its other rights and remedies under this Project Agreement, Project Co may:
  - (i) suspend performance of its obligations under this Project Agreement until such time as CMH has remedied such CMH Event of Default;
  - (ii) terminate this Project Agreement in its entirety by notice in writing having immediate effect; or
  - (iii) bring any action at law as may be necessary or advisable in order to recover damages and costs, subject to Section 35.2.
- (b) Where CMH has disputed the alleged CMH Event of Default set out in the Notice under Section 27.2(a), the remedies available to Project Co as set out in Section 27.2(a) shall be suspended and not available to Project Co until such time as the dispute has been resolved pursuant to Schedule 14 – Dispute Resolution Procedure and if the dispute is resolved in favour of Project Co and CMH has not remedied the CMH Event of Default within the applicable time period to remedy set out in Section 27.1 which time period shall commence on the issue of the decision under the Dispute Resolution Procedure.

## **27.3 Project Co's Costs**

- (a) CMH shall reimburse Project Co for all reasonable costs (including all applicable Taxes and all legal or professional services, legal costs being on a substantial indemnity basis) properly incurred by Project Co in exercising its rights under this Article 27, including any relevant increased administrative expenses. Project Co shall take commercially reasonable steps to mitigate such costs.

## **27.4 No Other Rights to Terminate**

- (a) Project Co shall have no right or entitlement to terminate this Project Agreement, nor to accept any repudiation of this Project Agreement, and shall not exercise, nor purport to exercise, any such right or entitlement except as expressly set forth in this Project Agreement.

## 28. NON-DEFAULT SUSPENSION AND TERMINATION

### 28.1 Suspension

- (a) CMH may order Project Co in writing to suspend or interrupt all or any part of the Work for such period of time as CMH may determine to be appropriate for the convenience of CMH. This right of CMH to suspend or interrupt the Work shall not give rise to any duty on the part of CMH to exercise this right for the benefit of Project Co or any other person or entity. In the event of an CMH-ordered suspension of Work not resulting from Project Co or a Project Co Party not performing its obligations under this Project Agreement, the Contract Time will be extended for such reasonable time as the Consultant shall recommend in consultation with CMH and Project Co, and Project Co shall be reimbursed by CMH for the Cost (as defined in Section 2.3.2 of Schedule 11 – Change Procedure) incurred by Project Co as a result of the suspension of the Work, and such extension of the Contract Time and reimbursement of the Cost shall be valued and processed as a Change Order in accordance with the Change Order procedure set out in Schedule 11. The Consultant is not authorized to order a suspension of the Work. The Work shall only be suspended by written notice from CMH to Project Co.
- (b) If the Work is stopped for any reason, Project Co shall provide protection for any part of the Work likely to become damaged during the Work stoppage. CMH shall pay the costs of such protection only if stoppage occurs due to the occurrence of a Delay Event.

### 28.2 Termination for Relief Event

- (a) If a Relief Event occurs and the effects of the Relief Event continue for 180 days from the date on which the Party affected gives notice to the other Party pursuant to Section 24.3(c), either Party may, at any time thereafter, terminate this Project Agreement by written notice to the other Party having immediate effect, provided that the effects of the Relief Event continue during such period to prevent either Party from performing a material part of its obligations under this Project Agreement.

### 28.3 Termination for Delay or Force Majeure

- (a) If all or substantially all of the Work should be stopped or otherwise delayed for a continuous period of 180 days or more (or if CMH reasonably believes that such a delay is reasonably likely to occur) as a result of the occurrence of any one or more events of Force Majeure or events described in Section 22.1(a)(i)(B), which may result in an extension of the Contract Time, CMH may, by giving Project Co written notice, terminate this Project Agreement. Such notice shall, in the case of

termination by CMH, include confirmation that CMH has, in respect of such termination, obtained prior written consent of MOHLTC.

- (b) If all or substantially all of the Work should be stopped or otherwise delayed for a continuous period of 180 days or more as a result of the occurrence of any one or more events of Force Majeure or events described in Sections 22.1(a)(i) to 22.1(a)(vii) or 28.1(a), Project Co may, by giving CMH written notice, terminate this Project Agreement provided that Project Co shall:
  - (i) at all times following the occurrence of any one or more of the events described in Sections 22.1(a)(i) and 22.1(a)(ii), take all reasonable steps to prevent and mitigate the effects of any delay;
  - (ii) at all times during which any one or more of the events described in Section 22.1(a)(i) and 22.1(a)(ii) is subsisting, take all steps in accordance with Good Industry Practice to overcome or minimize the consequences of the event; and
  - (iii) take all reasonable steps to mitigate its losses and costs resulting from the occurrence of any one or more of the events described in Sections 22.1(a)(i) and 22.1(a)(ii).

#### **28.4 Termination for Convenience**

- (a) CMH shall, in its Sole Discretion and for any reason whatsoever, be entitled to terminate this Project Agreement at any time on 180 days written notice to Project Co. Such notice shall, include confirmation that CMH has, in respect of such termination, obtained prior written consent of MOHLTC.
- (b) In the event of notice being given by CMH in accordance with this Section 28.4, CMH shall, at any time before the expiration of such notice, be entitled to direct Project Co to refrain from commencing, or allowing any third party to commence, the Work, or any part or parts of the Work, where such Work has not yet been commenced.

### **29. EFFECT OF TERMINATION**

#### **29.1 Termination**

- (a) Notwithstanding any provision of this Project Agreement, upon the service of a notice of termination, this Article 29 shall apply in respect of such termination.

## 29.2 Continued Effect – No Waiver

- (a) Notwithstanding any breach of this Project Agreement by a Party, the other Party may elect to continue to treat this Project Agreement as being in full force and effect and to enforce its rights under this Project Agreement without prejudice to any other rights which such other Party may have in relation to such breach. The failure of either Party to exercise any right under this Project Agreement, including any right to terminate this Project Agreement and any right to claim damages, shall not be deemed to be a waiver of such right for any continuing or subsequent breach.

## 29.3 Continuing Performance

- (a) Subject to any exercise by CMH of its right to perform, or to seek, pursuant to this Project Agreement, a third party to perform, the obligations of Project Co, the Parties shall continue to perform their obligations under this Project Agreement (including, if applicable, pursuant to Schedule 12 – Compensation on Termination), notwithstanding the giving of any notice of default or notice of termination, until the termination of this Project Agreement becomes effective in accordance with this Article 29.

## 29.4 Effect of Notice of Termination

- (a) On the service of a notice of termination:
  - (i) if termination is prior to the Substantial Completion Date in so far as any transfer shall be necessary to fully and effectively transfer such property to CMH as shall not already have been transferred to CMH pursuant to Section 11.9(f), Project Co shall transfer to, and there shall vest in CMH, free from all Encumbrances other than any Encumbrances derived through CMH, such part of the Work and the Facility as shall have been constructed and such items of the plant and equipment as shall have been procured by Project Co, and if CMH so elects:
    - (A) all plant, equipment and materials (other than those referred to in Section 29.4(a)(i)(B)) on or near to the Site shall remain available to CMH for the purposes of completing the Work; and
    - (B) all construction plant and equipment shall remain available to CMH for the purposes of completing the Work, subject to payment by CMH of Project Co's reasonable charges;
  - (ii) in the event of a termination as provided for pursuant to this Project Agreement, Project Co shall cooperate with CMH and turn over to CMH copies of Project Co's records, documentation and drawings necessary for



CMH to proceed with the Work, including the legal assignment to CMH of any of Project Co's rights in any agreement relating to the Work as CMH may require, and Project Co shall not do anything to impede CMH's ability to proceed with the Work. Further, Project Co agrees to turn over to CMH, on a timely basis, enabling Project Co to make and retain copies as it may reasonably deem necessary, all of Project Co's records, files, documents, materials, drawings, and any other items relating to the Project, whether located on the Site, at Project Co's office or elsewhere (including all records as described in Section 18.1(a) and notwithstanding the fact that such provision only permits access by CMH to such records) and to vacate the Site in accordance with CMH's reasonable instructions. CMH may retain such records, files, documents, materials, drawings and any other items for such time as it may need them and may reproduce any and all such items for its own use;

- (iii) Project Co shall use commercially reasonable efforts to assign or otherwise transfer to CMH, free of Encumbrances (other than any Encumbrances derived through CMH), the benefit of all manufacturers' warranties, including all documentation in respect thereof, in respect of mechanical and electrical plant and equipment used or made available by Project Co under this Project Agreement and included in the Facility; and
- (iv) Project Co's obligation under this Project Agreement as to quality, correction and warranty of the Work performed by Project Co up to the time of termination shall continue in force after such termination.

## **29.5 Ownership of Information**

- (a) Subject to Article 37, all information obtained by Project Co, including the Drawings and Specifications, the As-Built Drawings and other technical drawings and data, environmental and technical reports, and all other information directly related to the Work accumulated over the course of the performance of the Work shall be the property of CMH or the Consultant and Project Co shall have no right, title or interest therein whatsoever, and hereby waives any moral rights it may have under Applicable Law. Upon termination of this Project Agreement, all such information shall be provided or returned by Project Co to CMH, in electronic format where it exists in electronic format, and in its original format, when not in electronic format.
- (b) CMH shall provide Project Co, without charge, 10 hard copies of the Contract Documents (including all Addenda), 2 of which shall be used for record drawings, and 1 electronic copy in PDF format of the Contract Documents (including all Addenda) contained on a CD. CMH shall also provide Project Co, without charge, 1 hard copy of all administrative documents such as Change Orders,

Contemplated Change Notices, Change Directives, Supplemental Instructions and Design Issue resolution forms. Any additional copies of the Contract Document or part thereof including additional copies of administrative documents, shall be provided to Project Co at its expense. Project Co shall ensure that all copies of the Contract Documents received from CMH are kept in a secure location.

#### **29.6 Provision in Subcontracts**

- (a) Project Co shall make provision in all Subcontracts to which it is a party (including requiring the relevant Project Co Parties to make such provision) to ensure that CMH shall be in a position to exercise its rights, and Project Co shall be in a position to perform its obligations, under this Article 29.

#### **29.7 Survival**

- (a) The provisions of this Project Agreement which by their nature are continuing shall survive termination of this Project Agreement.

### **30. COMPENSATION ON TERMINATION**

#### **30.1 Compensation on Termination**

- (a) If this Project Agreement is terminated in accordance with the terms hereof, then Schedule 12 – Compensation on Termination shall apply and CMH shall pay Project Co any applicable compensation on termination.

### **31. TAXES**

#### **31.1 Project Co to Pay Taxes**

- (a) Project Co shall pay all Taxes in effect during the performance of the Work. The amount incurred (excluding HST) shall be included in the Cost of the Work. The Guaranteed Price shall exclude HST.

#### **31.2 Changes in Rates**

- (a) Any increase or decrease in costs to Project Co due to changes in such included Taxes after the Submission Date shall increase or decrease the Guaranteed Price accordingly, except for changes announced before the Submission Date and to take effect at some time thereafter, which shall, except as expressly set forth in Section 31.1, be deemed to have been taken into account in the Guaranteed Price.

### **31.3 Mark Up**

- (a) Project Co is not entitled to any mark-up for profit, overhead or otherwise, due to an increase in any Taxes included in the Cost of the Work. Project Co shall be entitled to claim for the increase in cost equal to the amount of such included Tax on the uncompleted Cost of the Work. CMH will be entitled to withhold payment to Project Co of a sum equal to the amount of any reduction in such included Tax on the uncompleted portion of the Work, only if CMH has not already benefited from said reduction in such included Tax by a decrease in the Guaranteed Price in accordance with Section 31.2.

### **31.4 Exemptions**

- (a) When an exemption or recovery of Taxes included in the Cost of the Work is applicable to this Project Agreement, Project Co shall, at the request of CMH, assist, join in, or make application for an exemption, recovery or refund of all such included Taxes and all amounts recovered or exemptions obtained shall be for the sole benefit of CMH. Project Co agrees to endorse over to CMH any cheques received from the federal or provincial governments as may be required to implement the foregoing, failing which, CMH is hereby authorized to deduct the amount from any payment that is then or may thereafter become due to Project Co hereunder.

### **31.5 Records**

- (a) Project Co shall maintain and make available to the Consultant accurate records, tabulating equipment and component costs showing Taxes.

## **32. INSURANCE AND PERFORMANCE SECURITY**

### **32.1 General Requirements**

- (a) Project Co and CMH shall comply with the provisions of Schedule 13 – Insurance and Performance Security.

### **32.2 No Relief from Liabilities and Obligations**

- (a) Neither compliance nor failure to comply with the insurance provisions of this Project Agreement shall relieve Project Co or CMH of their respective liabilities and obligations under this Project Agreement.

### 33. INDEMNITIES

#### 33.1 Project Co Indemnities to CMH

- (a) In addition to any other indemnification provided in this Project Agreement or in law or in equity, Project Co shall indemnify and save harmless CMH, the Consultant, CMH's Project Manager, Infrastructure Ontario and each of their respective directors, officers, consultants, employees, agents, representatives, successors and assigns, Her Majesty the Queen in right of Ontario, Her ministers, agents and employees, and any person for whom they are in law responsible (collectively, the "**CMH Indemnified Parties**") from and against any and all Direct Losses (including, with respect to the indemnity set out in Section 33.1(a)(viii), all clean up costs), which may be brought against them, suffered, sustained or incurred as a result of, in respect of, or arising out of any one or more of the following:
- (i) the death, sickness, disease or personal or bodily injury of any person;
  - (ii) any loss, damage or destruction of tangible or intangible property;
  - (iii) any safety infractions committed by Project Co or any Project Co Party under OHSA, or resulting from any failure by Project Co to fulfill its obligations under Section 11.6, including the failure to exercise any of the rights or powers given to Project Co under Section 11.6(b) at the Site in respect of any person for whom Project Co is responsible under OHSA in connection with the Project;
  - (iv) any infringement or alleged infringement of a patent of invention by Project Co or any Project Co Party, other than infringements or alleged infringements described in Section 33.2(a)(iii);
  - (v) any fines levied against Project Co or any CMH Indemnified Party due to Project Co's (or any Project Co Party's) violations of any Applicable Law;
  - (vi) without prejudice to CMH's rights under Article 26 and any other rights under this Project Agreement, any obligations of Project Co assumed by CMH under the Construction Contract and any reasonable costs and expenses incurred by CMH in relation to the exercise by CMH of its step-in rights under the Assignable Subcontract Agreement for Construction Contract;
  - (vii) any obligations of Project Co to satisfy judgements and pay costs resulting from construction liens arising from the performance of the Work or actions brought in connection with any such liens, or in connection with any other claim or lawsuit brought against CMH by any person that

provided services or materials to the Site which constituted part of the Work in accordance with Section 3.2 of Schedule 18 – Payments and Holdbacks; and

(viii) (A) Project Co's obligations under Article 14; and

(B) Project Co Hazardous Substances,

(collectively, the "**Project Co Indemnified Hazardous Substances Claims**"), which indemnification shall apply and extend to:

(I) Project Co Indemnified Hazardous Substances Claims made by federal, provincial or local government entities or agencies, and

(II) all Project Co Indemnified Hazardous Substances Claims arising out of such actual Release of Hazardous Substances even if such Project Co Indemnified Hazardous Substances Claims are not discovered or made until after the performance of the Work or after conclusion of this Project Agreement, provided this indemnity shall not be construed to negate, abridge or reduce other rights or obligations of indemnity set out in this Section 33.1, or which otherwise exist respecting a person or party described in this Section 33.1,

in each case, arising directly or indirectly out of, or in consequence of, any breach of this Project Agreement by Project Co or any act or omission of Project Co or any Project Co Party.

(b) Project Co shall indemnify and save harmless the CMH Indemnified Parties from and against any and all Direct Losses which may be suffered, sustained or incurred as a result of, in respect of, or arising out of:

(i) any breach of any representation or warranty by Project Co herein;

(ii) any claims with respect to the Project, by any Project Co Party that Project Co has replaced pursuant to Section 11.8(b); or

(iii) any breach of this Project Agreement or any Implementing Agreement by Project Co.

(c) CMH hereby holds in trust for and on behalf of the CMH Indemnified Parties other than CMH the benefit of the indemnities provided by Project Co set out in this Section 33.1.

- (d) Project Co shall indemnify CMH for damages suffered or incurred on account of
  - (i) any payment not duly made by Project Co pursuant to the terms of this Project Agreement on the due date; (ii) any overpayment to or under payment by Project Co; or (iii) an amount determined as payable by Project Co to CMH under Schedule 14 – Dispute Resolution Procedure, by payment of the amount equal to the Payment Compensation Amount calculated from the day after the date on which payment was due, the day on which overpayment was made by CMH or from the date identified (if any) applicable to an amount determined as payable by Project Co to CMH under Schedule 14 – Dispute Resolution Procedure, up to and including the date of payment.
- (e) For greater certainty:
  - (i) the liability of Project Co under this Section 33.1 shall not be greater than the total cumulative liability of Project Co under Section 35.2; and
  - (ii) the indemnities set out in this Section 33.1 shall not apply to the extent the breach of this Project Agreement or the act or omission of Project Co or any Project Co Party was caused or contributed to by:
    - (A) the breach of this Project Agreement by CMH; or
    - (B) any act or omission by CMH, any CMH Indemnified Party or any of CMH's own forces.

### 33.2 CMH Indemnities to Project Co

- (a) CMH shall indemnify and save harmless Project Co and the Project Co Parties and each of their respective directors, officers, consultants, employees, agents, representatives, successors and assigns (the “**Project Co Indemnified Parties**”) from and against any and all Direct Losses (including, with respect to the indemnity set out in Section 33.2(a)(iv), all clean up costs) which may be suffered, sustained or incurred as a result of, in respect of, or arising out of any one or more of the following:
  - (i) the death, sickness, disease or personal or bodily injury of any person;
  - (ii) any damage or destruction of tangible or intangible property;
  - (iii) any infringement or alleged infringement of a patent of invention in executing anything for the purpose of this Project Agreement, the model, plan, Specification or design of which was supplied to Project Co as part of the Contract Documents;

- (iv) (A) exposure to, or the presence of, Hazardous Substances at the Site other than Project Co Hazardous Substances;
- (B) the breach of any Applicable Law relating to such Hazardous Substances; and
- (C) any Release or threatened Release at or from the Site of any such Hazardous Substances which has or may have an adverse effect upon the environment or human health or safety,

other than Project Co Indemnified Hazardous Substances Claims as set out in Section 33.1(a)(viii) (collectively, the “**CMH Indemnified Hazardous Substances Claims**”), and in this regard, it is expressly agreed and understood that such indemnification shall apply and extend to CMH Indemnified Hazardous Substances Claims even if such CMH Indemnified Hazardous Substances Claims are not discovered or made until after the performance of the Work or after conclusion of this Project Agreement, provided this indemnity shall not be construed to negate, abridge or reduce other rights or obligations of indemnity set out in this Section 33.2 or which otherwise exist respecting a person or party described in Section 33.1,

in each case, arising directly or indirectly out of or in consequence of any breach of this Project Agreement by CMH or any act or omission of CMH or any CMH Party, provided that there shall be excluded from the indemnity given by CMH any liability for the occurrence of risks against which Project Co is bound to insure under this Project Agreement to the extent of the proceeds available or that should have been available but for a failure by Project Co to properly insure in accordance with the terms hereof.

- (b) CMH shall indemnify and save harmless the Project Co Indemnified Parties from and against any and all Direct Losses which may be suffered, sustained or incurred as a result of, in respect of, or arising out of:
  - (i) any breach of a representation or warranty by CMH herein; or
  - (ii) any breach of this Project Agreement or any Implementing Agreement by CMH.
- (c) Project Co hereby holds in trust for and on behalf of Project Co Indemnified Parties other than Project Co the benefit of the indemnities provided by CMH set out in this Section 33.2.
- (d) CMH shall indemnify Project Co for damages suffered or incurred on account of
  - (i) any payment not duly made by CMH pursuant to the terms of this Project

Agreement on the due date; (ii) any overpayment to or under payment by CMH; or (iii) an amount determined as payable by CMH to Project Co under Schedule 14 – Dispute Resolution Procedure, by payment of the amount equal to the Payment Compensation Amount calculated from the day after the date on which payment was due, the day on which overpayment was made by Project Co or from the date identified (if any) applicable to an amount determined as payable by CMH to Project Co under Schedule 14 – Dispute Resolution Procedure, up to and including the date of payment.

- (e) For greater certainty:
  - (i) the liability of CMH under this Section 33.2 shall not be greater than the total cumulative liability of CMH under Section 35.2; and
  - (ii) the indemnities set out in this Section 33.2 shall not apply to the extent the breach of this Project Agreement or the act or omission of CMH or any CMH Party was caused or contributed to by:
    - (A) the breach of this Project Agreement by Project Co; or
    - (B) any act or omission of Project Co or any Project Co Indemnified Party.

### 33.3 Conduct of Claims

- (a) This Section 33.3 shall apply to the conduct of claims made by a third person against a party having, or claiming to have, the benefit of an indemnity pursuant to this Project Agreement. The party having, or claiming to have, the benefit of the indemnity is referred to as the “**Beneficiary**” and the party giving the indemnity is referred to as the “**Indemnifier**”.
- (b) If the Beneficiary receives any notice, demand, letter or other document concerning any claim for which it appears that the Beneficiary is, or may become entitled to, indemnification under this Section 33.3, the Beneficiary shall give written notice to the Indemnifier as soon as reasonably practicable and in any event within 10 Business Days of receipt of the same. Such notice shall specify with reasonable particularity, to the extent that information is available, the factual basis for the claim and the amount of the claim.
- (c) Subject to Sections 33.3(d), 33.3(e) and 33.3(f), on the giving of such notice by the Beneficiary, where it appears that the Beneficiary is or may be entitled to indemnification from the Indemnifier in respect of all, but not part only, of the liability arising out of the claim, the Indemnifier shall (subject to providing the Beneficiary with a secured indemnity to the Beneficiary’s reasonable satisfaction against all costs and expenses that the Beneficiary may incur by reason of such



action) be entitled to dispute the claim in the name of the Beneficiary at the Indemnifier's own expense and take conduct of any defence, dispute, compromise, or appeal of the claim and of any incidental negotiations. The Beneficiary shall give the Indemnifier all reasonable cooperation, access and assistance for the purposes of considering and resisting such claim. The Beneficiary shall have the right to employ separate counsel in respect of such claim and the reasonable fees and expenses of such counsel shall be to the account of the Indemnifier only where representation of both the Indemnifier and Beneficiary by common counsel would be inappropriate due to any actual or potential conflicting interests between the Indemnifier and Beneficiary.

- (d) With respect to any claim conducted by the Indemnifier:
  - (i) the Indemnifier shall keep the Beneficiary fully informed and consult with it about material elements of the conduct of the claim;
  - (ii) the Indemnifier shall not bring the name or reputation of the Beneficiary into disrepute;
  - (iii) the Indemnifier shall not pay, compromise or settle such claims without the prior consent of the Beneficiary, such consent not to be unreasonably withheld or delayed;
  - (iv) the Indemnifier shall not admit liability or fault to any third party without the prior consent of the Beneficiary, such consent not to be unreasonably withheld or delayed; and
  - (v) the Indemnifier shall use commercially reasonable efforts to have the Beneficiary named as a beneficiary under any release given by the persons bringing the claim to which this Section 33.3 relates.
- (e) The Beneficiary shall be free to pay or settle any such claim on such terms as it thinks fit and without prejudice to its rights and remedies under this Project Agreement if:
  - (i) the Indemnifier is not entitled to take conduct of the claim in accordance with Section 33.3(c);
  - (ii) the Indemnifier fails to notify the Beneficiary of its intention to take conduct of the relevant claim within 10 Business Days of the notice from the Beneficiary under Section 33.3(b) or notifies the Beneficiary that the Indemnifier does not intend to take conduct of the claim; or
  - (iii) the Indemnifier fails to comply in any material respect with Section 33.3(d).

- (f) The Beneficiary shall be free at any time to give notice to the Indemnifier that the Beneficiary is retaining or taking over, as the case may be, the conduct of any defence, dispute, compromise or appeal of any claim, or of any incidental negotiations, to which Section 33.3(c) applies. For greater certainty, Project Co acknowledges and agrees that where CMH is the Beneficiary, CMH may retain or take over such conduct in any matter involving patient, clinical or research confidentiality or any matter involving public policy. On receipt of such notice the Indemnifier shall promptly take all steps necessary to transfer the conduct of such claim to the Beneficiary, and shall provide to the Beneficiary all relevant documentation and all reasonable cooperation, access and assistance for the purposes of considering and resisting such claim. If the Beneficiary gives any notice pursuant to this Section 33.3(f), then the Indemnifier shall be released from any liabilities arising under the applicable indemnity hereunder in respect of the applicable claim.
- (g) If the Indemnifier pays to the Beneficiary an amount in respect of an indemnity and the Beneficiary subsequently recovers, whether by payment, discount, credit, saving, relief or other benefit or otherwise, a sum or anything else of value (the **"Recovery Amount"**) which is directly referable to the fact, matter, event or circumstances giving rise to the claim under the indemnity, the Beneficiary shall forthwith repay to the Indemnifier whichever is the lesser of:
- (i) an amount equal to the Recovery Amount less any out-of-pocket costs and expenses properly incurred by the Beneficiary in recovering the same; and
  - (ii) the amount paid to the Beneficiary by the Indemnifier in respect of the claim under the relevant indemnity,
- provided that there shall be no obligation on the Beneficiary to pursue any Recovery Amount and that the Indemnifier is repaid only to the extent that the Recovery Amount, aggregated with any sum recovered from the Indemnifier, exceeds the loss sustained by the Beneficiary except, however, that if the Beneficiary elects not to pursue a Recovery Amount, the Indemnifier shall be entitled to require an assignment to it of the right to do so.
- (h) Any person taking any of the steps contemplated by this Section 33.3 shall comply with the requirements of any insurer who may have an obligation to provide an indemnity in respect of any liability arising under this Project Agreement.

### 33.4 Mitigation – Indemnity Claims

- (a) For greater certainty, Section 43.4 applies to any indemnity given under this Project Agreement and any such indemnity shall not extend to Direct Losses

which could have been reduced or avoided by the Beneficiary complying with such Section.

### 34. WAIVER OF CLAIMS

#### 34.1 Waiver of Claims by Project Co

- (a) As of the date of the final certificate for payment, Project Co expressly waives and releases CMH from all claims against CMH, including those that might arise from the wilful misconduct, negligence or breach of contract by CMH except:
  - (i) those made in writing prior to Project Co's application for final payment and still unsettled;
  - (ii) those arising from the provisions of any indemnity given by CMH under this Project Agreement; or
  - (iii) without limiting the provisions of Section 34.1(a)(ii), those arising from CMH's obligations under Article 14 and Section 33.2(a)(iv).

### 35. LIMITS ON LIABILITY

#### 35.1 Indirect Losses

- (a) Without prejudice to the Parties' rights in respect of payments provided for herein which may, in accordance with their terms or by necessary implication, include the payment of Indirect Losses, subject to the provisions hereof, the indemnities under this Project Agreement shall not apply and there shall be no right to claim damages for breach of this Project Agreement, in tort or on any other basis whatsoever, to the extent that any loss claimed by either Party is:
  - (i) for punitive, exemplary or aggravated damages;
  - (ii) for loss of income, loss of use, loss of production, loss of business or loss of business opportunity; or
  - (iii) for consequential loss or for indirect loss of any nature suffered or allegedly suffered by either Party,

provided that the exceptions in (ii) and (iii) shall not apply as a result of, or in relation to, CMH's loss of use of the Facility and/or the Existing Facility or a portion thereof, which shall be Direct Losses for all purposes of this Project Agreement,

(collectively, "**Indirect Losses**").

## 35.2 Maximum Liability

- (a) Subject to and save and except in respect of:
  - (i) any claims of CMH against Project Co:
    - (A) for the cost to perform and complete the Work in accordance with the Contract Documents, including the reasonable and proper costs of CMH incurred in carrying out any re-tendering of the Work or any applicable portion thereof;
    - (B) for the costs that may arise under Sections 36.2 and 36.3 to correct defects, deficiencies or non-compliant items in the Work;
    - (C) for the costs that may arise in the circumstances of Section 26.1(a)(i); or
    - (D) to recover from Project Co payment of any amount that would have been payable to CMH under policies of insurance described under Schedule 13 but for the breach by Project Co under any such policies, which breach relieved the insurer of its obligation to pay CMH under such policies;
  - (ii) any claims of Project Co against CMH for the payment of the Guaranteed Price (including Additional CMH Payments), the Interim Completion Payment, the Substantial Completion Payment or any Compensation Payment;
  - (iii) any claims by either Party against the other for:
    - (A) damages for fraud, material misrepresentation, wilful misconduct or deliberate acts of wrongdoing;
    - (B) costs arising from each Party's obligations under Article 14 and corresponding indemnities in Sections 33.1(a)(viii) and 33.2(a)(iv), respectively; or
    - (C) any insurance proceeds where such funds have been misapplied by such Party or which, under the terms of this Project Agreement should have been paid to the other Party,

but notwithstanding any other provision of this Project Agreement, the total cumulative liability of either Party to the other for all costs, damages or losses of any kind, in law or in equity, whether based on tort, negligence, contract, warranty, strict liability or otherwise arising from or relating to this Project

Agreement (including, for clarity, in respect of a Project Co Delay or any indemnity provided by either Party under this Project Agreement), shall not be greater than a total cumulative liability of \$10,000,000. Each of these limits shall be exclusive of any insurance proceeds received or which will be received pursuant to policies maintained by or on behalf of Project Co in accordance with Schedule 13 – Insurance and Performance Security. For greater certainty, nothing herein is intended to limit the rights of CMH in respect of any Security required to be provided by Project Co under Schedule 13 – Insurance and Performance Security and nothing herein shall limit either CMH's or Project Co's ability to pursue claims against the Consultant for indemnity with respect to negligent design or engineering, subject to the limitations set out in Section 35.2(b).

- (b) Project Co acknowledges that the aggregate liability of the Consultant in all claims arising under or in respect of this Project Agreement shall be limited to the amount of the errors and omissions insurance coverage available to the Consultant in respect of such claim. CMH covenants with Project Co to cause errors and omissions insurance to be in place covering the Consultant with indemnity limits of not less than \$10,000,000. For greater certainty, Project Co shall not seek to recover from the Consultant or from any other person that might seek indemnity or contribution from the Consultant any amount in excess of the amount of the available indemnity under any errors and omissions insurance coverage available to the Consultant and responsive to such claim. Project Co acknowledges that the Consultant is a third party beneficiary under this Section 35.2(b) and that the Consultant shall be entitled to plead this Section 35.2(b) in its defence to any action brought by Project Co and Project Co waives any defence to such pleading by the Consultant. Project Co further acknowledges that CMH is contracting in this respect as agent for the Consultant.

## 36. WARRANTY

### 36.1 Project Co Warranty

- (a) Project Co warrants that the Work, including all Products, and in addition, all parts and workmanship replaced during the initial warranty period, shall conform to the specifications set out in the Contract Documents in all respects and shall be new, of good quality material, of merchantable quality and fit for their intended purpose, as described in the Contract Documents, and free of defects in materials, equipment and workmanship for a period of one (1) year from:
- (i) the Phased Occupancy Date with respect to Phase 2 (as defined in the Specifications), but only with respect to those portions of the Work directly affected by the occupancy by CMH of Phase 2 except for the equipment listed in Section 15.1 of Specification 01 70 00 (in respect of which Section 36.1(a)(ii) shall apply); and

- (ii) with respect to the balance of the Work, including the equipment listed in Section 15.1 of Specification 01 70 00, the Substantial Completion Date.

This warranty shall not limit extended warranties on any items of equipment or material called for elsewhere in the Specifications or otherwise provided by any manufacturer of such equipment or material. Project Co shall ensure that all extended warranties specified in the Contract Documents are provided and shall assign to CMH all such extended warranties in accordance with the provisions of Section 16.2(i).

### **36.2 Corrections**

- (a) Project Co agrees to correct promptly, at its own expense, in a manner approved by CMH, defects, deficiencies or non-compliant items in the Work which appear prior to and during the warranty periods set out in Section 36.1. Project Co acknowledges that the timely performance of warranty work is critical to the ability of CMH to maintain effective operations of the Facility. Project Co shall use commercially reasonable efforts to respond to the requirement of CMH to correct defective, deficient or non-compliant items in the Work within the time periods required by CMH which, for example, in relation to critical areas can require immediate correction (for example, isolation room air handling or a roof leak which makes a clinical care area unavailable). Project Co further acknowledges that if CMH is unable to contact Project Co and/or obtain the corrective work within such time period required by CMH that CMH's own forces may take such emergency steps as are reasonable and appropriate to correct such defects, deficiencies or non-compliant items in the Work, at Project Co's sole cost and expense, and except in the case of damage caused by CMH's own forces, such emergency steps taken by CMH's own forces shall not invalidate any warranties in respect of such portion of the Work affected by such corrective actions of CMH's own forces.

### **36.3 Make Good Any Damage**

- (a) Subject to Section 36.2, Project Co shall promptly, and in any event not more than 30 days after receipt of written notice thereof from the Consultant or CMH, Make Good any defects, deficiencies or non-compliant items in the Work which may develop within periods for which said materials, equipment, Products and workmanship are warranted, and also Make Good any damage to other Work caused by the repairing of such defects, deficiencies or non-compliant items. All of such Work shall be at Project Co's expense. None of such Work shall be the basis of a claim for a Change Order, additional compensation or damages. The above-noted time period of 30 days shall be subject to the following:

- (i) If the corrective Work cannot be completed in the 30 days specified, Project Co shall be in compliance if Project Co:
  - (A) commences and is diligently proceeding with the correction of the Work within the specified time;
  - (B) provides CMH with a schedule acceptable to CMH for such correction; and
  - (C) corrects the Work in accordance with such schedule.
- (b) If Project Co fails to correct the Work in the time specified or subsequently agreed upon, without prejudice to any other right or remedy CMH may have, CMH may correct such Work and deduct the cost and expense thereof from any CMH Holdback held by CMH or from any payment then or thereafter due to Project Co provided the Consultant has certified such cost to CMH.
- (c) After the Final Completion Date, CMH shall cause Project Co to be granted access to the Site for the purpose of performing the warranty work that is required pursuant to Sections 36.2 and 36.3. Project Co acknowledges that such access to the Site may be subject to such limitations as may be imposed by CMH.

#### **36.4 Performance of Replacement Work**

- (a) The performance of replacement work and Making Good of defects, deficiencies or non-compliant items for which Project Co is responsible, shall be commenced and completed as expeditiously as possible, and shall be executed at times convenient to CMH and this may require work outside normal working hours at Project Co's expense. Any extraordinary measures required to complete the Work, as directed by CMH to accommodate the operation of the Facility or other aspects of the Project as constructed shall be at Project Co's expense.

#### **36.5 Opening, Tests, Inspections**

- (a) Project Co shall, at any time or times prior to the expiry of said warranty period and when required to do so by CMH, make such openings, tests, inspections, excavations, examinations, or other investigations in, through, of or in the vicinity of the Work as directed and shall, if required, Make Good again, to the satisfaction of CMH, any openings, excavations or disturbances of any property, real or personal, resulting therefrom. If any defect, deficiency or non-compliant item for which Project Co is responsible is found in the Work by such investigations, the cost of such investigations and such Making Good shall be borne by Project Co; but if no such defect, deficiency or non-compliant item for which Project Co is responsible is found by such investigations, the said cost shall be borne by CMH.

### **36.6 Remedies Not Exclusive**

- (a) The foregoing express warranties shall not deprive CMH of any action, right or remedy otherwise available to CMH at law or in equity for breach of any of the provisions of the Contract Documents by Project Co, and the periods referred to in this Article 36, shall not be construed as a limitation on the time in which CMH may pursue such other action, right or remedy.

### **36.7 Occupation by CMH**

- (a) For the purposes of this Article 36, completion of a milestone other than Substantial Completion is signified by availability of the relevant space for occupation by CMH, as more particularly described in the Specifications.

### **36.8 No Limitation**

- (a) Subject to Section 11.19(f), neither the performance of work by CMH's own forces nor the work of CMH's other contractors, shall, except with respect to any damage caused by CMH's own forces or CMH's other contractors, limit the availability or terms of any warranty.

## **37. INTELLECTUAL PROPERTY**

### **37.1 Ownership of Specifications and Models**

- (a) Specifications, Drawings, models, and copies thereof furnished by the Consultant are and shall remain the Consultant's property, with the exception of the signed Contract Document sets, which shall belong to each Party to this Project Agreement. All Specifications, Drawings and models furnished by the Consultant are to be used only with respect to the Work and are not to be used on other work. These Specifications, Drawings and models are not to be copied or altered in any manner except in accordance with the Contract Documents without the written authorization of the Consultant.
- (b) Models (other than financial models) furnished by Project Co at CMH's expense are the property of CMH.

### **37.2 Patent Fees**

- (a) Project Co shall pay the royalties and patent licence fees required for the performance of this Project Agreement. The amount incurred shall be included in the Guaranteed Price.



### 37.3 Copyright Notice

- (a) The Parties acknowledge that the Queen's Printer for Ontario is the exclusive owner of the copyright in the RFP Documents.

## 38. COMMUNICATIONS PROTOCOL AND CONFIDENTIALITY

### 38.1 Communications Protocol

- (a) Project Co shall not, and shall ensure that the Project Co Parties and any person affiliated with Project Co do not, issue or disseminate any media release, public announcement or public disclosure (whether for publication in the press, on the radio, television, internet or any other medium) relating to the Project, this Project Agreement or any matters related thereto, without the prior written consent of CMH and Infrastructure Ontario, in their Sole Discretion, provided that if Project Co, a Project Co Party or any person affiliated with Project Co is a public company, it shall be entitled to make such disclosure as is required by Applicable Law, subject to notification and reasonable consultation with CMH and Infrastructure Ontario prior to such disclosure.
- (b) Project Co shall, and shall ensure that the Project Co Parties and any person affiliated with Project Co, in each case, comply, at all times, with CMH's and Infrastructure Ontario's media release and publicity protocols or guidelines, including the Communications Protocol set out in Schedule 21, as such protocols and/or guidelines are updated by CMH and Infrastructure Ontario from time to time, provided that if any such person is a public company, it shall be entitled to make such disclosure as is required by Applicable Law, subject to notification and reasonable consultation with CMH and Infrastructure Ontario prior to such disclosure.
- (c) CMH, either on its own or together with Infrastructure Ontario, propose to establish a public information repository for the Project which may be website based as well as a hard copy document repository for purposes of communicating to the public information respecting the Project and the progress of the Construction Work. It is not intended that this information repository would include any information which falls within one of the exemptions under FIPPA, though the information repository may also contain the redacted versions of this Project Agreement or any of the Implementing Agreements pursuant to Section 38.3. Other than in respect of such redacted publications, CMH on its own or together with Infrastructure Ontario, will establish a communications protocol in consultation with Project Co for the development and management of the information repository.

### 38.2 Disclosure

- (a) Subject to Sections 38.2(b), 38.2(c) and 38.3, but notwithstanding anything else in this Project Agreement to the contrary, Project Co acknowledges and agrees that, in accordance with the transparency and accountability principles of the IPFP Framework, CMH has a right to disclose or publish (including on websites) this Project Agreement, any or all terms hereof, including any or all contractual submissions and other records kept in accordance with this Project Agreement, any information related to the performance of Project Co (or any Project Co Party) or any information derived from this Project Agreement or the information related to the performance of Project Co (or any Project Co Party) as CMH, in its Sole Discretion, may consider appropriate. In exercising its discretion, CMH will be guided by the principles set out in Sections 38.2(b), and 38.2(c).
- (b) CMH will not disclose portions of this Project Agreement, any terms hereof, including any contractual submissions or other records kept in accordance with this Project Agreement, any information related to the performance of Project Co (or any Project Co Party) or any information derived from this Project Agreement or the information related to the performance of Project Co (or any Project Co Party) which would be exempt from disclosure under FIPPA.
- (c) Notwithstanding Section 38.2(b), but subject to Section 38.3, where a compelling public interest in the disclosure of the information clearly outweighs the public interest in limiting the disclosure of the information supplied by Project Co (or any Project Co Party), CMH may disclose such information.

### 38.3 Redaction

- (a) Prior to disclosing or publishing this Project Agreement, any terms hereof, including any contractual submissions or other records kept in accordance with this Project Agreement, any information related to the performance of Project Co (or any Project Co Party) or any information derived from this Project Agreement or the information related to the performance of Project Co (or any Project Co Party), CMH shall provide to Project Co a redacted version of this Project Agreement or other documents or information to be disclosed or published, on the basis that the information so redacted constitutes information which should not be disclosed pursuant to Section 38.2(b). The Parties acknowledge and agree that the Guaranteed Price, but not any breakdown thereof, may be disclosed.
- (b) If Project Co, acting in good faith, contends that any of the information not redacted constitutes information that falls within the scope of Section 38.2(b) and, accordingly, would be exempt from disclosure under FIPPA, the dispute may be referred for resolution in accordance with Schedule 14 – Dispute Resolution Procedure, and CMH shall not disclose any information in dispute until a

determination is made. Any such determination shall be made with reference to the text and principles of FIPPA.

#### **38.4 Disclosure to Government**

- (a) Project Co acknowledges and agrees that CMH will be free to disclose any information, including Confidential Information, to each MEDEI, IO, MOHLTC and/or the Province, and, subject to compliance with FIPPA, MEDEI, IO, MOHLTC and/or the Province will be free to use, disclose or publish (including on websites) the information on such terms and in such manner as MEDEI, IO, MOHLTC and/or the Province sees fit.
- (b) For greater certainty, the Parties acknowledge and agree that, subject only to the removal of any information which the Parties are (or would be) entitled to refuse to disclose pursuant to FIPPA, this Project Agreement, any contractual submissions or other records kept in accordance with this Project Agreement, any information related to the performance of Project Co (or Project Co Party) or any information derived from this Project Agreement or the information related to the performance of Project Co (or any Project Co Party) are public documents and information and, as such, may be disclosed by MEDEI, IO, MOHLTC and/or the Province.

#### **38.5 Freedom of Information**

- (a) The Parties acknowledge and agree that FIPPA applies to CMH, MEDEI, IO, MOHLTC and the Province and that MEDEI, IO, MOHLTC and the Province are required to fully comply with FIPPA.

#### **38.6 Use and Disclosure of Confidential Information**

- (a) Except as authorized hereunder, each Party shall hold in confidence, not disclose and not permit any person any manner of access to, whether directly or indirectly, any Confidential Information of any other Party, provided that this Section 38.6 shall not restrict either Party from disclosing such Confidential Information to its professional advisors, to the extent necessary, to enable that Party to perform, to cause to be performed, or to enforce, its rights or obligations under this Project Agreement or any of the Implementing Agreements.
- (b) Project Co may:
  - (i) disclose in confidence to Agent and prospective lenders and their professional advisors such Confidential Information as is reasonably required by Agent or any such prospective lender in connection with the raising of financing for the Work or which Project Co is obliged to supply by the terms of the Lending Agreements; and

- (ii) disclose in confidence to any Project Co Party and their professional advisors, such Confidential Information as is necessary for the performance by such Project Co Party of its obligations under this Project Agreement or any of the Implementing Agreements.
- (c) Project Co acknowledges that MEDEI, IO, MOHLTC and/or the Province may use Confidential Information of Project Co for purposes not specific to the Project, but for other general governmental purposes, such as development of the Province's alternate procurement and financing policies and framework. MEDEI, IO, MOHLTC and/or the Province will advise Project Co prior to using any Confidential Information of Project Co for non-Project purposes.
- (d) Subject to the foregoing, neither Party shall use, or directly or indirectly cause, authorize or permit any other person to use, any Confidential Information of the other Party except for the purposes of this Project Agreement or any Implementing Agreements, as permitted by this Project Agreement or any Implementing Agreement, or as authorized by the disclosing Party in writing.
- (e) Each Party shall protect all Confidential Information of the disclosing Party with the same degree of care as it uses to prevent the unauthorized use, disclosure, publication, or dissemination of its own confidential information of a similar nature or character, but in no event less than a reasonable degree of care.

### 38.7 Exceptions

- (a) Information of a Party (the "**Proprietor**") will not be considered to be Confidential Information in the following circumstances:
  - (i) the Proprietor advises the other Party to whom the information has been disclosed (the "**Confidant**") in writing that the information is not required to be treated as Confidential Information;
  - (ii) the information is as of the date of this Project Agreement, or becomes at any time thereafter, generally available to or accessible by the public through no fault or wrongdoing of the Confidant;
  - (iii) the information is a matter of public record or in the public domain;
  - (iv) the information was in the possession of the Confidant prior to its disclosure and the Confidant came into possession of such information without being in breach of this Project Agreement;
  - (v) the information is received by the Confidant on a non-confidential basis from a source other than the Proprietor, provided that to the best of the Confidant's knowledge such source is not bound by a confidentiality

agreement with the Proprietor or otherwise prohibited from disclosing the information to the Confidant by a contractual, legal or fiduciary obligation;

- (vi) the information was independently developed by the Confidant without access to the Confidential Information, as evidenced by written records;
- (vii) the information is required to be disclosed pursuant to Applicable Law, provided that the Confidant provides, where the circumstances reasonably permit, the Proprietor with reasonable notification and an opportunity to contest such requirement prior to disclosure;
- (viii) the information is disclosed to CMH upon a termination of this Project Agreement, pursuant to Article 29 or is otherwise reasonably required by CMH for the purposes of performing (or having performed) the Work, including the construction of the Facility, subject to payment by CMH of any royalties or patent license fees that were payable by Project Co in respect of such information (if any) and to any related confidentiality obligations disclosed to CMH to which such information is subject; or
- (ix) the information would not be exempt from disclosure under FIPPA.

### **38.8 Survival of Confidentiality**

- (a) Except for Confidential Information that Project Co has identified in writing to CMH as being commercially sensitive, in which case the obligations in this Article 38 shall continue, the obligations in Sections 38.1 to 38.7 will cease on the date that is 3 years after the Final Completion Date.

### **38.9 Protection of Personal Information**

- (a) Project Co acknowledges the importance of maintaining the confidentiality and privacy of Personal Information.
- (b) Project Co shall, and shall require each Project Co Party to, only collect, hold, process, use, store and disclose Personal Information with the prior consent of CMH and only to the extent necessary to perform Project Co's obligations under this Project Agreement.
- (c) Project Co shall, and shall require each Project Co Party to, at all times treat Personal Information as strictly confidential and shall comply with all applicable requirements of the Contract Documents and the requirements of Applicable Law, including FIPPA and the *Personal Health Information Protection Act*, 2004 (Ontario).

- (d) Project Co shall take all necessary and appropriate action, and shall require each Project Co Party to take all necessary and appropriate action, against any person who fails to comply with this Article 38.
- (e) Project Co shall allow CMH on reasonable notice to inspect the measures of Project Co and each Project Co Party to protect Personal Information.

### **38.10 Protection of Patient Information**

- (a) Project Co shall take all necessary steps, including the appropriate technical and organizational and physical security measures, and shall require each Project Co Party to take all necessary steps and to include provisions in Subcontracts to require each Project Co Party and other Project Co Parties to take all necessary steps, such that Project Co, the Project Co Parties, and its and their staff shall protect, secure and keep confidential any Patient Information.
- (b) Project Co shall keep confidential, and shall require each Project Co Party to keep confidential and to include provisions in all Subcontracts to require all Project Co Parties to keep confidential, all Patient Information that any of them may encounter or obtain during the course of their duties.
- (c) CMH may from time to time require that Project Co and any Project Co Party or members of its or their staff execute and deliver within 2 Business Days of such request an agreement satisfactory to CMH, acting reasonably, requiring such person to keep Patient Information confidential.
- (d) This Section 38.10 shall not limit Section 38.9.

### **38.11 Survival**

- (a) Subject to Section 38.8, the obligations in Sections 38.1 to 38.10 shall survive the termination of this Project Agreement.

## **39. ASSIGNMENT, SUBCONTRACTING AND CHANGES IN CONTROL**

### **39.1 Project Co Assignment**

- (a) Project Co shall not sell, assign, transfer, charge, mortgage, encumber, dispose of or otherwise alienate all or any part of any interest, whether legal or beneficial, in this Project Agreement or any Implementing Agreement without the prior written consent of CMH, which consent may be withheld in the Sole Discretion of CMH.
- (b) Section 39.1(a) shall not apply to:

- (i) the grant of any security or any other interest to Agent under any of the Lending Agreements; or
- (ii) subject to Section 7.1(a)(xx), any Subcontract or sub-subcontract entered into by Project Co, the Project Co Parties or any Sub-Subcontractor in connection with the Project.

### 39.2 CMH Assignment

- (a) CMH shall not charge, mortgage or encumber, or except in accordance with Section 39.2(b), sell, assign, transfer, charge, mortgage, encumber, dispose of or otherwise alienate, all or any part of its interest in this Project Agreement or any Implementing Agreement.
- (b) CMH may sell, assign, transfer, dispose of or otherwise alienate all (but not less than all) of its interest in this Project Agreement and the Implementing Agreements:
  - (i) to the Local Health Integration Network;
  - (ii) to any public hospital under the *Public Hospitals Act* (Ontario) to whom MOHLTC, exercising its statutory rights, would be entitled to transfer same;
  - (iii) to any successor of CMH, where such successor arises as a result of a direction or approval under the *Public Hospitals Act* (Ontario) and/or the *Local Health System Integration Act* (Ontario) or a reorganization of the delivery of health services initiated by the Province; or
  - (iv) to any person that is regulated and funded by the Province as a healthcare institution and is approved by MOHLTC as a transferee of same;

provided that (A) the person to whom any such sale, assignment, transfer, disposition or other alienation is made has the legal capacity, power and authority to accept such sale, assignment, transfer, disposition or other alienation, and agrees in writing with Project Co and Agent to assume and perform all of the obligations of CMH hereunder and under all of the Implementing Agreements, and (B) MOHLTC confirms to the assignee or transferee its commitment to fund the assignee or transferee on terms and conditions no less favourable than those set out in the Funding Letter and a copy of such confirmation is provided to Project Co and Agent.

- (c) Upon any sale, assignment, transfer, disposition or other alienation in accordance with Section 39.2(b), CMH shall be released from all of its obligations under this Project Agreement to the extent assumed by the assignee or transferee.

### 39.3 Subcontractors

- (a) Project Co shall not subcontract any interest in this Project Agreement or the Construction Contract, and shall not permit the Contractor to subcontract any interest in the Construction Contract, to a Restricted Person, or any Affiliate thereof, or a person whose standing or activities: (i) are inconsistent with CMH's role as a hospital, (ii) may compromise the reputation of CMH; (iii) may compromise the integrity of the Province or the Project; or (iv) may compromise the nature of Province's health care system, so as to affect public confidence in that system.
- (b) Project Co shall not terminate, agree to the termination of or replace the Contractor unless Project Co has complied with Sections 6.2(a), 39.3(c) and 39.3(d) or received the prior written consent of CMH, which may be withheld in the Sole Discretion of CMH.
- (c) Subject to Section 39.3(d), if the Construction Contract shall at any time lapse, terminate or otherwise cease to be in full force and effect, whether by reason of default or otherwise, with the effect that the Contractor shall cease to act in relation to the Project, Project Co shall forthwith appoint a replacement, subject to CMH's prior written consent, acting reasonably, as to the suitability of the replacement.
- (d) It is a condition of replacement of the Contractor, and Project Co shall require, that any replacement enter into a contract upon the same or substantially similar terms as the Construction Contract so replaced, including the provision of replacement Security and an assignment agreement on the same or substantially similar terms as the Assignable Subcontract Agreement for Construction Contract unless any material variations are approved by CMH, acting reasonably.

### 39.4 Changes in Ownership

- (a) No Change in Ownership of Project Co, or any company of which Project Co is a subsidiary, shall be permitted:
  - (i) where the person acquiring the ownership interest is a Restricted Person or a person whose standing or activities (i) are inconsistent with CMH's role as a hospital; (ii) may compromise the reputation of CMH; or (iii) may compromise the integrity or the nature of the Province's health care system, so as to affect public confidence in that system; or
  - (ii) if such Change in Ownership would have a material adverse effect on the performance of the Work.



- (b) No Change in Control of Project Co, or any company of which Project Co is a subsidiary, shall be permitted without the prior written consent of CMH, which may be withheld in CMH's Sole Discretion.
- (c) This Section 39.4 shall not apply to a Change in Ownership or Change in Control of companies whose equity securities are listed on a recognized stock exchange.
- (d) Whether or not Project Co is required to obtain CMH's consent to a Change in Ownership or Change in Control pursuant to this Section 39.4, Project Co shall provide notice to CMH of any Change in Ownership or Change in Control of Project Co, or any company of which Project Co is a subsidiary, as the case may be, within 5 Business Days of such Change in Ownership or Change in Control, and such notification shall include a statement identifying the then current shareholders and their respective holdings in the voting securities of Project Co, or any company of which Project Co is a subsidiary, as the case may be.
- (e) No Restricted Person or a person whose standing or activities are inconsistent with the Province's reputation or integrity shall be permitted to have at any time or acquire, Direct or Indirect Power or Control over any member of the Project Co Group in relation to the decisions, management, actions or policies of Project Co or in relation to the operation, management and ownership of the Project.

## 40. DISPUTE RESOLUTION PROCEDURE

### 40.1 Dispute Resolution

- (a) All disputes shall be resolved in accordance with, and the Parties shall comply with, Schedule 14 – Dispute Resolution Procedure.

## 41. PROHIBITED ACTS

### 41.1 Definition

- (a) The term “**Prohibited Act**” means:
  - (i) offering, giving or agreeing to give to CMH or any public body (or anyone employed by or acting on their behalf), or to any family member of such person, any gift or consideration of any kind as an inducement or reward:
  - (A) for doing or not doing, or for having done or not having done, any act in relation to the obtaining or performance of this Project Agreement or any other agreement with CMH or any public body in connection with the Project; or

- (B) for showing or not showing favour or disfavour to any person in relation to this Project Agreement or any other agreement with CMH or any public body in connection with the Project;

provided that this Section 41.1(a)(i) shall not apply to Project Co or any Project Co Party (or anyone employed by or acting on their behalf) providing consideration to CMH or any public body in the ordinary course, or as reasonably necessary, to fulfill or comply with the obligations and liabilities of Project Co under this Project Agreement or any other agreement with CMH or any public body in connection with the Project;

- (ii) entering into this Project Agreement or any other agreement with CMH or any public body in connection with the Project for which a commission or a fee has been paid or has been agreed to be paid by Project Co, or on its behalf or to its knowledge, CMH or any public body (or anyone employed by or acting on their behalf), or to any family member of such person, unless, before the relevant agreement is entered into, particulars of any such commission or fee have been disclosed in writing to CMH, provided that this Section 41.1(a)(ii) shall not apply to a fee or commission paid by Project Co or any Project Co Party (or anyone employed by or acting on their behalf) to CMH or any public body pursuant to an agreement where such fee or commission is paid in the ordinary course, or as reasonably necessary, to fulfill or comply with the obligations and liabilities of Project Co under this Project Agreement or any other agreement with CMH or any public body in connection with the Project without contravening the intent of this Article 41;
- (iii) breaching or committing any offence under any Applicable Law in respect of corrupt or fraudulent acts, or at common law, in respect of fraudulent acts in relation to this Project Agreement or any other agreement with CMH or any public body in connection with the Project; or
- (iv) defrauding or attempting to defraud or conspiring to defraud CMH or any other public body.

#### 41.2 Warranty

- (a) Project Co warrants that, in entering into this Project Agreement, it has not committed any Prohibited Act.

### 41.3 Remedies

- (a) If Project Co or any Project Co Party (or anyone employed by or acting on their behalf) commits any Prohibited Act, then CMH shall be entitled to act in accordance with the following:
  - (i) if the Prohibited Act is committed by Project Co or by an employee acting under the direction of a director or officer of Project Co, CMH may give written notice to Project Co and a Project Co Event of Default shall be deemed to have occurred;
  - (ii) if the Prohibited Act is committed by an employee of Project Co acting independently of a direction of a director or officer of Project Co, then CMH may give written notice to Project Co and a Project Co Event of Default shall be deemed to have occurred, unless, within 30 days of receipt of such notice, Project Co terminates the employee's employment and ensures that the relevant part of the Work shall be performed by another person;
  - (iii) if a Prohibited Act is committed by a Project Co Party or by an employee of that Project Co Party not acting independently of a direction of a director or officer of that Project Co Party, then CMH may give written notice to Project Co and a Project Co Event of Default shall be deemed to have occurred, unless, within 30 days of receipt of such notice, Project Co terminates the relevant Subcontract and ensures that the relevant part of the Work shall be performed by another person, where relevant, in accordance with Section 39.2(b)(i);
  - (iv) if the Prohibited Act is committed by an employee of a Project Co Party acting independently of a direction of a director or officer of that Project Co Party, then CMH may give written notice to Project Co and a Project Co Event of Default shall be deemed to have occurred, unless, within 30 days of receipt of such notice, Project Co causes the termination of the employee's employment and ensures that the relevant part of the Work shall be performed by another person; and
  - (v) if the Prohibited Act is committed on behalf of Project Co or a Project Co Party by a person not specified in Section 41.3(a)(i) to 41.3(a)(iv), then CMH may give notice to Project Co and a Project Co Event of Default shall be deemed to have occurred, unless, within 30 days of receipt of such notice, Project Co causes the termination of such person's employment or the appointment of their employer and, if necessary, ensures that the relevant part of the Work shall be performed by another person.

- (b) Any notice of termination under this Section 41.3 shall specify:
  - (i) the nature of the Prohibited Act;
  - (ii) the identity of the person whom CMH believes has committed the Prohibited Act; and
  - (iii) the date of termination in accordance with the applicable provisions of this Project Agreement.
- (c) Without prejudice to its other rights or remedies under this Section 41.3, CMH shall be entitled to recover from Project Co any Direct Loss sustained in consequence of any breach of this Article 41.

#### **41.4 Permitted Payments**

- (a) Nothing contained in this Article 41 shall prevent Project Co or any other person from paying any proper commission, fee or bonus whether to its employees within the agreed terms of their employment or otherwise, and such commission fee or bonus shall not constitute a Prohibited Act.

#### **41.5 Notification**

- (a) Project Co shall notify CMH of the occurrence and details of any Prohibited Act promptly on Project Co becoming aware of its occurrence.

#### **41.6 Replacement of Project Co Party**

- (a) Where Project Co is required to replace any Project Co Party pursuant to this Article 41, the party replacing such Project Co Party shall from the time of the replacement be deemed to be a Project Co Party and the provisions of this Project Agreement shall be construed accordingly.

### **42. NOTICES**

#### **42.1 Notices to Parties**

- (a) All notices, requests, demands, instructions, certificates, consents, approvals and other communications (each being a “**Notice**”) required or permitted under this Project Agreement shall be in writing (whether or not “written notice” or “notice in writing” is specifically required by the applicable provision of this Project Agreement) and served by sending the same by registered mail, facsimile or by hand, as follows:

If to Project Co:

2423402 Ontario Inc.  
407 Basaltic Road  
Concord, Ontario  
L4K 4W8

Attention: John Aquino  
Facsimile No.: 416-667-8462

with a copy to Contractor:

Bondfield Construction Company Limited  
407 Basaltic Road  
Concord, Ontario L4K 4W8

Attention: John Aquino  
Facsimile No.: 416-667-8462

If to CMH:

Cambridge Memorial Hospital  
700 Coronation Blvd,  
Cambridge, ON N1R 3G2

Attention: Angelo Presta, Director Capital Redevelopment  
Facsimile No.: 519-740-4953

with a copy to:

Attention: Mike Prociw, Vice President, Finance and Corporate Services  
Facsimile No.: 519-740-4953

with a copy to:

Infrastructure Ontario  
777 Bay Street, Suite 602  
Toronto, Ontario M5G 2C8

Attention: Robert Orr, Vice President, Project Delivery  
Facsimile No.: 416-326-9291

#### **42.2 Notice to Consultant**

- (a) In addition to the notice requirements set out in Section 42.1, where any Notice is to be provided or submitted to the Consultant, it shall be provided or submitted by sending the same by registered mail, facsimile or by hand, as follows:

Stantec Architecture Ltd., Architects  
401 Wellington Street West, Suite 100  
Toronto, ON M5V 1E7

Attention: Diego Morettin  
Facsimile No.: 416-596-7892

#### **42.3 Facsimile**

- (a) Where any Notice is provided or submitted to a Party via facsimile, an original of the Notice sent via facsimile shall promptly be sent by regular mail or registered mail. For greater certainty, a Notice given via facsimile shall not be invalid by reason only of a Party's failure to provide an original of the Notice in compliance with this Section 42.3.

#### **42.4 Change of Address**

- (a) Either Party to this Project Agreement may, from time to time, change any of its contact information set forth in Section 42.1 or 42.2 by prior Notice to the other Party, and such change shall be effective on the Business Day that next follows the recipient Party's receipt of such Notice unless a later effective date is given in such Notice.

#### **42.5 Deemed Receipt of Notices**

- (a) Subject to Sections 42.5(b), 42.5(c) and 42.5(d):
- (i) a Notice given by registered mail shall be deemed to have been received on the third Business Day after mailing;
  - (ii) a Notice given by hand delivery shall be deemed to have been received on the day it is delivered; and
  - (iii) a Notice given by facsimile shall be deemed to have been received on the day it is transmitted by facsimile.
- (b) If the Party giving the Notice knows or ought reasonably to know of difficulties with the postal system which might affect negatively the delivery of mail, any

such Notice shall not be mailed but shall be made or given by personal delivery or by facsimile transmission in accordance with this Article 42.

- (c) If any Notice delivered by hand or transmitted by facsimile is so delivered or transmitted, as the case may be, either on a day that is not a Business Day or on a Business Day after 4:00 p.m. (recipient's local time), then such Notice shall be deemed to have been received by such recipient on the next Business Day.
- (d) A Notice given by facsimile shall be deemed to have been received by the recipient on the day it is transmitted only if a facsimile transmission report (maintained by the sender) indicates that the transmission of such Notice was successful.

#### **42.6 Service on CMH**

- (a) Where any Notice is required to be served on CMH, the obligation to serve such Notice shall be fulfilled by serving it on CMH in accordance with the provisions of this Article 42.

### **43. GENERAL**

#### **43.1 Amendments**

- (a) This Project Agreement may not be amended, restated, supplemented or otherwise modified except by an agreement in writing signed by duly authorized representatives of the Parties and stating on its face that it is intended to be an amendment, restatement, supplement or other modification, as the case may be, to this Project Agreement.

#### **43.2 Waiver**

- (a) No waiver made or given by a Party under or in connection with this Project Agreement shall be binding or effective unless the waiver is in writing, signed by an authorized representative of the Party giving such waiver, and delivered by such Party to the other Parties. No waiver made with respect to any right, power or remedy in one instance will be deemed to be a waiver with respect to any other instance involving the exercise of such right, power, or remedy or with respect to any other right, power, or remedy.
- (b) Failure by either Party or the Consultant to exercise any of its rights, powers or remedies hereunder or its delay to do so shall not constitute a waiver of those rights, powers or remedies. The single or partial exercise of a right, power or remedy shall not prevent its subsequent exercise or the exercise of any other right, power or remedy.

### 43.3 Relationship Between the Parties

- (a) Each of the Parties acknowledges that it is contracting on its own behalf and not as an agent for any other person and subject to Schedule 20 – Form of Assignable Subcontract Agreement, this Project Agreement is not intended to and does not create or establish between the Parties, or between any of CMH, any Project Co Party, and the Province, including Infrastructure Ontario, any relationship as partners, joint venturers, employer and employee, master and servant, or (except as provided in this Project Agreement), of principal and agent, and does not create or establish any relationship whatsoever between CMH, the Province, including Infrastructure Ontario, and any representative or employee of Project Co or the Project Co Parties.
- (b) The Parties further agree that:
  - (i) except as expressly provided in this Project Agreement, neither Party shall be, or be deemed to be, an agent of the other Party, and neither Party shall have authority hereunder to represent that it is an agent of the other Party, or to accept any order, or enter into any contract or agreement, or make any representations or warranties of any kind to any person, or to assume or create any obligation, express or deemed, on behalf of or binding, or purportedly binding upon, the other Party;
  - (ii) neither Party shall be required to make or pay employment benefits, contributions for Employment Insurance, Canada Pension Plan, Workers' Compensation Board or other similar levies with respect to any persons employed or engaged by the other Party;
  - (iii) except as otherwise expressly provided in this Project Agreement, each Party shall be free from the control of the other Party as to the manner in which it shall perform its obligations, or cause same to be performed, under this Project Agreement; and
  - (iv) any person which a Party may engage as an agent, employee, subcontractor or otherwise, to perform such Party's obligations under this Project Agreement, as permitted hereby, shall, unless the Parties otherwise agree in writing, be engaged by such Party to act solely on behalf of such Party, and such person shall not act, or be deemed to act, on behalf of the Party that did not engage its services.



#### 43.4 General Duty to Mitigate

- (a) CMH and Project Co shall at all times take commercially reasonable steps to minimize and mitigate any loss for which the relevant Party is entitled to bring a claim against the other Party pursuant to this Project Agreement.

#### 43.5 Actual Knowledge

- (a) Without limitation to its actual knowledge and/or such knowledge which it, at law, may from time to time, be deemed to have, Project Co and CMH shall, for all purposes of this Project Agreement, be deemed to have such knowledge in respect of the Project as is actually held (or ought reasonably to be held) by their respective directors and officers.

#### 43.6 Entire Agreement

- (a) Except where provided otherwise in this Project Agreement, this Project Agreement constitutes the entire agreement between the Parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings, whether oral, written, express or implied, concerning the subject matter of this Project Agreement, including the Request for Proposals and the Proposal Submission, but excepting any of the Contract Documents and the Implementing Agreements, which agreements shall continue in full force and effect in accordance with their terms.

#### 43.7 No Reliance

- (a) Each of the Parties acknowledges that:
  - (i) it has not entered into this Project Agreement on the basis of and does not rely, and has not relied, upon any statement or representation, whether negligent or innocent, or warranty or other provision, whether oral, written, express or implied, made or agreed to by any person, whether a party to this Project Agreement or not, except those expressly made, given or repeated in this Project Agreement and the other Implementing Agreements and the only remedy or remedies available in respect of any misrepresentation or untrue statement made to it shall be those expressly provided for in this Project Agreement or the other Implementing Agreements; and
  - (ii) this Section 43.7 shall not apply to any statement, representation or warranty made fraudulently, or to any provision of this Project Agreement which was induced by fraud, for which the remedies available shall be all those available under Applicable Law.

#### **43.8 Severability**

- (a) Each provision of this Project Agreement shall be valid and enforceable to the fullest extent permitted by law. If any provision of this Project Agreement is declared invalid, unenforceable or illegal by the courts of a competent jurisdiction, such provision may be severed and such invalidity, unenforceability or illegality shall not prejudice or affect the validity, enforceability and legality of the remaining provisions of this Project Agreement. If any such provision of this Project Agreement is invalid, unenforceable or illegal, the Parties shall, acting in good faith, promptly negotiate new provisions to eliminate such invalidity, unenforceability or illegality and to restore this Project Agreement as near as possible to its original intent and effect.

#### **43.9 Enurement**

- (a) This Project Agreement and any other agreement entered into in connection with the Project to which both CMH and Project Co are parties shall enure to the benefit of, and be binding on, CMH and Project Co and their respective permitted successors and permitted transferees and assigns.

#### **43.10 Governing Law and Jurisdiction**

- (a) This Project Agreement, and each of the documents contemplated by or delivered under or in connection with this Project Agreement, shall be governed by and construed in accordance with the laws of Ontario and the laws of Canada applicable therein and shall be treated in all respects as an Ontario contract, without regard to conflict of laws principles.
- (b) Subject to Schedule 14 – Dispute Resolution Procedure, both Parties hereby irrevocably attorn to the exclusive jurisdiction of the courts of the Province of Ontario and all courts competent to hear appeals therefrom.

#### **43.11 Cumulative Remedies**

- (a) Except as otherwise set forth in this Project Agreement, the rights, powers and remedies of each Party set forth in this Project Agreement are cumulative and are in addition to and without prejudice to any other right, power or remedy that may be available to such Party under this Project Agreement at law or in equity.

#### **43.12 Further Assurance**

- (a) Each Party shall do all reasonable things, from time to time, and execute all reasonable further documents necessary to give full effect to this Project Agreement.

#### 43.13 Costs

- (a) Each Party shall be responsible for paying its own costs and expenses incurred in connection with the negotiation, preparation and execution and delivery of this Project Agreement.

#### 43.14 Language of Agreement

- (a) Each of the Parties acknowledges having requested and being satisfied that this Project Agreement and related documents be drawn in English. Chacune des Parties reconnaît avoir demandé que ce document et ses annexes soient rédigés en anglais et s'en declare satisfaite.
- (b) For greater certainty, all correspondence, notices, drawings, test reports, certificates, specifications, information, operating and maintenance instructions, name plates, identification labels, instructions and notices to the public and staff and all other written, printed or electronically readable matter required in accordance with, or for purposes envisaged by, this Project Agreement shall be in English.

#### 43.15 Proof of Authority

- (a) Each Party shall provide proof to each other Party in a form acceptable to such other Party, that any person executing this Project Agreement or any of the Implementing Agreements on its behalf, has the requisite authority to execute this Project Agreement or such Implementing Agreements on its behalf.

#### 43.16 Counterparts

- (a) This Project Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the Parties shall constitute a full, original and binding agreement for all purposes. Counterparts may be executed either in original or faxed form provided that any Party providing its signature in faxed form shall promptly forward to each other Party an original signed copy of this Project Agreement which was so faxed.

#### 43.17 Time is of the Essence

- (a) Time is of the essence in this Project Agreement.

TOR01: 5333935: v14

**[SIGNATURE PAGE IMMEDIATELY FOLLOWS]**

IN WITNESS WHEREOF the Parties have executed this Project Agreement as of the date first above written.

**CAMBRIDGE MEMORIAL HOSPITAL**

Per: 

Name: Patrick Gaskin

Title: President and Chief Executive Officer

Per: 

Name: Rita Westbrook

Title: Chair, Board of Directors

I/We have authority to bind the corporation

**[SIGNATURE PAGE FOR PROJECT AGREEMENT]**

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**Confidential**

IN WITNESS WHEREOF the Parties have executed this Project Agreement as of the date first above written.

**CAMBRIDGE MEMORIAL HOSPITAL**

Per: 

Name: Patrick Gaskin

Title: President and Chief Executive Officer

Per: 

Name: Rita Westbrook

Title: Chair, Board of Directors

I/We have authority to bind the corporation

**[SIGNATURE PAGE FOR PROJECT AGREEMENT]**

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Confidential

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**Cambridge Memorial Hospital  
Capital Redevelopment Project**

**Project Agreement  
Execution Version**

**2423402 ONTARIO INC.**

Per: \_\_\_\_\_

Name: John Aquino

Title: President

Per: \_\_\_\_\_

Name:

Title:

I/We have authority to bind the corporation

**[SIGNATURE PAGE FOR PROJECT AGREEMENT]**

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**Confidential**

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**SCHEDULE 1**  
**DEFINITIONS AND INTERPRETATION**

1. **Definitions.** In the Project Agreement, unless the context otherwise requires:
- 1.1 “**Addenda**” means addenda No. 2, 5, 6, 9, 10, 13, 14, 15, 16 and 19 as issued by CMH together with any post-award addenda.
- 1.2 “**Additional CMH Payments**” means amounts payable to Project Co pursuant to any Change Order or Change Directive under which CMH is expressly responsible for an increase to the Guaranteed Price, which includes any cost arising out of a Change in the Scope of the Work initiated by CMH pursuant to Schedule 11 – Change Procedure, or any payments to be made by CMH pursuant to Articles 4, 21, 22, 23, 25 or 26 or any other payment to be made by CMH, which, pursuant to the express provisions of the Project Agreement are to be paid as Additional CMH Payments, but not including any progress payments made in respect of Base Progress Payments.
- 1.3 “**Affiliate**” means an “**affiliate**” as that term is used in the *Business Corporations Act* (Ontario) and any successor legislation thereto, and, in the case of Project Co, shall include each of the Shareholders.
- 1.4 “**Agent**” means Bank of Montreal, acting in its capacity as agent for and on behalf of the Lenders.
- 1.5 “**Anticipated Final Completion Date**” has the meaning given in Section 16.3(a) of the Project Agreement.
- 1.6 “**Applicable Law**” means:
- (a) any statute or proclamation or any delegated or subordinate legislation including regulations and by-laws;
  - (b) any Authority Requirement; and
  - (c) any judgment of a relevant court of law, board, arbitrator or administrative agency which is a binding precedent in the Province of Ontario,
- in each case, in force in the Province of Ontario, or otherwise binding on Project Co, any Project Co Party, CMH or any CMH Party and, in particular, shall include the *Public Hospitals Act* (Ontario).
- 1.7 “**Apprenticeship Plan**” has the meaning given in Section 11.24(a) of the Project Agreement.

- 1.8 “**Approved Subcontractor Work**” means the work to be performed by each of the Approved Subcontractors set out in Schedule 19 – List of Project Co Parties.
- 1.9 “**Approved Subcontractors**” means a subcontractor which is on the list of Subcontractors approved by CMH pursuant to the Request for Proposals process and included on the list of Project Co Parties set out in Schedule 19 of the Project Agreement.
- 1.10 “**As-Built Drawings**” or “**As-Built**” means a set of Contract Documents marked-up by Project Co or a Project Co Party during construction, to record changes in the Work from the design documents and to illustrate actual locations of hidden utilities or concealed elements. The term may also be interpreted to mean a set of Contract Documents containing Project Co’s annotations.
- 1.11 “**Assignable Subcontract Agreement**” means the form of agreement attached as Schedule 20 to the Project Agreement.
- 1.12 “**Assignable Subcontract Agreement for Construction Contract**” means the form of agreement attached as Schedule 23 to the Project Agreement.
- 1.13 “**Assignment and Assumption Agreement**” means the agreements to be entered into between CMH, the Contractor and the third party Supplier that is the counterparty to each of the CMH Assigned Contracts, in the form set out in Appendix E to Schedule 3 – Completion Documents.
- 1.14 “**Associated Liabilities**” has the meaning given in Section 4.21(b)(ii)(B) of the Project Agreement.
- 1.15 “**Authority Requirement**” means any order, direction, directive, request for information, policy, administrative interpretation, guideline or rule of or by any Governmental Authority to the extent that same have the force of law.
- 1.16 “**Base Progress Payments**” means base progress payments made in accordance with the Construction Contract other than the Interim Completion Payment and the Substantial Completion Payment, but not including Additional CMH Payments.
- 1.17 “**Beneficiary**” has the meaning given in Section 33.3(a) of the Project Agreement.
- 1.18 “**Bonds**” means any one or more of the Performance Bond and Labour and Material Payment Bond and collectively, means all of them, which Bonds are in the forms attached as Appendices B and C, respectively, to Schedule 13 – Insurance and Performance Security Requirements.
- 1.19 “**Building Code**” means the regulations made under Section 34 of the *Building Code Act, 1992* (Ontario), as amended or replaced from time to time.



- 1.20 **“Building Permits”** means City of Cambridge Building Permit #13 007066 000 00.
- 1.21 **“Business Day”** means any day other than a Saturday, a Sunday, a statutory holiday in the Province of Ontario or any day on which banks are not open for business in the City of Cambridge, Ontario.
- 1.22 **“Cash Allowance Disbursement Authorization”** is an authorization to Project Co by CMH to expend monies from cash allowances included in the Guaranteed Price, as contemplated under Section 3.2 of the Project Agreement.
- 1.23 **“Certified Cost to Complete”** means the value of the Work remaining to be performed under the Project Agreement following the last day of the agreed monthly payment period ending immediately prior to the Substantial Completion Payment Date, as certified to CMH by the Consultant provided that for greater certainty, the Certified Cost to Complete shall not include any amount in respect of Minor Deficiencies (as provided in Sections 16.2(f) and 16.2(h) of the Project Agreement) to the extent that such amount is included in the CMH Holdback.
- 1.24 **“Change Directive”** means a written instruction prepared by the Consultant and signed by CMH directing a Change in the Scope of the Work within the general scope of the Contract Documents.
- 1.25 **“Change in Control”** means, with respect to a person:
- (a) any Change in Ownership, where the effect of such change is to result in control of the decisions made by or on behalf of such person subsequently being with a different entity or entities than prior to such change;
  - (b) any other change in respect of the power to elect a majority of the directors of the person or otherwise control the decisions made on behalf of such person; or
  - (c) any other change of direct or indirect power or authority through any contractual right or other power or interest with or over a person to influence, direct, cause to change or prevent from changing the approval of a decision, direction of the management, actions or policies of such person.
- 1.26 **“Change in Law”** means the coming into effect or repeal (without re-enactment or consolidation) in Ontario of any Applicable Law, or any amendment or variation of any Applicable Law, including any judgment of a relevant court of law which changes binding precedent in Ontario, in each case after the date of the Project Agreement.
- 1.27 **“Change in Ownership”** means, with respect to a person, any change in ownership, whether beneficial or otherwise, of any of the shares or units of ownership of such person, or in the direct or indirect power to vote or transfer any of the shares or units of ownership of such person.

- 1.28** “**Change in the Scope of the Work**” or “**Scope Change**” shall mean any change in the scope of the Work from that shown in or which is properly inferable, readily apparent or readily discoverable from the Contract Documents and relating to the quantity or quality of Products or materials, components or equipment to be incorporated into the Work, or any specified method of installation of materials or equipment into the Work, including changes arising from Design Issues falling within categories “B” and “D” in the Risk Assessment Guidelines, but does not include a Project Co Design Contingency expenditure. It is agreed that refinements and detailing will be accomplished from time to time with respect to the Contract Documents, including the addition of items or materials which may have been omitted from the Contract Documents but which are necessary to complete a detail shown, specified or readily apparent or properly inferable therefrom. Such refinements and detailing shall not constitute a Change in the Scope of the Work and will not result in any adjustment of the Guaranteed Price, but will be treated as a Project Co Design Contingency expenditure in accordance with Section 11.17 of the Project Agreement. For greater certainty, it is understood and agreed that where Project Co is entitled to any extension of time or compensation for additional costs or expenses pursuant to the express provisions of the Contract Documents, the matter giving rise to such extension of time or additional costs or expenses shall be deemed to be a Change in the Scope of the Work and shall be processed as a Change Order pursuant to Schedule 11 – Change Procedure.
- 1.29** “**Change Order**” means a written amendment to the Contract Documents prepared in accordance with Schedule 11 – Change Procedure, by the Consultant and signed by CMH and Project Co stating their agreement upon:
- (a) a Change in the Scope of the Work;
  - (b) the method of adjustment or the amount of the adjustment in the Overhead and Profit Fee, if any;
  - (c) the method of adjustment or the amount of the adjustment in the Guaranteed Price; and
  - (d) the extent of the adjustment in the Contract Time, if any.
- 1.30** “**CMH**” means Cambridge Memorial Hospital.
- 1.31** “**CMH Assigned Contracts**” means the four contracts entered into by CMH with Suppliers in connection with the procurement and supply of various equipment, materials and services, as further described in the Specifications, including paragraph 6 of Section 01 11 00 – Summary of Work.
- 1.32** “**CMH Event of Default**” has the meaning given in Section 27.1(a) of the Project Agreement.

- 1.33 “**CMH Holdback**” means any amount which CMH may withhold from payment under Section 16.2(h) of the Project Agreement, provided for greater certainty, that where this Project Agreement provides for a deduction in respect of any CMH Holdback, such deduction shall apply to any payments to be made by CMH hereunder (whether to Project Co or the Agent), notwithstanding that the Project Agreement expressly provides for deductions from payments to be made to Project Co.
- 1.34 “**CMH Indemnified Hazardous Substances Claims**” has the meaning given in Section 33.2(a)(iv) of the Project Agreement.
- 1.35 “**CMH Indemnified Parties**” has the meaning given in Section 33.1(a) of the Project Agreement.
- 1.36 “**CMH Party**” means any of CMH’s agents, contractors and subcontractors of any tier and its or their directors, officers and employees, and other persons engaged in respect of the Work, including CMH’s Project Manager and the Consultant but excluding Project Co and any Project Co Party, and the term “**CMH Parties**” shall be construed accordingly.
- 1.37 “**CMH Permits, Licences and Approvals**” means:
- (a) the Building Permits;
  - (b) any permanent easements; and
  - (c) any rights of servitude, pertaining to the Project.
- 1.38 “**CMH’s Project Manager**” means the individual appointed by CMH to assist CMH in the implementation of the Project.
- 1.39 “**CMH Taxes**” means taxes or payments in lieu of taxes imposed on CMH, based on or measured by income or profit of CMH or capital taxes based on or measured by the capital of CMH and HST and property taxes for which CMH is responsible pursuant to the provisions of the Project Agreement.
- 1.40 “**Commercial Close**” has the meaning given in Section 2.1(a) of the Project Agreement.
- 1.41 “**Commissioning**” shall mean the process of:
- (a) moving a building from a static condition to a dynamic condition;
  - (b) preparing a building, or a system for its intended use; and
  - (c) the management of testing, verifying, recording and documenting and the training of CMH’s employees regarding the operation of systems within a building to assure specified operations through the range of operating conditions,

and shall include, for greater certainty but without limitation, the requirement that all active building systems and technologies forming part of the Work perform in accordance with the design intent, manufacturer's performance specifications and the Contract Documents.

- 1.42 **"Commissioning Agent"** shall mean the person or entity chosen by CMH, if any, to assist with Commissioning.
- 1.43 **"Compensation Event"** has the meaning given in Section 23.1(a) of the Project Agreement.
- 1.44 **"Compensation Payment"** means the Default Termination Payment or the Non Default Termination Sum, as defined in Schedule 12 – Compensation on Termination.
- 1.45 **"Confidant"** has the meaning given in Section 38.7(a)(i) of the Project Agreement.
- 1.46 **"Confidential Information"** means all confidential and proprietary information which is supplied by or on behalf of a Party, whether before or after the date of the Project Agreement, which is clearly marked as confidential or proprietary when first disclosed, including information disclosed orally if it is identified as confidential at the time of disclosure and further confirmed in writing as confidential within 14 days of disclosure.
- 1.47 **"Construction Contract"** means the guaranteed price construction contract between Project Co and the Contractor dated on or about the date of the Project Agreement.
- 1.48 **"Construction Guarantor"** means Bondfield Construction Company Limited.
- 1.49 **"Construction Schedule"** means each detailed computerized schedule prepared by Project Co in accordance with the terms and conditions of the Contract Documents, as updated from time to time in accordance with Section 12.1 of the Project Agreement.
- 1.50 **"Construction Work"** means the construction, supply, installation, testing, Commissioning and completion of the Facility, including, rectification of any Minor Deficiencies, all warranty work and any other related activities required pursuant to the provisions of the Project Agreement, provided, however, that for the purpose of this defined term, the term "Project Agreement" shall be deemed not to include any of the activities, covenants, terms or conditions contained in the list set out below in numbered items (a) through (n) inclusive (including the actual executed versions of the documents referred to below), and for greater certainty shall not include any covenant, agreement, undertaking or obligation related to the Financing or the Cost of Financing:

- (a) Recitals
- (b) Article 2

- (c) Sections 4.2, 4.3, 4.4 and 4.9
  - (d) Sections 6.3 and 6.4
  - (e) Article 7
  - (f) Section 26.1(a)(iii)
  - (g) Sections 39.3(c) and 39.3(d)
  - (h) Article 42
  - (i) Schedule 3 – Completion Documents
  - (j) Schedule 4 – Project Co Information
  - (k) Schedule 5 – Form of Lender’s Direct Agreement
  - (l) Schedule 8 – Financial Model and Financial Information
  - (m) Schedule 18 – Payments and Holdbacks
  - (n) Schedule 22 – Form of Performance Guarantee of Construction Guarantor
  - (o) Schedule 23 – Form of Assignable Subcontract Agreement for Construction Contract
  - (p) Schedule 24 – Form of Trust Account Acknowledgment Agreement
- 1.51** “**Consultant**” means Stantec Architecture Ltd., Architects, or such other architect or engineer or entity licensed to practice in the Province of Ontario, as may be appointed from time to time by CMH. The term Consultant means the Consultant or the Consultant’s representative.
- 1.52** “**Contamination**” means the presence of any Hazardous Substance in the environment, except Hazardous Substances present in the environment in concentrations below applicable standards as set by Applicable Law. If Contamination is present in soil, surface water or groundwater, then the soil, surface water or groundwater, as applicable, containing the Contamination shall also be deemed for the purposes of the Project Agreement to be Contamination.
- 1.53** “**Contemplated Change Notice**” means a notice from CMH to Project Co describing a contemplated Change in the Scope of the Work.

- 1.54 “**Contract Documents**” means the Project Agreement, the Construction Contract, the Drawings and Specifications, the Addenda, the Site Information and Assignable Subcontract Agreements.
- 1.55 “**Contract Time**” is the time stipulated in Section 11.1(a)(ii) of the Project Agreement from commencement of the Work to the applicable Phased Occupancy Dates, to the Interim Completion Date, to the Substantial Completion Date and to the Final Completion Date.
- 1.56 “**Contractor**” means Bondfield Construction Company Limited, engaged by Project Co to perform the Work and any substitute building contractor engaged by Project Co as may be permitted by the Project Agreement.
- 1.57 “**Cost of the Financing**” means all costs and expenses incurred in connection with the Financing pursuant to the indicative financing term sheet included in the Proposal Submission and Lending Agreements, including all interest, fees, expense reimbursements, pre-payment and breakage costs and all other costs and expenses, as set out in Schedule 8 – Financial Model and Financial Information.
- 1.58 “**Cost of the Work**” means the cost to Project Co of performing the Work as set out in Schedule 8 – Financial Model and Financial Information and shall include all amounts to be included in the Cost of the Work set out in the Contract Documents, including, for greater certainty, the Project Co Design Contingency and the Project Co Fee.
- 1.59 “**CPM**” has the meaning given in Section 12.1(a)(ii) of the Project Agreement.
- 1.60 “**Debt Amount**” has the meaning given in Schedule 12 - Compensation on Termination.
- 1.61 “**Debt Service Amount**” means, for any period, the principal and interest payable by Project Co or any Project Co Party to the Lenders in the normal course under the Lending Agreements.
- 1.62 “**Default Termination Payment**” has the meaning given in Schedule 12 - Compensation on Termination.
- 1.63 “**Delay Events**” has the meaning given in Section 22.1(a) of the Project Agreement.
- 1.64 “**Design Issue**” means any matter arising under, with respect to, or in connection with the Contract Documents, and in particular, the Drawings and Specifications, which requires clarification in order to complete the Work.
- 1.65 “**Direct Losses**” means all damages, losses, liabilities, penalties, fines, assessments, claims, actions, costs, expenses (including the reasonable cost of legal or professional services, legal costs being on a full indemnity basis), suits, proceedings, demands and

charges, whether arising under statute, contract or at common law, except Indirect Losses.

**1.66 “Direct or Indirect Power or Control”** means the direct or indirect power or control over the decisions, management, actions or policies of a person, including through the direct or indirect power or control over the decisions, management, actions or policies of any persons having direct or indirect power or control over the decisions, management, actions or policies of any other person, whether through:

- (a) ownership, beneficial or otherwise, of any of the shares, units or equity interests of a person;
- (b) the direct or indirect power to vote any of the shares, units or equity interests of a person; or
- (c) the direct or indirect power or authority to influence or direct the approval of a decision, the management, actions or policies of a person or to prevent the approval of a decision, the management, actions or policies of a person through any contractual right or other power or interest with or over a person.

**1.67 “Disclosed Hazardous Substances”** has the meaning given in Section 14.1(c)(i) of the Project Agreement.

**1.68 “Discriminatory Change in Law”** means any Change in Law the effect of which is to discriminate directly against or impose additional Taxes which apply specifically to:

- (a) hospitals whose construction and financing are procured by a contract similar to the Project Agreement in relation to other similar hospitals;
- (b) the Facility in relation to other hospitals;
- (c) Project Co in relation to other persons; or
- (d) persons undertaking projects for construction and financing that are procured by a contract similar to the Project Agreement in relation to other persons undertaking similar projects procured on a different basis,

except that such Change in Law shall not be a Discriminatory Change in Law:

- (e) where it is in response to any act or omission on the part of Project Co which contravenes Applicable Law (other than an act or omission rendered illegal by virtue of the Discriminatory Change in Law itself);
- (f) solely on the basis that its effect on Project Co is greater than its effect on other companies; or

- (g) where such Change in Law is a change in Taxes that affects companies generally.
- 1.69 **“Dispute Resolution Procedure”** means the procedure set out in Schedule 14 – Dispute Resolution Procedure.
- 1.70 **“Drawings”** or **“drawings”** means the graphic and pictorial portions of the Contract Documents, wherever located and whenever issued, showing the design, location, and dimensions of the Work, and generally including plans, elevations, sections, details, schedules and diagrams and includes those Drawings listed in Schedule 2 – List of Consultants, Drawings and Specifications.
- 1.71 **“Economic Interest”** means any right to receive, directly or indirectly and whether in cash or in kind, a payment, repayment, fee, interest, dividend, distribution, redemption or any other consideration of benefit or value to the recipient of any nature whatsoever.
- 1.72 **“Emergency”** means any situation, event, occurrence, multiple occurrences or circumstances:
- (a) that:
- (i) constitutes or may constitute a hazard to or jeopardizes or may jeopardize or pose a threat to health and safety of any persons (including CMH) or any part of or the whole of the Facility;
- (ii) causes or may cause damage or harm to property, buildings and/or equipment; or
- (iii) materially interferes with or prejudices or may materially interfere with or prejudice the safe operation of the Facility, any part of the Site or, the conduct of Work,
- and which, in the opinion of CMH, requires immediate action to prevent and/or mitigate the occurrence (or risk of the occurrence) of the foregoing; or
- (b) which gives rise to an emergency, as determined by any statutory body including (notwithstanding the generality of the foregoing) the police, the armed forces, fire or ambulance services.
- 1.73 **“Encumbrance”** means any mortgage, lien, pledge, judgment, execution, charge, security interest, restriction, claim or encumbrance of any nature whatsoever, including claims of the Workplace Safety and Insurance Board, Canada Revenue Agency, and other Governmental Authorities.
- 1.74 **“Environmental Reports”** means:



- (a) “Cambridge Memorial Hospital, Final Phase One Environmental Site Assessment”, prepared by MTE, MTE File no 32713-200, dated February 22, 2013;
  - (b) “Cambridge Memorial Hospital, Final Phase Two Environmental Site Assessment”, prepared by MTE, MTE File no 32713-200, dated March 31, 2013; and
  - (c) “Cambridge Memorial Hospital, Final Supplemental Investigation” prepared by MTE, MTE File no 32713-200, dated October 4, 2013, 2013.
- 1.75 “Equipment”** means all equipment listed in Volume 7 of the Specifications, being the Type A Equipment, the Type B Equipment, the Type C Equipment, the Type D Equipment and the Type E Equipment.
- 1.76 “Equipment List”** means the list of the Equipment contained in Volume 7 of the Specifications.
- 1.77 “Equipment Subcommittee”** has the meaning given in Section 13.6(a) of the Project Agreement.
- 1.78 “Existing Facility”** means the existing hospital building of CMH within parts of which and adjoining which the Work will occur.
- 1.79 “Facility”** means:
- (a) all buildings, facilities and other structures;
  - (b) all site services, utilities, roadways and parking spaces required to support such buildings, facilities and structures; and
  - (c) all supporting systems, infrastructure and improvements.
- required by the Contract Documents and whether or not in the course of construction, installation or completion of the Project and generally described as the Cambridge Memorial Hospital Capital Redevelopment Project. This description does not in any manner limit the scope of the Work as set out in the Contract Documents.
- 1.80 “Final Completion”** shall occur when the Work, except those items arising from the provisions of Article 36, has been deemed to have been completed in accordance with the applicable provisions of the *Construction Lien Act* (Ontario) and is so certified by the Consultant in accordance with the Project Agreement, including satisfying the requirements of Section 4 of Schedule 18.

- 1.81 “**Final Completion Certificate**” means the certificate to be issued by the Consultant in accordance with Section 16.4 of the Project Agreement.
- 1.82 “**Final Completion Countdown Notice**” has the meaning given in Section 16.3(a) of the Project Agreement.
- 1.83 “**Final Completion Date**” means the date on which Final Completion is achieved as evidenced by the certificate of Final Completion of the Work issued by the Consultant, as such date shall be stated therein.
- 1.84 “**Final Completion Notice**” has the meaning given in Section 16.4(b) of the Project Agreement.
- 1.85 “**Financial Close**” means the date of execution and delivery of the Implementing Agreements and the Lending Agreements.
- 1.86 “**Financial Close Target Date**” means August 28, 2014 as such date may be extended in accordance with the provisions of the Project Agreement.
- 1.87 “**Financial Model**” means the Financial Model included in Schedule 8 – Financial Model and Financial Information.
- 1.88 “**Financing**” means the financing with Lender that is consistent in all material respects with Schedule 8 - Financial Model and Financial Information and the Project Agreement, to finance the Base Progress Payments until the Substantial Completion Payment Date.
- 1.89 “**FIPPA**” means the *Freedom of Information and Protection of Privacy Act* (Ontario).
- 1.90 “**Force Majeure**” has the meaning given in Section 25.1(a) of the Project Agreement.
- 1.91 “**Funding Letter**” means the funding letter from the MOHLTC to CMH dated August 14, 2014 evidencing the commitment of the MOHLTC to fund a portion of CMH’s financial obligations under the Project Agreement and the other Implementing Agreements, as amended, supplemented, restated or replaced from time to time, in accordance with the Project Agreement.
- 1.92 “**Geotechnical Reports**” means:
- (a) “Cambridge Memorial Hospital, Geotechnical Investigation”, prepared by exp Services Inc., dated June 2013; and
  - (b) “Cambridge Memorial Hospital, Geotechnical Comments for BH30”, prepared by exp Services Inc., dated January 29, 2013.

- 1.93 **“Good Industry Practice”** means using standards, practices, methods and procedures to a good commercial standard, in conformity with Applicable Law and having regard to the standard of care set out in Section 11.2(a)(viii) of the Project Agreement.
- 1.94 **“Government Entity”** means one or more of the Province, MEDEI, MOHLTC, CMH and the Government of Canada.
- 1.95 **“Governmental Authority”** means the MOHLTC and any other federal, provincial, territorial, regional, municipal or local governmental authority, quasi-governmental authority, court, government or self-regulatory organization, commission, board, tribunal, organization, or any regulatory, administrative or other agency, or any political or other subdivision, department, or branch of any of the foregoing, having legal jurisdiction in any way over the Project, any aspect of the performance of the Project Agreement or any of the Implementing Agreements in each case to the extent it has or performs legislative, judicial, regulatory, administrative or other functions within its jurisdiction.
- 1.96 **“Guarantee of Construction Guarantor”** means a guarantee given by Construction Guarantor in the form of Schedule 22.
- 1.97 **“Guaranteed Price”** is the amount referred to in Section 3.1(a) of the Project Agreement.
- 1.98 **“Hazardous Substances”** means any contaminant, pollutant, dangerous substance, toxic substance, liquid waste, industrial waste, gaseous waste, hauled liquid waste, hazardous material, or hazardous substance as defined or identified pursuant to any Applicable Law.
- 1.99 **“Health Specific Change in Law”** means any Change in Law which principally affects or principally relates only to the provision or operation of healthcare premises.
- 1.100 **“Hedge Provider”** means a person that has entered into a Hedging Agreement with Project Co pursuant to the Lending Agreements, together with their successors and permitted assigns.
- 1.101 **“Hedging Agreement”** means an agreement relating to the hedging of interest rate risk entered into by Project Co and the Hedge Provider(s) pursuant to the Lending Agreements.
- 1.102 **“HST”** means the value-added tax payable and imposed pursuant to Part IX of the *Excise Tax Act* (Canada), and any successor legislation thereto.
- 1.103 **“Implementing Agreements”** means the Construction Contract, the Guarantee of Construction Guarantor, the Lender’s Direct Agreement and all other documents and agreements delivered by the Parties at Financial Close under Section 2.3 of the Project Agreement, excluding the Project Agreement, the Lending Agreements and Project Co’s public announcement release(s).

- 1.104 “**Indemnifiable Taxes**” has the meaning given in Section 4.21(b)(ii)(A) of the Project Agreement.
- 1.105 “**Indemnifier**” has the meaning given in Section 33.3(a) of the Project Agreement.
- 1.106 “**Indirect Losses**” has the meaning given in Section 35.1(a) of the Project Agreement.
- 1.107 “**Infrastructure Ontario**” or “**IO**” means the Ontario Infrastructure and Lands Corporation.
- 1.108 “**Insurance**” means the insurance contemplated in Schedule 13 – Insurance and Performance Security.
- 1.109 “**Insurance and Bonding Trust Agreement**” means the agreement substantially in the form of Schedule 17 – Form of Insurance and Bonding Trust Agreement.
- 1.110 “**Interest Rate**” means [1.950%] as adjusted by the increase or decrease in the Interest Reference Rate as set out in Section 3.1(b) of the Project Agreement.
- 1.111 “**Interest Reference Rate**” means the reference benchmark rate of interest identified in the Financial Model and used in the calculation of the Project Debt Interest Cost, and for greater clarity, is the base rate of interest exclusive of any stated or imbedded spread, (including credit, swap or other types of spread) or fees.
- 1.112 “**Interim Completion**” means that:
- (a) Project Co has performed its obligations under Section 16.1 of the Project Agreement;
  - (b) the Interim Work is available for occupancy by CMH in accordance with the standards for occupancy set out in the Building Code and the requirements of local municipal building authorities in the City of Cambridge;
  - (c) the Commissioning of the Interim Work has been completed in accordance with the Contract Documents to the extent required to meet the requirements for occupancy of the Interim Work set out in the Building Code and the building services required for CMH to carry out its Commissioning activities with respect to the Interim Work are available in accordance with the Specifications; and
  - (d) all Interim Work Deliverables other than those included as Interim Minor Deficiencies in accordance with Section 16.1(g) of the Project Agreement have been assigned and provided to CMH.

- 1.113 **“Interim Completion Date”** means the date on which Interim Completion is achieved as evidenced by the certificate of Interim Completion issued by the Consultant, as such date shall be stated therein.
- 1.114 **“Interim Completion Payment”** means \$65,000,000.
- 1.115 **“Interim Completion Payment Date”** means the 10<sup>th</sup> Business Day following the date of delivery by the Consultant of its report under Section 16.1(c) of the Project Agreement confirming Interim Completion.
- 1.116 **“Interim Deliverables”** has the meaning given in Section 16.1(g) of the Project Agreement.
- 1.117 **“Interim Minor Deficiencies”** means any defects, deficiencies and items of outstanding Interim Work (including in relation to seasonal work), which would not materially impair CMH’s use and enjoyment of the Interim Work and includes any damage to the Interim Work of CMH’s own forces or the work of CMH’s other contractors caused by Project Co.
- 1.118 **“Interim Minor Deficiencies List”** means the list of Minor Deficiencies prepared by the Consultant in accordance with Section 16.1(b) of the Project Agreement.
- 1.119 **“Interim Preliminary Minor Deficiencies List”** means the list of Minor Deficiencies identified by Project Co in accordance with Section 16.1(a) of the Project Agreement.
- 1.120 **“Interim Work”** means all work required for completion and commissioning and the achievement of the Phased Occupancy Date in respect of “Phase 2” as such Phase is defined in the Specifications, including the required,
- (a) civil, architectural, mechanical, electrical and structural work; and
  - (b) tie in to the Existing Facility,
- as described in the Contract Documents, and including rectification of any Interim Minor Deficiencies, any portion of the Work requiring completion in order to allow the occupancy by CMH of the Interim Work, and other activities required pursuant to the provisions of the Project Agreement and, for greater certainty, does not include the Financing.
- 1.121 **“IPFP Framework”** has the meaning given in Recital D of the Project Agreement.
- 1.122 **“Junior Lenders”** – there are no Junior Lenders under the Project Agreement and any reference to “Junior Lenders” in the Project Agreement shall have no force or effect.
- 1.123 **“Key Personnel”** has the meaning given in Section 8.4(a) of the Project Agreement.

- 1.124 “**Labour and Material Payment Bond**” means, collectively, the Labour and Material Payment Bond and the Multiple Obligee Rider to Labour and Material Payment Bond in the form attached as Appendix C to Schedule 13 – Insurance and Performance Security Requirements.
- 1.125 “**Legislative Holdback**” means the holdback to be maintained under Part IV of the *Construction Lien Act* (Ontario).
- 1.126 “**Legislative Holdback Payment Date**” means the date for payment of the Legislative Holdback pursuant to Section 4 of Schedule 18 - Payments and Holdbacks.
- 1.127 “**Lender**” means any or all of the persons acting arm’s length to Project Co and each Project Co Party who provide the Financing, including Bank of Montreal, Caisse Centrale Desjardins and The Toronto-Dominion Bank, and for greater clarity, excludes any Affiliate of Project Co or of a Project Co Party.
- 1.128 “**Lender’s Consultant**” means any consultant appointed from time to time by Lender providing Financing for the Work. Nothing contained in the Contract Documents and no action taken by Lender’s Consultant in connection with the Work or the Contract Documents shall constitute direction and/or control by CMH, Project Co or Lender providing Financing for the Work.
- 1.129 “**Lender’s Direct Agreement**” means the direct agreement to be entered into between CMH, Lender and Project Co in the form set out in Schedule 5 – Lender’s Direct Agreement.
- 1.130 “**Lending Agreements**” has the meaning given in Schedule 5 – Lender’s Direct Agreement.
- 1.131 “**Local Health Integration Network**” means the Local Health Integration Network as defined pursuant to the *Local Health System Integration Act* (Ontario).
- 1.132 “**Longstop Date**” has the meaning given in Section 26.1(a)(ii) of the Project Agreement.
- 1.133 “**Make Good**”, “**Made Good**” and derivatives thereof, means repairing, restoring, refurbishing, rehabilitating or performing filling operation on the Work as required under the Contract Documents or any existing components disturbed due to the Work, to at least the condition existing at the commencement of the Work, in terms of construction integrity, finishes, alignment with existing adjoining surfaces, compatibility of materials, sound attenuation criteria, exfiltration/infiltration requirements, air/vapour barrier and thermal continuity.
- 1.134 “**MEDEI**” means Her Majesty the Queen in right of Ontario as represented by the Minister of Economic Development, Employment and Infrastructure, and includes any successors thereto or persons exercising delegated power under the Minister’s authority.

- 1.135 “**Minor Deficiencies**” means any defects, deficiencies and items of outstanding Work (including in relation to seasonal work), which would not materially impair CMH’s use and enjoyment of the Work and includes any damage to the Work of CMH’s own forces or the work of CMH’s other contractors caused by Project Co.
- 1.136 “**Minor Deficiencies List**” has the meaning given in Section 16.2(b) of the Project Agreement.
- 1.137 “**MOHLTC**” means Her Majesty the Queen in right of Ontario as represented by the Minister of Health and Long-Term Care, and includes any successors thereto or persons exercising delegated power under such Minister’s authority.
- 1.138 “**Multiple Obligee Rider to Labour and Material Payment Bond**” means the Multiple Obligee Rider amending the Labour and Material Payment Bond to add CMH and Lender as additional named Obligees, in the form attached as Exhibit 1 to Appendix C of Schedule 13 – Insurance and Performance Security Requirements.
- 1.139 “**Multiple Obligee Rider to Performance Bond**” means the Multiple Obligee Rider amending the Performance Bond to add CMH and Lender as additional named Obligees, in the form attached as Exhibit 1 to Appendix B of Schedule 13 – Insurance and Performance Security Requirements.
- 1.140 “**No-Default Payment Compensation Amount**” means the rate of interest per annum quoted by Bank of Montreal from time to time as its reference rate for Canadian Dollar demand loans made to its commercial customers in Canada and which it refers to as its “prime rate”, as such rate may be changed from time to time.
- 1.141 “**Non-Default Termination Sum**” has the meaning given in Schedule 12 – Compensation on Termination.
- 1.142 “**Non-Resident**” means a person that is, at the relevant time, a non-resident of Canada for the purposes of the *Income Tax Act* (Canada).
- 1.143 “**Notice**” has the meaning given in Section 42.1(a) of the Project Agreement.
- 1.144 “**Notice of Project**” means a notice of project filed with the Ministry of Labour in compliance with O. Reg. 213/91 under the OHSA.
- 1.145 “**OHSA**” means the *Occupational Health and Safety Act* (Ontario).
- 1.146 “**Overhead and Profit Fee**” means the amount stipulated in Schedule 11 – Change Procedure, which excludes HST.
- 1.147 “**Party**” means either CMH or Project Co, and “**Parties**” means both CMH and Project Co, but, for greater certainty, such definitions do not include IO or the Province,

including Her Majesty the Queen in right of Ontario, as represented by either the Minister of Health and Long-Term Care or the Minister of Infrastructure, or otherwise.

- 1.148 “Patient Information”** means Personal Information of patients and clients of CMH and other users of the Facility.
- 1.149 “Payment Compensation Amount”** means an amount equal to simple interest at an annual rate equal to 2% over the rate of interest per annum quoted by Bank of Montreal from time to time as its reference rate for Canadian Dollar demand loans made to its commercial customers in Canada and which it refers to as its “prime rate”, as such rate may be changed from time to time.
- 1.150 “Performance Bond”** means collectively, the Performance Bond and the Multiple Obligor Rider to the Performance Bond in the form attached as Appendix B to Schedule 13 – Insurance and Performance Security Requirements.
- 1.151 “Permits, Licences and Approvals”** means the CMH Permits, Licences and Approvals and the Project Co Permits, Licences and Approvals.
- 1.152 “Permitted Borrowing”** means:
- (a) any advance to Project Co under the Lending Agreements;
  - (b) any additional financing approved by CMH in accordance with Section 2.10 of Schedule 11 – Change Procedure to the Project Agreement; and
  - (c) any amendment, waiver or exercise of a right under the Lending Agreements made during the Step-In Period that does not increase CMH’s liabilities under the Project Agreement whether actual or contingent, present or future, known or unknown.
- 1.153 “Personal Information”** means all personal information (as the term “personal information” is defined in the *Personal Information and Electronic Documents Act* (Canada) in the custody or control of Project Co or the Project Co Parties, other than personal information of employees of Project Co or the Project Co Parties that is wholly unrelated to the Work and not derived directly or indirectly from CMH or any CMH Party in respect of the Project.
- 1.154 “Phased Occupancy Date”** means the date when a Phase of the Work intended to be occupied by CMH as set out in the Contract Documents prior to Substantial Completion or as established by Project Co and CMH under Section 12.1(a)(i) of the Project Agreement, meets the requirements of Section 11.12(c) of the Project Agreement.
- 1.155 “Phases”** means the phases of the Work described in the Contract Documents, including Division 01 and “Phase” means any of the Phases.



- 1.156 **“Phasing Requirements”** means the distinct Phases of the Project as described in Section 01 31 40 – Contract Sequencing of the Specifications.
- 1.157 **“Pre-Existing Environmental Site Conditions”** means the environmental condition of the Site as set out in the Environmental Reports.
- 1.158 **“Procurement Monitoring and Implementation Plan”** means the plan set out in Schedule 15 to the Project Agreement.
- 1.159 **“Product” or “Products”** means material, machinery, equipment and fixtures forming the Work but does not include machinery and equipment used to prepare, fabricate, convey or erect the Work, which is referred to as construction machinery and equipment.
- 1.160 **“Prohibited Act”** has the meaning given in Section 41.1(a) of the Project Agreement.
- 1.161 **“Project”** means the construction and financing of the Facility.
- 1.162 **“Project Agreement”** means this Project Agreement and all schedules hereto, as the same may be amended, modified, restated, supplemented or replaced from time to time and for greater certainty, includes the Addenda but does not include the Proposal Submission or any of the responses to requests for information submitted by Project Co pursuant to the Request for Proposals, all of which are superseded by this Project Agreement and the Addenda.
- 1.163 **“Project Co”** means 2423402 Ontario Inc.
- 1.164 **“Project Co Construction Event of Default”** means a Project Co Event of Default relating to a failure or breach by Project Co to perform, observe or comply with any covenants, agreements, obligations or liabilities with respect to the Construction Work, excluding a default under Section 26.1(a)(xii) of the Project Agreement relating to a default by the Construction Guarantor under the guarantee of the Construction Guarantor, the form of which is attached to this Project Agreement as Schedule 22.
- 1.165 **“Project Co Delay”** means any delay in achieving the Phased Occupancy Dates, Interim Completion, Substantial Completion or Final Completion by the prescribed dates set out in Section 11.1(a)(ii) of the Project Agreement, other than as expressly permitted under Article 22 of the Project Agreement.
- 1.166 **“Project Co Design Contingency” or “PDC”** is the portion of the Guaranteed Price which comprises all the costs (including the Project Co Fee) to implement an acceptable resolution to any and all Design Issues that are properly characterized as Project Co Design Issues.
- 1.167 **“Project Co Design Issue”** has the meaning given in Section 11.17(b) of the Project Agreement.

- 1.168 **“Project Co Event of Default”** has the meaning given in Section 26.1(a) of the Project Agreement.
- 1.169 **“Project Co Fee”** means a fixed fee payable to Project Co included in the Cost of the Work.
- 1.170 **“Project Co Group”** means Project Co together with any person or group of persons, who, either individually or collectively, have Direct or Indirect Power or Control of Project Co.
- 1.171 **“Project Co Hazardous Substances”** has the meaning given in Section 14.1(d)(i) of the Project Agreement.
- 1.172 **“Project Co Indemnified Hazardous Substances Claims”** has the meaning given in Section 33.1(a)(viii) of the Project Agreement.
- 1.173 **“Project Co Indemnified Parties”** has the meaning given in Section 33.2(a) of the Project Agreement.
- 1.174 **“Project Co Party”** means:
- (a) the Contractor;
  - (b) Construction Guarantor;
  - (c) any person engaged by Project Co and/or the Contractor, from time to time, as may be permitted by the Project Agreement to procure or manage the provision of the Work (or any part thereof); and
  - (d) in respect of each of the above, their Subcontractors or Suppliers of any tier, agents, employees, officers and directors,
- and **“Project Co Parties”** shall be construed accordingly.
- 1.175 **“Project Co Permits, Licences and Approvals”** means all permissions, consents, approvals, certificates, permits, licences, statutory agreements and authorizations to be obtained by Project Co in accordance with the Project Agreement and as required by Applicable Law, other than the CMH Permits, Licenses and Approvals.
- 1.176 **“Project Co’s Preliminary Minor Deficiencies List”** has the meaning given in Section 16.2(a) of the Project Agreement.
- 1.177 **“Project Debt”** means the principal amount issued and secured by the Lending Agreements.

- 1.178 **“Project Debt Interest Cost”** means the budgeted amount of aggregate interest charges in respect of the Project Debt used to calculate the Cost of the Financing portion of the Guaranteed Price.
- 1.179 **“Project Deliverables”** has the meaning given in Section 16.2(i) of the Project Agreement.
- 1.180 **“Project Documents”** means the Implementing Agreements and the Lending Agreements.
- 1.181 **“Project Term”** means the period commencing on the date of the Project Agreement and expiring at midnight on the Termination Date.
- 1.182 **“Proposal Submission”** means the proposal submitted by Project Co in accordance with the Request for Proposals.
- 1.183 **“Proprietor”** has the meaning given in Section 38.7(a) of the Project Agreement.
- 1.184 **“Province”** means Her Majesty the Queen in Right of Ontario.
- 1.185 **“Recovery Amount”** has the meaning given in Section 33.3(g) of the Project Agreement.
- 1.186 **“Refinancing”** has the meaning given in Schedule 28 – Refinancing.
- 1.187 **“Reimbursement Event”** has the meaning given in Section 19.5(a) of the Project Agreement.
- 1.188 **“Release”** has the meaning given in Section 14.1(c)(iii) of the Project Agreement.
- 1.189 **“Relevant Change in Law”** means any Change in Law that:
- (a) requires Project Co to perform any work of alteration, addition, demolition, extension or variation in the quality or function of the Facility which Project Co would not otherwise be required to perform in order to comply with its obligations under the Project Agreement; and
  - (b) was not reasonably foreseeable at the date of the Project Agreement by an experienced contractor carrying out and performing activities similar to those to be carried out and/or performed by any Project Co Party in relation to the Project,
- and includes a Discriminatory Change in Law and a Health Specific Change in Law.
- 1.190 **“Relief Event”** has the meaning given in Section 24.1(a) of the Project Agreement.

- 1.191 “Request for Proposals” or “RFP”** means the request for proposals issued for the delivery by Infrastructure Ontario and CMH for the delivery of the Project dated November 14, 2013.
- 1.192 “Restricted Person”** means any person who, or any member of a group of persons acting together, any one of which:
- (a) has, directly or indirectly, its principal or controlling office in a country that is subject to any economic or political sanctions imposed by Canada or Ontario;
  - (b) has as its primary business the illegal manufacture, sale, distribution or promotion of narcotics substances or arms, or is or has been involved in terrorism;
  - (c) in the case of an individual, he or she (or in the case of a legal entity, any of the members of its board of directors or its senior executive managers) has been sentenced to imprisonment or otherwise given a custodial sentence, other than a suspended sentence, for any criminal offence or for any offence under any Provincial statute, other than offences under the *Highway Traffic Act* or corresponding legislation in any other jurisdiction, or under any municipal laws, less than five years prior to the date at which the consideration of whether such individual is a “**Restricted Person**” is made hereunder;
  - (d) has as its primary business the acquisition of distressed assets or investments in companies or organizations which are or are believed to be insolvent or in a financial standstill situation or potentially insolvent;
  - (e) is subject to a material claim of CMH or the Province under any proceedings (including regulatory proceedings) which have been concluded or are pending at the time at which the consideration of whether such person is a “**Restricted Person**” is made hereunder, and which (in respect of any such pending claim, if it were to be successful) would, in CMH’s view, in either case, be reasonably likely materially to affect the ability of Project Co to perform its obligations under the Project Agreement; or
  - (f) has a material interest in the production of tobacco products.
- 1.193 “Risk Assessment Guidelines”** means the Risk Assessment Guidelines for the Project set out in Schedule 16 – Risk Assessment Guidelines.
- 1.194 “Schedule”** means a schedule to the Project Agreement.
- 1.195 “Schedule Cushion”** means a schedule contingency added to the last activity on the critical path of the Construction Schedule and consisting of 30 days duration. The Schedule Cushion shall be included in the Construction Schedule and, for greater certainty, the Schedule Cushion shall not extend the Contract Time. CMH has ownership

of the Schedule Cushion and can elect to use it at any time in respect of an CMH initiated Change Order, or upon the occurrence of a Delay Event which would otherwise grant to Project Co an extension of the Contract Time, provided any portion of the Schedule Cushion which has not been used by CMH prior to the Substantial Completion Date will be given to Project Co. Use of the Schedule Cushion by CMH shall not result in any right of Project Co to a claim for an increase in the Cost of the Financing.

- 1.196 “Scheduled Final Completion Date”** means May 15, 2019.
- 1.197 “Scheduled Interim Completion Date”** means November 30, 2016, as such date may be extended pursuant to Article 22 of the Project Agreement.
- 1.198 “Scheduled Substantial Completion Date”** means a date that is no later than March 31, 2019 as such date may be extended pursuant to Article 22 of the Project Agreement.
- 1.199 “Security”** means the Bonds, the Insurance and any other security interests granted by Project Co to the Agent pursuant to the Security Documents.
- 1.200 “Security Documents”** means all security granted by Project Co to the Lenders (or any trustee or agent thereof, including the Agent) pursuant to or in connection with the Lending Agreements, including but not limited to:
- (a) the general security agreement made on or about the date hereof between Project Co and the Agent;
  - (b) the direct agreement between Project Co, the Agent and the Contractor;
  - (c) the assignment of material documents by Contractor;
  - (d) assignment of accounts by Project Co;
  - (e) limited recourse guarantee and pledge agreements; and
  - (f) the blocked account agreement.
- 1.201 “Senior Lenders”** shall have the same meaning as the Lender.
- 1.202 “Severe Market Disruption”** means any occurrence of exceptional circumstances in financial markets in Europe, the United States of America and/or Canada which:
- (a) results in the suspension or cessation of all or substantially all lending activity in national or relevant international capital or interbank markets; and
  - (b) adversely affects access by Project Co to such markets.

- 1.203 “**Shareholder(s)**” means a Party listed in Schedule 4 – Project Co Information, as amended from time to time in accordance with the Project Agreement.
- 1.204 “**Shop Drawings**” or “**shop drawings**” means drawings, diagrams, illustrations, schedules, performance charts, brochures, samples, Product data, and other data which Project Co provides to illustrate details of a portion of the Work.
- 1.205 “**Shop Drawing Schedule**” means the schedule for the submission of shop drawings described in Section 11.11(c) of the Project Agreement.
- 1.206 “**Site**” means the land of CMH located in the City of Cambridge, Ontario as described in Schedule 25 - Legal Description of the Lands.
- 1.207 “**Site Background Reports**” means the Environmental Reports and the Geotechnical Reports.
- 1.208 “**Site Information**” means:
- (a) the Site Background Reports;
  - (b) other information respecting the Site in the Contract Documents, including infrastructure drawings and other reports, information or plans; and
  - (c) information that would have been properly inferable, readily apparent or readily discoverable to Project Co from its inspections of the Site carried out by Project Co or by any Project Co Party during the Request for Proposals process prior to the Submission Date.
- 1.209 “**Sole Discretion**” has the meaning given in Section 1.1(e) of the Project Agreement.
- 1.210 “**Specifications**” means that portion of the Contract Documents, wherever located and whenever issued, consisting of written requirements and standards for Products, systems, workmanship and the services necessary for the performance of the Work and includes those Specifications listed in Schedule 2 – List of Consultants, Drawings and Specifications.
- 1.211 “**Standby Letter of Credit**” has the meaning given in Section 2.2(a) of the Project Agreement.
- 1.212 “**Sub-Subcontractor**” means a person or entity at any tier of the contracting chain beneath a Subcontractor or Supplier, who performs a part or parts of the Work, or supplies Products worked to a special design for the Work or who supplies work, services, materials, equipment or labour in any respect of the Work or who supplies Products not worked to a special design for the Work.

- 1.213 “**Subcontractor**” means a person or entity having a direct contract with Project Co to perform all or a part or parts of the Work, or to supply Products worked to a special design for the Work or who supplies work, services or labour in any respect of the Work.
- 1.214 “**Subcontracts**” means the contracts entered into by or between Project Co and any Project Co Party at any tier, including the Contractor and any other Subcontractor at any tier in relation to any aspect of the Work.
- 1.215 “**Submission Date**” means April 23, 2014.
- 1.216 “**Substantial Completion**” means:
- (a) Project Co has performed its obligations under Article 16 of the Project Agreement;
  - (b) the Work is available for occupancy by CMH in accordance with the standards for occupancy set out in the Building Code and the requirements of local municipal building authorities in the City of Cambridge;
  - (c) the Commissioning of the Work has been completed in accordance with the Contract Documents to the extent required to meet the requirements for occupancy of the Work set out in the Building Code and the building services required for CMH to carry out its Commissioning activities are available in accordance with the Specifications; and
  - (d) all Project Deliverables, other than those included as Minor Deficiencies in accordance with Section 16.2(h) of the Project Agreement, have been assigned and provided to CMH.
- 1.217 “**Substantial Completion Date**” means the date on which Substantial Completion is achieved as evidenced by the certificate of Substantial Completion issued by the Consultant, as such date shall be stated therein.
- 1.218 “**Substantial Completion Payment**” means the amount determined by subtracting from the amount of the Guaranteed Price, as adjusted in accordance with the terms of the Project Agreement as at the end of the last day of the agreed monthly payment period ending immediately prior to the Substantial Completion Payment Date, the following amounts (without duplication):
- (a) all Additional CMH Payments (including any payments pursuant to Section 8.5 of Schedule 5 – Form of Lender’s Direct Agreement) paid, payable, or which will become payable by CMH in respect of Work performed in accordance with the Project Agreement on or before the last day of the agreed monthly payment period ending immediately prior to the Substantial Completion Payment Date;

- (b) the Certified Cost to Complete;
- (c) the CMH Holdback as at the Substantial Completion Payment Date;
- (d) any Legislative Holdback then required to be maintained by CMH as at the Substantial Completion Payment Date; and
- (e) the Interim Completion Payment.

**1.219 “Substantial Completion Payment Date”** means the 10th Business Day following the later of:

- (a) the date of delivery by the Consultant of a certificate of substantial performance of the Work in accordance with the *Construction Lien Act* (Ontario) pursuant to Section 16.2(c) of the Project Agreement; and
- (b) the delivery by the Consultant of its report under Section 16.2(d) of the Project Agreement confirming that Substantial Completion has been achieved.

**1.220 “Supplemental Instruction”** means an instruction, including a field or site instruction, issued for recording any clarifications or interpretation of the Contract Documents or giving direction on field conditions and not involving adjustment in the Guaranteed Price or Contract Time, in the form of Specifications, Drawings, schedules, samples, models, or written instructions, consistent with the intent of the Contract Documents. A Supplemental Instruction is to be issued by the Consultant to supplement the Contract Documents as required for the performance of the Work.

**1.221 “Supplier”** means a person who supplies to Project Co, or to any Subcontractor, any equipment, materials, supplies or services as part of, or for, the Work.

**1.222 “Surety”** means the person issuing the Bonds.

**1.223 “Tax” or “Taxes”** means any and all taxes, levies, imposts, duties, fees, withholdings, assessments, deductions or charges whatsoever, imposed, assessed, levied or collected by any Governmental Authority, together with interest thereon and penalties with respect thereto, and includes all HST except where stated to the contrary, provided however that “Taxes” shall not include the CMH Taxes.

**1.224 “Termination Date”** means the earlier of the Final Completion Date and such earlier date, if any, on which termination of the Project Agreement takes effect in accordance with its terms.

**1.225 “Trust Account”** means the trust account established by CMH and Project Co and in respect of which CMH, Project Co and the financial institution in which such account is



established and maintained shall enter into the Trust Account Acknowledgment Agreement.

- 1.226 **“Trust Account Acknowledgment Agreement”** means the agreement substantially in the form of the agreement attached as Schedule 24 to the Project Agreement.
- 1.227 **“Type A Equipment”** means each item of equipment marked “A” in the “Planning Code” column of the Equipment List;
- 1.228 **“Type B Equipment”** means each item of equipment marked “B” in the “Planning Code” column of the Equipment List;
- 1.229 **“Type C Equipment”** means each item of equipment marked “C” in the “Planning Code” column of the Equipment List;
- 1.230 **“Type D Equipment”** means each item of equipment marked “D” in the “Planning Code” column of the Equipment List;
- 1.231 **“Type E Equipment”** means each item of equipment marked “E” in the “Planning Code” column of the Equipment List;
- 1.232 **“Undisclosed Hazardous Substances”** has the meaning given in Section 14.1(e) of the Project Agreement.
- 1.233 **“Utilities”** means energy/power supplies and waste recovery, including electricity, natural gas/fuel oil, water, sanitary waste, storm water, and bulk medical gas compounds.
- 1.234 **“Utility Company”** means any company or companies designated by Project Co to provide Utilities.
- 1.235 **“Work”** means the construction, installation, testing, Commissioning and completion of the Facility, including rectification of any Minor Deficiencies, and any other activities required pursuant to the provisions of the Project Agreement. For greater certainty, Work does not include the Financing.
- 1.236 **“Work Committee”** has the meaning given in Section 13.1(a) of the Project Agreement.
- 1.237 **“WSIB”** means the Ontario Workplace Safety and Insurance Board that is responsible for administering the *Workplace Safety and Insurance Act*, 1997 (Ontario).
2. **Interpretation.** Unless otherwise expressly provided in the Contract Documents, the Contract Documents shall be interpreted according to the following provisions, unless the context requires a different meaning:

- 2.1 The tables of contents, headings, marginal notes and references to them in the Contract Documents are for convenience of reference only, shall not constitute a part of the Contract Documents, and shall not be taken into consideration in the interpretation of, or affect the meaning of, the Contract Documents.
- 2.2 Except where the context requires otherwise (irrespective of whether some, but not all, references in a Schedule specifically refer to that Schedule or to other portions of the Project Agreement) references to specific Sections, Clauses, Paragraphs, Subparagraphs, Schedules, and other divisions of the Project Agreement are references to such Sections, Clauses, Paragraphs, or Subparagraphs of, Schedules to, or divisions of the Project Agreement and the terms “Section” and “Clause” are used interchangeably and are synonymous.
- 2.3 Except where the context requires otherwise, references to specific Sections, Clauses, Paragraphs, Subparagraphs, Schedules, and other divisions of the Project Agreement followed by a number are references to the whole of the Section, Clause, Paragraph, Subparagraphs, Schedule or other division of the Project Agreement as applicable, bearing that number, including all subsidiary provisions containing that same number as a prefix.
- 2.4 The Schedules to the Project Agreement are an integral part of the Project Agreement and a reference to the Project Agreement includes a reference to the Schedules.
- 2.5 All references in the Project Agreement to a Schedule shall be to a Schedule of the Project Agreement.
- 2.6 All capitalized terms used in a Schedule shall have the meanings given to such terms in Schedule 1, unless stated otherwise in a particular Schedule in which case such definition shall have the meaning given to it in that Schedule solely for the purposes of that Schedule.
- 2.7 Words importing persons or parties are to be broadly interpreted and include an individual, corporation, firm, partnership, joint venture, trust, unincorporated organization, Governmental Authority, unincorporated body of persons or association and any other entity having legal capacity, and the heirs, beneficiaries, executors, administrators or other legal representatives of a person in such capacity.
- 2.8 Unless the context otherwise requires, wherever used herein the plural includes the singular, the singular includes the plural, and each of the masculine, feminine and neuter genders include all other genders.
- 2.9 Unless otherwise provided in the Project Agreement, all accounting and financial terms used in the Project Agreement shall be interpreted and applied in accordance with Canadian GAAP.

- 2.10 References to any standard, principle, agreement (including this Project Agreement) or document include (subject to all relevant approvals and any other provisions of the Project Agreement concerning amendments) a reference to that standard, principle, agreement or document as amended, supplemented, restated, substituted, replaced, novated or assigned.
- 2.11 References to any Applicable Law, including any statutes or other Applicable Law specifically referred to herein, whether or not amendments or successors to such Applicable Law are referred to herein, are to be construed as references to that Applicable Law as from time to time amended or to any Applicable Law covering the same or similar subject matter from time to time replacing, extending, consolidating or amending the same.
- 2.12 References to a statute shall include all regulations, by-laws, ordinances and orders made under or pursuant to the statute.
- 2.13 References to persons shall include their successors and assigns. References to a public organization shall include its successors and assigns, and if a public organization ceases to exist or ceases to perform its functions without a successor or assign, references to such public organization shall be deemed to include a reference to any public organization or any organization or entity which has taken over either or both the functions and responsibilities of such public organization.
- 2.14 A reference in the Project Agreement or in any Project Document to any right, power, obligation or responsibility of any Governmental Authority shall be deemed to be a reference to the Governmental Authority that, pursuant to Applicable Laws, has such right, power, obligation or responsibility at the relevant time.
- 2.15 The words in the Project Agreement and in any Implementing Agreements shall bear their natural meaning. Words and abbreviations which have well known technical or trade meanings are used in the Contract Documents in accordance with such recognized meanings.
- 2.16 Each Party's respective obligations shall be construed as separate obligations owed to the other Party or Parties, as the case may be.
- 2.17 References containing terms such as:
- (a) **"hereof", "herein", "hereto", "hereinafter"**, and other terms of like import are not limited in applicability to the specific provision within which such references are set forth but instead refer to the Project Agreement taken as a whole;
  - (b) **"includes" and "including"**, whether or not used with the words **"without limitation"** or **"but not limited to"**, shall not be deemed limited by the specific enumeration of items but shall, in all cases, be deemed to be without limitation

and construed and interpreted to mean “includes without limitation” and “including without limitation”; and

- (c) “accepted”, “reviewed”, “designated”, “directed”, “inspected”, “instructed”, “permitted”, “required” and “selected” when used in a Contract Document are deemed to be followed by the words “by the Consultant” unless the context provides otherwise; the words “acceptable”, “submit” and “satisfactory” when used in a Contract Document are deemed to be followed by the words “to the Consultant” unless the context provides otherwise.
- 2.18 In construing the Project Agreement, the rule known as the *ejusdem generis* rule shall not apply nor shall any similar rule or approach apply to the construction of the Project Agreement and, accordingly, general words introduced or followed by the word “other” or “including” or “in particular” shall not be given a restrictive meaning because they are followed or preceded (as the case may be) by particular examples intended to fall within the meaning of the general words.
- 2.19 Where the Project Agreement or any Implementing Agreement states that an obligation shall be performed “no later than” or “within” or “by” a stipulated date or event which is a prescribed number of days after a stipulated date or event, the latest time for performance shall be 5:00 p.m. on the last day for performance of the obligation concerned, or, if that day is not a Business Day, 5:00 p.m. on the next Business Day.
- 2.20 Where the Project Agreement or any Implementing Agreement states that an obligation shall be performed “no later than” or “by” a prescribed number of days before a stipulated date or event or “by” a date which is a prescribed number of days before a stipulated date or event, the latest time for performance shall be 5:00 p.m. on the last day for performance of the obligation concerned, or if that day is not a Business Day, 5:00 p.m. on the next Business Day.
- 2.21 Where the Project Agreement states that an obligation shall be performed “on” a stipulated date, the latest time for performance shall be 5:00 p.m. on that day, or, if that day is not a Business Day, 5:00 p.m. on the next Business Day.
- 2.22 Any reference to time of day or date means the local time or date in Cambridge, Ontario. Any reference to a stipulated “day” which is not specifically referred to as a “Business Day” shall be deemed to be a calendar day.
- 2.23 Unless otherwise indicated, time periods will be strictly construed and time is of the essence of this Project Agreement.
- 2.24 Whenever the terms “will” or “shall” are used in the Project Agreement in relation to Project Co or CMH, they shall be construed and interpreted as synonymous and to read “Project Co shall” or “CMH shall” as the case may be.

- 2.25 Any reference to currency is to Canadian currency and any amount advanced, paid or calculated is to be advanced, paid or calculated in Canadian currency.
- 2.26 Unless otherwise identified in the Project Agreement, all units of measurement in any documents submitted by Project Co to CMH shall be in accordance with the SI system of units.
- 2.27 Terms not defined herein and used in the Project Agreement or any Implementing Agreements which have a technical meaning commonly understood by the health care sector or construction industry in Ontario will be construed as having that meaning unless the context otherwise requires.
- 2.28 **[Intentionally Deleted.]**
- 2.29 Wherever in this Project Agreement Project Co covenants, agrees or undertakes:
- (a) to do any act, matter or thing, that shall be deemed to mean that Project Co will do or cause to be done such act, matter or thing itself or by a Project Co Party; and
  - (b) not to do any act, matter or thing, that shall be deemed to mean that Project Co will not, and will cause each Project Co Party not to do such act, matter or thing.

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**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceeding commenced at Toronto

**MOTION RECORD  
(Bond Compliance and Determination of Issues)  
VOLUME I OF II**

**McCarthy Tétrault LLP**  
Suite 5300, TD Bank Tower  
Toronto Dominion Centre  
66 Wellington Street West  
Toronto, ON M5K 1E6  
Fax: 416- 868-0673

**Heather L. Meredith** LSO#: 48354R  
Tel: 416-601-8342  
Email: [hmeredith@mccarthy.ca](mailto:hmeredith@mccarthy.ca)

**Geoff R. Hall** LSO#: 34701O  
Tel: 416-601-7856  
Email: [ghall@mccarthy.ca](mailto:ghall@mccarthy.ca)

**Trevor Courtis** LSO#: 67715A  
Tel: 416-601-7643  
Email: [tcourtis@mccarthy.ca](mailto:tcourtis@mccarthy.ca)

Lawyers for the Applicant,  
Bank of Montreal  
19149496