

Court File No. CV-18-00610995-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**IN THE MATTER OF THE RECEIVERSHIP OF
2442931 ONTARIO INC.**

B E T W E E N:

BANK OF MONTREAL, AS ADMINISTRATIVE AGENT

Applicant

- and -

2442931 ONTARIO INC.

Respondent

**APPLICATION RECORD
(Appointment of a Receiver
returnable December 21, 2018)**

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TO: THE SERVICE LIST

SERVICE LIST

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Proposed Receiver

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Lawyers for Alvarez & Marsal Canada Inc.

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CV-18-00 610995-00CL
Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**IN THE MATTER OF THE RECEIVERSHIP OF
2442931 ONTARIO INC.**

BETWEEN:

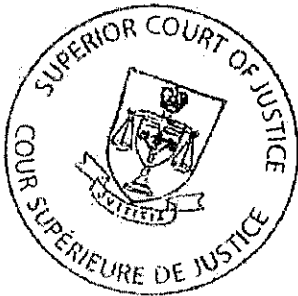
BANK OF MONTREAL, AS ADMINISTRATIVE AGENT

Applicant

- and -

2442931 ONTARIO INC.

Respondent



NOTICE OF APPLICATION

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicant. The claim made by the Applicant appears on the following page.

THIS APPLICATION will come on for a hearing on Friday, December 21, 2018, at 10:00 a.m., before a judge presiding over the Commercial List at 330 University Avenue, 8th Floor, Toronto, Ontario M5G 1R7.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of

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appearance, serve a copy of the evidence on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date December 17, 2018

Issued by



Local Registrar

Uvez Memon

Address of court office: Superior Court of Justice
330 University Avenue, 7th Floor
Toronto, Ontario M5G 1R7

TO: **2442931 ONTARIO INC.**
407 Basaltic Road
Concord, ON L4K 4W8

APPLICATION

1. The Applicant, Bank of Montreal, in its capacity as administrative agent (the “Administrative Agent”) pursuant to the credit agreement dated January 27, 2015 (the “Credit Agreement”) between 2442931 Ontario Inc. (“Project Co”) as borrower, each of the financial institutions and other entities from time to time parties thereto (the “Lenders”) as lenders, and the Administrative Agent, makes an application for:
 - (a) an order validating service of this Notice of Application and the Application Record in the manner effected, abridging the time for service thereof, and dispensing with service thereof on any party other than the parties served;
 - (b) an order, substantially in the form of order included at Tab 3 of the Application Record, appointing Alvarez & Marsal Canada Inc. (“A&M”) as receiver, without security, of all of the assets, undertakings and properties of Project Co under section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C 1985, c. B-3 (the “BIA”), and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the “CJA”); and
 - (c) such further and other relief as to this Honourable Court may deem just.
2. The grounds for the application are:

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- (a) Project Co is a wholly-owned subsidiary of Bondfield Construction Company Limited (the “Contractor”). It is a special purpose vehicle which has no assets other than the relevant contracts relating to the St. Michael’s Hospital (“SMH”) Redevelopment Project (the “Project”).
- (b) The Applicant is the Administrative Agent under the Credit Agreement pursuant to which the Lenders made a committed, partially revolving construction credit facility (the “Credit Facility”) available to Project Co in relation to the Project.
- (c) Zurich Insurance Company Ltd. (the “Surety”) issued two bonds in respect of the Project as required by the Credit Agreement, including a Public Private Partnership Performance Bond (the “P3 Bond”) in the amount of \$156,325,362.60 and a Labour and Material Payment Bond in the amount of \$142,113,966 (the “Bonds”). The Bonds provided by the Surety were material credit inducements to the Lenders in approving and advancing the Credit Facility.
- (d) As security for all principal, interest, fees and other amounts owing by Project Co to the Lenders under the Credit Agreement, the Administrative Agent, on behalf of the Lenders, holds, *inter alia*, a General Security Agreement pursuant to which Project Co granted a security interest in all its property, assets and undertakings.
- (e) On December 5, 2018, the Administrative Agent made demand on Project Co for payment of its indebtedness to the Lenders in the amount of \$230,642,104.52, and issued a Notice of Intention to Enforce Security pursuant to the *Bankruptcy and Insolvency Act* (Canada).

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The Project and Requirement for a Receiver

- (f) The Project involves the construction of the redevelopment of SMH and consists of building in four phases a new 17 storey patient-care tower at the corner of Queen and Victoria Streets, construction of the new Shuter Wing and renovations of existing space in the Donnelly Wing, the Cardinal Carter Wing and the Bond Wing.
- (g) There have been delays in the construction work due to various defaults committed by the Contractor. In addition, there are a number of construction liens registered on the Project site and as a result of financial challenges experienced by the Contractor, the Project has effectively been ground to a halt for some time.
- (h) Notwithstanding the various Events of Default by the Contractor, Project Co has not taken any steps to declare the Contractor in default under the Construction Contract or to make demand under the P3 Bond, causing material prejudice for the Lenders, SMH and the community it serves, and other stakeholders.
- (i) SMH delivered a default notice on November 2, 2018 (the "Project Co Default Notice"). The delivery of the Project Co Default Notice is subject to the Lender's Direct Agreement and, in particular, section 7 thereof, which restricts SMH from terminating the Project Agreement until the expiry of the 90 day notice period provided for by the Lender's Direct Agreement. The application to appoint the Receiver is time sensitive in light of this deadline.
- (j) With Project Co not acting, the Administrative Agent, with the support of SMH, has been attempting to work with the Surety consensually so construction work can resume and the Project can be completed.

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- (k) On November 16, 2018, the Administrative Agent made demand on the performance component of the P3 Bond.
- (l) To date, the Surety has not complied with the demand by selecting any of the options available to it.
- (m) In response to the demand, the Surety has taken the position that the demand made by the Administrative Agent was not a proper demand claiming that in order to assert rights on the P3 Bond the Administrative Agent is required to "step-in" to the position of Project Co. The Administrative Agent disagrees with this position, based on the express language of the P3 Bond.
- (n) The Surety is also taking the position that the party calling upon the P3Bond is required to execute a Completion Contract with the Replacement Contractor and a Mitigation Funding Agreement with the Surety. The parties have not agreed on the terms of these agreements due to various fundamental concerns which the agreements have raised for the Administrative Agent and the Lenders. These issues remain unresolved.
- (o) By this application it is the intention of the Administrative Agent to seek the appointment of the Receiver to facilitate the prompt resumption of the construction work and the completion of the Project for the benefit of the Lenders, SMH, the community it serves, and other stakeholders, and then resolve any remaining issues with the Surety through negotiation or litigation, if necessary.

Statutory and Other Grounds

- (p) Section 243 of the *BIA* and Section 101 of the *CJA*.
 - (q) Such further and other grounds as the lawyers may advise.
3. The following documentary evidence will be used at the hearing of the application:
- (a) the Affidavit of Eden Orbach sworn December 17, 2018, and the exhibits thereto;
 - (b) the consent of A&M to act as receiver; and
 - (c) such further and other evidence as the lawyers may advise and this Honourable Court may permit.

December 17, 2018

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IN THE MATTER OF THE RECEIVERSHIP OF 2442931 ONTARIO INC.

CV-18-00610995-0001L

BANK OF MONTREAL, AD ADMINISTRATIVE AGENT and

Applicant

2442931 ONTARIO INC.

Respondent

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF APPLICATION

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Lawyers for the Applicant

TAB 2

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**IN THE MATTER OF THE RECEIVERSHIP OF
2442931 ONTARIO INC.**

BETWEEN:

BANK OF MONTREAL, AS ADMINISTRATIVE AGENT

Applicant

- and -

2442931 ONTARIO INC.

Respondent

**AFFIDAVIT OF EDEN ORBACH
(Sworn on December 17, 2018)**

I, Eden Orbach, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

1. I am a Senior Manager with the Bank of Montreal ("**BMO**"), Special Accounts Management Unit ("**SAMU**"). I am the person responsible for the day-to-day management of the Credit Facility provided to 2442931 Ontario Inc. ("**Project Co**") pursuant to the credit agreement between Project Co, as borrower, each of the financial institutions and other entitles from time to time parties thereto (the "**Lenders**"), as lenders, and BMO, as administrative agent (the "**Administrative Agent**"), made as of January 27, 2015 (the "**Credit Agreement**"). I have also been involved in the Administrative Agent's dealings with Project Co and Bondfield Construction Company Limited (the "**Contractor**"). As such, I have personal knowledge of the facts and matters hereinafter deposed, except where stated to be based on information and belief, in which case, I verily believe the same to be true.

2. Capitalized terms used and not otherwise defined in this affidavit, shall have the meaning given to such terms in the Credit Agreement and the Project Agreement (as defined herein).

Overview

3. This affidavit is sworn in support of the application by the Administrative Agent pursuant to section 243 of the *Bankruptcy and Insolvency Act* (Canada) and section 101 of the *Courts of Justice Act* (Ontario) for the appointment of Alvarez & Marsal Canada Inc. (the "Receiver") as receiver and manager of all of the assets, properties and undertaking of Project Co.

4. Project Co is a wholly-owned subsidiary of the Contractor. It is a special purpose vehicle which, to my knowledge, has no assets other than the relevant contracts relating to the St. Michael's Hospital Redevelopment Project (the "Project").

5. Pursuant to the Credit Agreement, the Lenders provided a Credit Facility to Project Co for the design, construction and completion of the Project. The Project is structured as a P3 (Public – Private Partnership) infrastructure development project and was awarded to Project Co by St. Michael's Hospital ("SMH") acting with the assistance of Infrastructure Ontario ("IO") for a guaranteed price of \$305,351,258. The Project involves the construction of the redevelopment of SMH and consists of building in four phases a new 17 storey patient-care tower at the corner of Queen and Victoria Streets, construction of the new Shuter Wing and renovations of existing space in the Donnelly Wing, the Cardinal Carter Wing and the Bond Wing.

6. There have been delays in the construction work due to various defaults committed by the Contractor. In addition, there are a number of construction liens registered on the Project site. It is my understanding that as a result of financial challenges experienced by the Contractor, the Project has effectively been ground to a halt for some time.

7. Project Co currently owes the Lenders approximately \$230,642,104.52, plus interest and all other costs, charges and expenses, which continue to accrue (collectively, the "Indebtedness") for advances made to Project Co under the Credit Facility pursuant to the Credit Agreement.

8. The Credit Agreement provides that the first partial loan repayment to be made by Project Co is in the amount of \$173,274,150 upon the Tower Interim Completion Date, which was scheduled to be November 27, 2017. According to the Lender's technical advisors and SMH, Tower Interim Completion is almost complete but has been delayed due to the financial distress of the Contractor.

9. Zurich Insurance Company Ltd. (the "**Surety**") issued two bonds in respect of the Project as required by the Credit Agreement: a Public Private Partnership Performance Bond (the "P3 Bond") in the amount of \$156,325,362.60 and a Labour and Material Payment Bond in the amount of \$142,113,966 (collectively, the "**Bonds**"). The Bonds provided by the Surety were material credit inducements to the Lenders in approving and advancing the Credit Facility.

10. Notwithstanding the various Events of Default by the Contractor, Project Co has not taken any steps to declare the Contractor in default under the Construction Contract or to make demand under the P3 Bond, causing material prejudice for the Lenders, SMH and the community it serves, and other stakeholders.

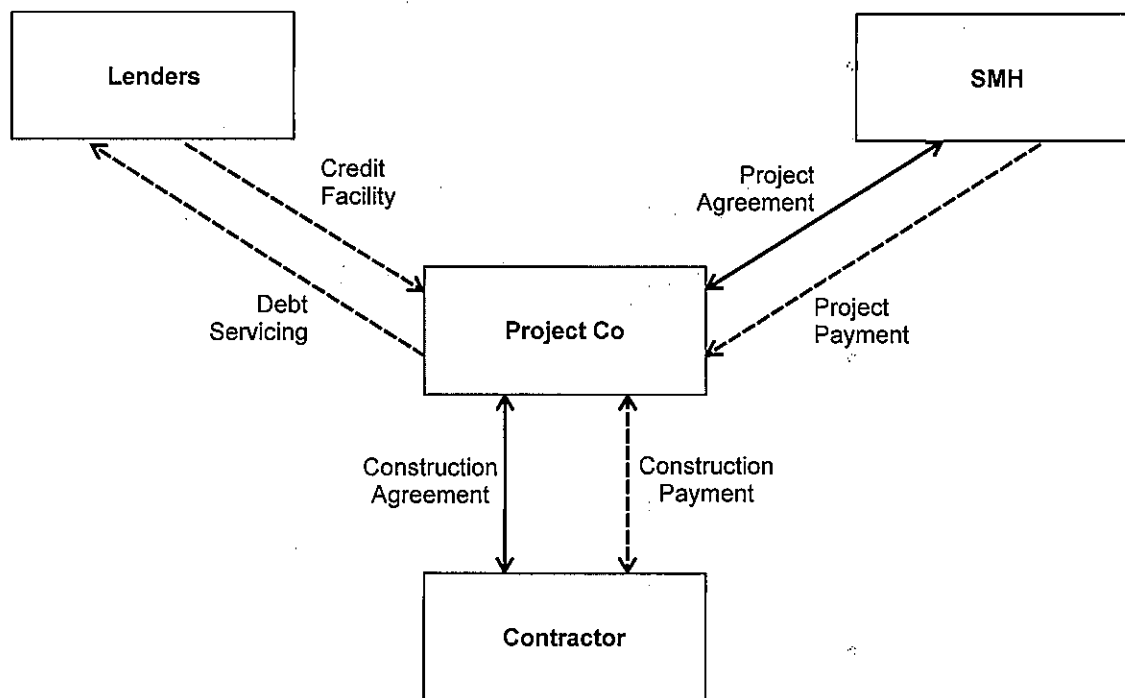
11. The Administrative Agent, SMH, and IO have sought to resolve matters consensually with the Surety so construction work can resume and the Project can be completed. The Administrative Agent has also, as an Additional Named Obligee, made demands on the liquid component of the P3 Bond and has made demand on the performance component of the P3 Bond. In response, the Surety has raised a number of technical issues, including that in order for the Administrative Agent to make a demand on the performance component of the P3 Bond it must first exercise its "step-in" rights under the Lender's Direct Agreement. While the Administrative Agent has the option to exercise "step-in" rights, it disagrees that it is required to exercise "step in" rights, which require the Lenders to perform the obligations of Project Co under the Project Agreement and may expose the Lenders to indeterminate liability.

12. On November 2, 2018, SMH issued a Project Co Default Notice alleging various defaults by Project Co under the Project Agreement. The Project Co Default Notice triggered a 90-day period following which SMH becomes entitled to terminate the Project Agreement. The termination of the Project Agreement by SMH would cause severe and irreparable harm to Project Co and significantly increase the risk of the Lenders not recovering their loan to Project Co.

13. The Lenders, with the support of SMH and IO, propose this receivership so that the Receiver, on behalf of Project Co, can make a call under the performance component of the P3 Bond as the Obligee and enter into arrangements on behalf of Project Co to ensure that construction resumes at the hospital and completed on a timely basis for the benefit of all stakeholders.

Project Structure

14. Project Co is a special purpose entity that is wholly-owned by the Contractor.
15. The Contractor is a full service construction company that has been in business for over forty years. It has been widely reported that the Contractor is financially distressed and as a result has struggled to complete various construction projects. A Receiver has now been appointed by this Court over an entity wholly-owned by the Contractor involved in a similar P3 Project and over other entities related to the Contractor.
16. The Credit Facility was provided by the Lenders to Project Co to finance the design, development and construction of the Project. A copy of the Credit Agreement is attached hereto and marked as **Exhibit "A"**.
17. The chart below indicates the general arrangements between SMH, Project Co and the Contractor in respect of the Project.



18. The construction of the Project was to be undertaken and completed by the Contractor. As part of being awarded the construction work and pursuant to the Project Agreement, Project Co and the Contractor entered into a Design and Construction Contract (the "**Construction Contract**"). A copy of the Construction Contract is attached hereto and marked as **Exhibit "B"**.

The Contractor has committed numerous and continuing defaults under the Construction Contract.

19. In addition to the Construction Contract and the Credit Agreement, the parties entered into a series of additional agreements relating to the Project including:

- (a) the Project Agreement between Project Co and SMH, a copy of which is attached hereto and marked as **Exhibit "C"**;
- (b) the Contractor Direct Agreement between the Contractor, the Administrative Agent and Project Co, a copy of which is attached hereto and marked as **Exhibit "D"**; and
- (c) the Lender's Direct Agreement between the Administrative Agent, Project Co and SMH, a copy of which is attached hereto and marked as **Exhibit "E"**.

The Credit Agreement and the Security

20. Subject to the terms of the Credit Agreement, the Lenders established and made available to Project Co the Credit Facility. The Credit Facility is a committed, partially revolving construction credit facility in the amount of the Total Commitment (which is up to the aggregate amount of \$230,563,776, as such amount may be reduced or cancelled in accordance with the terms of the Credit Agreement).

21. As security for all obligations owing by Project Co to the Lenders, the Lenders (by and through the Administrative Agent) hold, *inter alia*, the following security from Project Co and the Contractor:

- (a) a General Security Agreement pursuant to which Project Co granted a security interest in all of its present and after acquired property to the Administrative Agent as security for the payment and performance of the obligations owed by Project Co to the Lenders. A copy of the General Security Agreement is attached hereto and marked as **Exhibit "F"**;
- (b) a Limited Recourse Guarantee and Security Agreement of the Contractor (the "**Guarantee**"). Pursuant to the Guarantee, the Contractor guaranteed payment of the obligations of Project Co under the Credit Agreement and granted to the Administrative Agent a security interest in all of its equity interests in Project Co in

support of such Guarantee. The recourse of the Lenders under this Guarantee is limited to enforcement of the security interest granted over the Contractor's equity interests in Project Co. A copy of the Guarantee is attached hereto and marked as **Exhibit "G"**.

(collectively, the "**Lender Security**").

22. As indicated herein, various Events of Default have occurred under the Credit Agreement. The General Security Agreement expressly provides that the Administrative Agent may appoint or apply for the appointment of a receiver upon the occurrence of an Event of Default under the Credit Agreement.

23. The Lenders registered the security interest granted by Project Co under the Lender Security in the Ontario Personal Property Registry. Attached hereto and marked as **Exhibits "H"** is a copy of the Ontario Personal Property Registry search reports, dated December 13, 2018, in respect of Project Co.

The Surety

The Bonds

24. The Surety has issued the following Bonds in relation to the Project:

- (a) Public Private Partnership Performance Bond No. 6343517 in the amount of \$156,325,362.60, a copy of which is attached hereto, together with relevant riders, and marked collectively as **Exhibit "I"**; and
- (b) Labour and Material Payment Bond No. 6343517 in the amount of \$142,113,966, a copy of which is attached hereto and marked as **Exhibit "J"**.

It is necessary for Project Co to assert rights against the Surety in order for the Surety to respond to its obligations under the Bonds, which Project Co has failed to do.

25. Project Co is the Obligee under the P3 Bond. Each of the Administrative Agent and SMH are Additional Named Obligees under a Multiple Obligee Rider to the P3 Bond and are independently entitled to enforce the obligations of the Surety under the P3 Bond. The performance component of the P3 Bond provides that whenever the Contractor, as principal, is

declared by the Obligee to be in default under the Construction Contract, the Surety shall within 21 days of its receipt of the declaration of default elect one of the following four options:

1. arrange to remedy the default where such default is capable of remedy; or
2. complete the Bonded Obligations in accordance with the Construction Contract; or
3. obtain a bid or bids for submission to the Obligee for completing the Bonded Obligations and upon determination by the Surety and the Obligee, acting reasonably, of the lowest responsible bidder, arrange for a contract between such bidder and the Obligee and make available as work progresses sufficient funds to pay to complete such Bonded Obligations in accordance with the terms and conditions of the Construction Contract and to pay Obligee's expenses incurred as a result of the principal's default, relating directly to the performance of the Bonded Obligations, less the balance of the Construction Contract price; but not exceeding the remaining Bonded Amount; or
4. pay the Obligee the lesser of (a) the remaining balance of the Bonded Amount or (b) the Obligee's reasonable estimate of the cost to complete the Bonded Obligations under the Construction Contract in accordance with its terms and conditions, less the balance of the Construction Contract price.

Demand on the P3 Bond

26. The Administrative Agent made demand on the performance component of the Performance Bond on November 16, 2018. A copy of the demand made by the Administrative Agent is attached hereto and marked as **Exhibit "K"**. To date, the Surety has not complied with the demand made by the Administrative Agent on the performance component of the P3 Bond by selecting any of the options available to it. There have also been a number of demands made by the Administrative Agent on the liquid component of the P3 Bond, which demands have been honoured by the Surety.

27. In response to the demand, the Surety has taken the position that the demand made by the Administrative Agent was not a proper demand claiming that in order to assert rights on the P3 Bond the Administrative Agent is required to "step-in" to the position of Project Co. A redacted copy of the email, without attachments, from the Surety's lawyers asserting this position is attached hereto and marked as **Exhibit "L"**.

28. The Administrative Agent disagrees with this position, based on the express language of the P3 Bond. The Multiple Obligee Rider to the P3 Bond, which incorporates by reference all

terms, conditions and provisions of the P3 Bond, does not require the Administrative Agent, which has been added as an Obligee to the P3 Bond, to take this step. The terms of the Multiple Obligee Rider to the P3 Bond provide that the Administrative Agent is "...entitled to enforce the obligations of the Principal and the Surety under the Bond and this Multiple Obligee Rider".

29. The Surety has also taken the position that the party calling upon the P3 Bond is required to execute a Completion Contract with the Replacement Contractor and a Mitigation Funding Agreement with the Surety. The parties have not agreed on the terms of these agreements due to various fundamental concerns which the agreements have raised for the Administrative Agent and the Lenders.

30. These issues remain unresolved. By this application, it is the intention of the Administrative Agent to seek the appointment of the Receiver to facilitate the prompt resumption of the construction work and the completion of the Project for the benefit of the Lenders, SMH, its staff, physicians and patients, and other stakeholders, and then resolve any remaining issues with the Surety through negotiation or litigation, if necessary.

Liens

31. Attached hereto and marked as **Exhibit "M"** is a copy of the title search for the Project site dated December 14, 2018. Despite the existence of the Labour and Material Payment Bond pursuant to which lien claimants are entitled to have their claims paid, there remain 18 construction liens registered against the lands as at December 14, 2018.

SMH Demand and Termination Right

32. Pursuant to Article 34.3 of the Project Agreement, on the occurrence of a Project Co Event of Default, SMH may terminate the Project Agreement by giving written notice of default to Project Co and to any person specified in the Lender's Direct Agreement to receive such notice.

33. On November 2, 2018, SMH wrote to the Administrative Agent to provide a copy of the Project Co Default Notice that it had sent to Project Co. A copy of the letter with attached Project Co Default Notice is attached hereto and marked as **Exhibit "N"**. The delivery of the Project Co Default Notice is subject to the Lender's Direct Agreement and, in particular, section 8 thereof, which restricts SMH from terminating the Project Agreement until the expiry of the 90 day notice period provided for by the Lender's Direct Agreement. The application to appoint the Receiver is time sensitive in light of this deadline.

Lender Demand

34. On December 5, 2018, the Administrative Agent wrote to Project Co to demand repayment of the loan and issued a Notice of Intention to Enforce Security pursuant to the *Bankruptcy and Insolvency Act* (Canada) (the "BIA") (the "Project Co Demand"). Attached hereto and marked as Exhibit "O" to this my Affidavit is a copy of the Project Co Demand.

35. The Administrative Agent also wrote to the Contractor to demand payment pursuant to the Guarantee (the "Contractor Demand"). Attached hereto and marked as Exhibit "P" to this my Affidavit is a copy of the Contractor Demand.

Replacement Contractor

36. Ellis Don Construction Services Inc. ("Ellis Don"), a world-leading construction and building services company, is prepared to serve as the Replacement Contractor, subject to finalizing appropriate arrangements. Ellis Don is acceptable to SMH and the Lenders and I understand also to the Surety. SMH and the Lenders have been in discussions with Ellis Don, which has confirmed its willingness and ability to complete the construction work.

Conclusion

37. Alvarez & Marsal Canada Inc. is a licensed trustee in bankruptcy and has consented to being appointed Receiver of the assets, properties and undertaking of Project Co.

38. It is just, convenient, appropriate and necessary for the Receiver to be appointed over the assets, properties and undertaking of Project Co for at least the following reasons:

- (a) The appointment of the Receiver will allow for the Receiver, on behalf of Project Co, to assert and enforce Project Co's rights under the P3 Bond;
- (b) The stay of proceedings provided for in the proposed receivership order will prevent the termination of the Project Agreement;
- (c) The appointment of the Receiver and the funding to be provided by the Lenders will facilitate the timely completion of the Project for the benefit of the Lenders, SMH, the community it serves, and other stakeholders.

39. I swear this affidavit in support of an application to appoint Alvarez & Marsal Canada Inc. as Receiver of the properties, assets and undertaking of Project Co and for no other or improper purpose.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario, this 17th day of December, 2018.

Saneeta Tarvir
A COMMISSIONER FOR OATHS
in and for the Province of Ontario


EDEN ORBACH

Saneeta Tarvir,
a Commissioner, etc., Province of Ontario,
while a Student-at-Law.
Expires July 26, 2021.

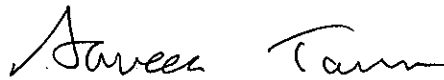
IN THE MATTER OF THE RECEIVERSHIP OF 2442931 ONTARIO INC.

Court File # CV-18-

BANK OF MONTREAL and **2442931 ONTARIO INC.**
Applicant Respondent

	<p>Ontario SUPERIOR COURT OF JUSTICE COMMERCIAL LIST</p> <p>Proceedings commenced in Toronto</p> <p>AFFIDAVIT OF EDEN ORBACH (Sworn DECEMBER 17, 2018) (Appoint Receiver)</p> <p>CHAITONS LLP 5000 Yonge Street, 10th Floor Toronto, ON M2N 7E9</p> <p>Harvey Chaiton Tel: (416) 218-1129 Fax: (416) 218-1849 Email: harvey@chaitons.com</p> <p>Lawyers for the applicant, Bank of Montreal, as Administrative Agent</p> <p>DOCS 18598977</p>
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THIS IS EXHIBIT "A" TO
THE AFFIDAVIT OF EDEN ORBACH
SWORN BEFORE ME THIS 17th
DAY OF DECEMBER, 2018.



A Commissioner etc.

CREDIT AGREEMENT

Made as of January 27, 2015

Between

2442931 ONTARIO INC.
as Borrower

and

**EACH OF THE FINANCIAL
INSTITUTIONS AND OTHER ENTITIES FROM
TIME TO TIME PARTIES HERETO**
as Lenders

and

**BANK OF MONTREAL, THE TORONTO-DOMINION BANK, CAISSE CENTRALE
DESJARDINS AND NATIONAL BANK OF CANADA**

as Lead Arrangers

and

BANK OF MONTREAL
as Administrative Agent

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CREDIT AGREEMENT

This Agreement is made as of January 27, 2015 between

2442931 ONTARIO INC., a corporation incorporated under the laws
of the Province of Ontario
as Borrower

and

**EACH OF THE FINANCIAL INSTITUTIONS AND OTHER
ENTITIES FROM TIME TO TIME PARTIES HERETO**
as Lenders

and

BANK OF MONTREAL
as Administrative Agent

RECITALS

- A. The Borrower has requested that the Lenders make the Credit Facility available.
- B. Each Lender is prepared to make its Commitment available to the Borrower, subject to the terms and conditions of this Agreement.

FOR VALUE RECEIVED, the parties agree as follows:

SECTION 1 – INTERPRETATION

1.1 Certain Defined Terms

The terms defined below shall have the indicated meanings unless the context expressly or by necessary implication requires otherwise:

- (1) **Acceptable Credit Support** means an unconditional, irrevocable standby letter of credit (not secured by any assets of the Borrower) from any one of the following banks: National Bank of Canada or any other bank listed under Schedule I to the *Bank Act* (Canada) provided that such bank also has a credit rating of at least A+ from S&P or the equivalent rating from Moody's or such other form of security as may be acceptable to the Lenders; provided that, in the event of a ratings downgrade at any time of the issuing bank which results in such bank ceasing to have a credit rating of at least A+ from S&P or the equivalent rating from Moody's, such letter of credit shall be replaced, within 20 Business Days, with a letter of credit issued by a bank listed under Schedule I to the *Bank Act* (Canada) that meets the foregoing minimum credit rating requirement or, if no such bank then meets the minimum credit rating requirements, by such other bank or financial institution that meets such minimum credit rating requirement; provided further that the letter of credit may be

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drawn down if not replaced within 20 Business Days and the proceeds thereof deposited into a cash collateral account established and maintained by the Administrative Agent, such cash collateral to be released to the appropriate party upon delivery of a replacement letter of credit issued by a bank or financial institution which meets the foregoing requirements of this definition.

(2) **Account Bank** means Bank of Montreal and any replacement bank pursuant to the provisions of the Blocked Account Agreement.

(3) **Additional Insurance** means the insurance coverages which the Borrower is required to maintain or cause to be maintained pursuant to Sections 9.1(21) and 9.1(22) of this Agreement in excess of the Project Insurance.

(4) **Additional SMH Payments** means amounts payable to the Borrower pursuant to any Variation Confirmation or Variation Directive under which SMH is expressly responsible for an increase to the Guaranteed Price.

(5) **Administrative Agent** means Bank of Montreal, when acting as administrative agent and any successor administrative agent appointed under Section 7.7 of the CBA Schedule.

(6) **Affected Borrowing** has the meaning given to it in Section 4.8.

(7) **Affected Lender** has the meaning given to it in Section 4.1(4).

(8) **Affiliate** has the meaning given to it in Section 1 of the CBA Schedule.

(9) **Agency Fee** has the meaning given to it in Section 4.2(4).

(10) **Agency Fee Payment Date** has the meaning given to it in Section 4.2(4).

(11) **Agent's Funding Account** means the following non-interest bearing account maintained by the Administrative Agent, to which payments and transfers are to be effected as follows:

<u>Bank:</u>	Bank of Montreal
<u>Swift Address:</u>	BOFMCAM2
<u>Account Number:</u>	00021447805
<u>Favour:</u>	GFS Agency Bank Services
<u>Reference:</u>	2442931 Ontario Inc.

or such other account of the Administrative Agent in Toronto, Ontario as the Administrative Agent may at any time and from time to time advise the Borrower and the Lenders in writing.

(12) **Agent's Funding Account Balance** means, at any time, such portion of the Agent's Funding Account standing to the credit of the Borrower at such time, less any amounts funded on such date with respect to interest or Borrowing Costs payable to the Lenders.

- (13) **Agreed Currency** has the meaning given to it in Section 14.4.
- (14) **Agreement** has the meaning given to it in Section 1 of the CBA Schedule.
- (15) **Applicable Law** has the meaning given to it in Section 1 of the CBA Schedule.
- (16) **Applicable Margin** means 0.95% per annum.
- (17) **Applicable Percentage** has the meaning given to it in Section 1 of the CBA Schedule.
- (18) **Applicable Consent** means any Consent that is necessary under Applicable Law at any given time (having regard to the then given state of construction of the Project) for the Contractor to perform the Works as contemplated by the Material Project Documents, for the Borrower or the Contractor to enter into any Material Project Document or Loan Document, or for the Borrower or the Contractor to consummate any transaction contemplated thereby.
- (19) **Assignment and Assumption** has the meaning given to it in Section 1 of the CBA Schedule.
- (20) **Assignment of Accounts** means the Assignment of Accounts dated as of the Financial Closing Date between the Borrower and the Administrative Agent, granting to the Administrative Agent on behalf of the Lenders a first ranking assignment by way of security over all of the Borrower's right, title and interest in all Project Accounts.
- (21) **Associate** has the meaning given to it in the *Business Corporations Act* (Ontario).
- (22) **Available Commitment** means, as of any date during the Term, the Total Commitment less the aggregate of all Loans previously made or deemed to have been made to the Borrower under this Agreement, but including the amount of any Loans repaid pursuant to Section 5.2(a).
- (23) **Base Progress Payments** has the meaning set forth in the Construction Contract, but for greater certainty not including any payments in respect of Additional SMH Payments or Not-In-Contract Equipment.
- (24) **Blocked Account Agreement** means the agreement between the Borrower, the Administrative Agent and the Account Bank with respect to the operation of the Borrower Proceeds Account.
- (25) **Borrower** means 2442931 Ontario Inc., a corporation incorporated under the laws of the Province of Ontario, and shall include its successors and permitted assigns.
- (26) **Borrower General Security Agreement** means the General Security Agreement dated as of the Financial Closing Date between the Borrower and the Administrative Agent, granting to the Administrative Agent on behalf of the Lenders a first ranking security interest in all of the personal property, assets and undertaking of the Borrower, including the Project Accounts, the Contractor Support Agreement and the Material Project Documents.
- (27) **Borrower Proceeds Account** means the following account maintained by the Borrower with the Account Bank, to which payments and transfers are to be effected as follows:

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Bank: Bank of Montreal

Swift Address: BOFMCAM2

Transit Number: 00022

Account Number: 0002-1906-995

Beneficiary: 2442931 Ontario Inc.

(28) ***Borrower's Knowledge*** means, with respect to the subject matter of any representation, warranty, covenant, agreement or obligation relating to the Borrower or the Contractor contained in any Loan Document, the knowledge of any Responsible Officer of the Borrower after reasonable inquiry.

(29) ***Borrowing Costs*** means all interest expenses, Break Costs, amounts payable by the Borrower under the Interest Rate Swaps and other fees or costs of any nature or type payable by the Borrower under this Agreement in connection with the Credit Facility or the Interest Rate Swaps, all calculated without duplication and crediting all amounts payable to the Borrower under the Interest Rate Swaps.

(30) ***Branch of Account or Lending Office*** means, with respect to each Lender, the branch of the Lender at the address set out opposite the Lender's name on Schedule 1.1(30) or other branch as the Lender may advise the Borrower and the Administrative Agent in writing.

(31) ***Break Costs*** means the amount (if any) by which:

(a) the amount which the relevant Lender would have received by way of interest under this Agreement on the principal amount of the Loan prepaid to it for the period from the date of such prepayment to the last day of the then current Interest Period in respect thereof, had such principal amount been received on the last day of the Interest Period;

exceeds

(b) the amount which that Lender would be able to obtain by placing an amount equal to the principal amount prepaid to it on deposit with a bank listed under Schedule I to the *Bank Act (Canada)* chosen by such Lender for a period starting on the Business Day following receipt or recovery and ending on the last day of the then current Interest Period.

(32) ***Business Day*** means a day on which chartered banks are open for over-the-counter business in Toronto and Montreal and excludes Saturday, Sunday and any other day which is a statutory holiday in Toronto or Montreal.

(33) ***Canadian Benefit Plans*** means all material employee benefit plans or arrangements maintained or contributed to by the Borrower that are not Canadian Pension Plans, including all profit sharing, savings, supplemental retirement, retiring allowance, severance, pension, deferred

compensation, welfare, bonus, incentive compensation, phantom stock, legal services, supplementary unemployment benefit plans or arrangements and all life, health, dental and disability plans and arrangements in which the employees or former employees of the Borrower participate or are eligible to participate but excluding all stock option or stock purchase plans.

(34) **Canadian Dollars** and the symbols “\$” and “Cdn\$” each means lawful money of Canada.

(35) **Canadian Pension Plans** means all plans or arrangements that are considered to be pension plans for the purposes of any applicable pension benefits standards statute or regulation in Canada established, maintained or contributed to by the Borrower for its employees or former employees.

(36) **Capital Lease** means, with respect to a Person, any lease or other arrangement for the use of property or assets that would be required to be accounted for as a capital lease on a balance sheet of that Person in accordance with GAAP. The amount of any Capital Lease at any date shall be the amount of the obligation in respect thereof required to be included on the balance sheet of the Person.

(37) **CBA Schedule** means the model credit agreement provisions attached hereto as Schedule A, which have been revised under the direction of the Canadian Bankers’ Association Secondary Loan Market Specialist Group from provisions prepared by The Loan Syndications and Trading Association, Inc., and which form part of this Agreement and shall be deemed for such purpose to be a part hereof as if fully set forth herein, as modified as set forth below and therein and as further amended, modified, supplemented or restated from time to time by the parties to this Agreement.

(38) **CDOR Rate** means, on any day, the annual rate of interest which is the arithmetic average of the “BA 1 month” rates applicable to Canadian Dollar Bankers’ Acceptances identified as such on the Reuters Screen CDOR Page at approximately 10:00 a.m. on such day (as adjusted by the Administrative Agent after 10:00 a.m. to reflect any error in any posted rate or in the posted average annual rate). If the rate does not appear on the Reuters Screen CDOR Page as contemplated above, then the CDOR Rate on any day shall be calculated as the arithmetic average of the discount rates applicable to one month Canadian Dollar Bankers’ Acceptances of, and as quoted by, the Lenders as of 10:00 a.m. on the day, or if the day is not a Business Day then on the immediately preceding Business Day.

(39) **Change in Control** has the meaning given to it in the Project Agreement.

(40) **Change in Law** has the meaning given to it in Section 1 of the CBA Schedule.

(41) **Collateral** means the undertaking, property and assets covered by the Security Documents and any other property, real or personal, tangible or intangible, now existing or hereafter acquired by the Borrower in connection with the Works or the Project, that may at any time be or become subject to a Lien in favour of the Administrative Agent on behalf of the Lenders, or in favour of the Lenders, in each case to secure any or all of the Obligations.

(42) **Commitment** means, with respect to any Lender, the principal amount set out opposite the Lender’s name in Schedule 1.1(42), as such amount may be reduced or cancelled in accordance with this Agreement.

- (43) **Compensable Financing Costs** means the amount of any compensation payable under the Project Agreement as an increase to the Guaranteed Price (as defined in the Project Agreement) due to increased Borrowing Costs.
- (44) **Compensation Payment** has the meaning given to it in the Project Agreement.
- (45) **Completion Holdback** has the meaning given to it in the Project Agreement.
- (46) **Compliance Certificate** means a compliance certificate substantially in the form attached as Schedule 1.1(45) signed by a Responsible Officer of the Borrower.
- (47) **Condemnation** means in respect of the Site or the Facility any taking, condemnation, confiscation, expropriation, deprivation, seizure, restraint, detention, appropriation of, or requisition of use or title to, the Site or the Facility or any part thereof, including a taking, confiscation, expropriation, seizure, or appropriation of, or requisition or sale of the use or title to, any access or occupancy rights in respect of the Site or the Facility or any part thereof, wholly or partially (temporarily or permanently), by or on account of any threatened or actual eminent domain proceeding or other taking of action by any Person having the power of eminent domain or by or on account of an eviction by paramount title or any transfer made in lieu of any such proceeding or action. A “**Condemnation**” shall be deemed to have occurred on the earliest of the dates that use, occupancy or title vests in the condemning authority.
- (48) **Consents** means permissions, authorizations, registrations, consents, approvals, certificates, certificates of authorization, permits, licences, statutory agreements, waivers, exceptions, variances, orders, judgments, written interpretations, decrees, exemptions, publications, filings, notices to and declarations of or with, or required by, any Governmental Authority under Applicable Law and consents and agreements from any third parties (including any planning permission and consents or approvals and any Environmental Permits). For greater certainty, “**Consents**” shall also include the terms and conditions as may be attached to any Consent.
- (49) **Construction Budget** means in respect of the Works a construction budget setting forth all costs associated with the completion of the Works, including all hard costs and soft costs relating to the completion of the Works and all other Transaction Expenses, which shall be in form and substance satisfactory to the Lenders’ Consultant and the Administrative Agent, as revised from time to time by the Borrower with the approval of the Lenders’ Consultant and the Administrative Agent.
- (50) **Construction Contract** means the guaranteed price contract dated as of the Financial Closing Date and entered into between the Borrower and the Contractor for the carrying out of the Works.
- (51) **Construction Costs** means all costs of any nature or type whatsoever (other than Borrowing Costs) as provided for in the Financial Model and Construction Budget incurred or to be incurred by the Contractor in relation to the Works up to the Substantial Completion Date plus all costs of any kind relating to the Works that will be incurred up to the date of Final Completion but excluding costs of Variation Confirmations or Variation Directives that increase the Guaranteed Price (as defined in the Project Agreement).
- (52) **Construction Period** means the period commencing on the Financial Closing Date and ending on the earlier of the Substantial Completion Payment Date and the Longstop Date.

(53) **Construction Subcontract** means each agreement entered into between the Contractor and a Subcontractor, or any replacement of such Subcontractor, to perform a portion of the Works under the Construction Contract.

(54) **Contractor** means Bondfield Construction Company Limited, a corporation incorporated under the laws of the Province of Ontario, and shall include its successors and permitted assigns.

(55) **Contractor Assignment of Material Documents** means the Assignment of Material Documents dated as of the Financial Closing Date made by the Contractor in favour of the Administrative Agent, granting to the Administrative Agent on behalf of the Lenders a first ranking assignment by way of security over all of the Contractor's right, title and interest in all Material Project Documents to which the Contractor is, or will become, party.

(56) **Contractor Bonds** means, collectively, the Contractor P3 Bond and the Contractor Labour and Material Payment Bond.

(57) **Contractor Direct Agreement** means the Contractor Direct Agreement dated as of the Financial Closing Date between the Contractor, the Borrower and the Administrative Agent.

(58) **Contractor Labour and Material Payment Bond** has the meaning given to it in Section 8.1(2)(b).

(59) **Contractor P3 Bond** has the meaning given to it in Section 8.1(2)(a).

(60) **Contractor Support Agreement** means the Contractor Support Agreement dated as of the Financial Closing Date between the Contractor and the Borrower.

(61) **Cost of the Works** has the meaning given to it in the Project Agreement.

(62) **Cost Overrun** means, with regard to any particular phase of the Works or component of the Works, the amount by which (a) Construction Costs in respect of such phase or component, exceed (b) amounts allocated thereto in the Construction Budget or the Financial Model.

(63) **Cost to Complete Deficiency** means, in respect of any Funding Date, the amount, if any, certified by the Lenders' Consultant, by which:

- (a) the aggregate, without duplication, of:
 - (i) the Estimated Cost to Complete calculated as of such date, and
 - (ii) the Tower Interim Completion Holdback and the Completion Holdback imposed or claimed by SMH under the Project Agreement up to and including such date (other than in respect of Additional SMH Payments), less amounts in respect of which SMH has withdrawn funds from the Trust Account in accordance with the terms of the Trust Account Agreement to reimburse itself for construction costs relating to the Works,

- (b) exceeds the aggregate, without duplication, of:
 - (i) the Available Commitment as of such date,
 - (ii) the Agent's Funding Account Balance as of such date;
 - (iii) any credit balance in the Borrower Proceeds Account as of such date;
 - (iv) where an event which causes delay or increases the Estimated Cost to Complete has occurred, the amount of any compensation (other than Additional SMH Payments) that SMH has committed in writing to provide to the Borrower in respect of any such increase and any other costs resulting from such delay (including any additional financing costs); and
 - (v) cash or liquid security provided by the Borrower or the Contractor up to and including such date in respect of the Tower Interim Completion Holdback and the Completion Holdback, which have not been refunded or returned to the Borrower or the Contractor, as the case may be, in accordance with Section 6.5(2).

- (64) **Credit Facility** has the meaning given to it in Section 3.1.

- (65) **DBRS** means Dominion Bond Rating Service Limited, and includes any successor to its rating business.

- (66) **Debt** means, in respect of any Person (without duplication):
 - (a) all debts and liabilities of the Person for borrowed money;
 - (b) all Financial Assistance granted by the Person;
 - (c) any obligation, contingent or other, which is required to be classified in accordance with GAAP upon the Person's balance sheet as a liability;
 - (d) any obligation secured by any Lien existing on property owned or acquired by the Person subject to the Lien whether or not the obligation secured thereby shall have been assumed (but if not assumed, the amount of such Debt for the purposes of any calculation under this Agreement shall not exceed the fair market value of such property);
 - (e) any obligation for the payment of rent or hire of real or personal property of any kind whatsoever (including immovable, movable or mixed, tangible or intangible and including the outstanding amount of any Capital Lease by which the Person is bound as lessee);
 - (f) any liabilities, contingent, unmatured or other, under indemnities or other agreements of the Person given in respect of any bankers' acceptance, letter of credit or letter of guarantee; and

- (g) the outstanding amount of any operating lease under which the Person has furnished a residual value guarantee and in respect of which the Person is liable as lessee and the present value of future rental payments under all synthetic leases;

but *Debt* does not include deferred taxes or obligations to trade creditors incurred in the ordinary course of business.

- (67) *Default* has the meaning given to it in Section 1 of the CBA Schedule.
- (68) *Direct Agreements* means the Lenders' Direct Agreement and the Contractor Direct Agreement and *Direct Agreement* means either one of them.
- (69) *Distribution* means any payment, loan, contribution or other transfer of funds or property to the beneficial holder of any security issued by the Borrower (where security has the meaning assigned in the *Securities Act* (Ontario)), or to any Associate or Affiliate of that holder, either directly or indirectly, and includes management, consulting or servicing fees, bonuses, dividends, distributions of capital, repayment of any loans or associated interest or the redemption, retraction or purchase of any of those securities; provided that payments to the Contractor under the Construction Contract and Transaction Expenses payable on the Financial Closing Date, in each case in amounts consistent with the Financial Model, shall not be "**Distributions**" for the purposes of this Agreement or the other Loan Documents.
- (70) *Environmental Activity* means any activity, event or circumstance in respect of Hazardous Materials, including its storage, use, holding, collection, purchase, accumulation, assessment, generation, manufacture, construction, processing, treatment, stabilization, disposition, handling or transportation or its Release into the natural environment including movement through or in the air, soil, subsoil, surface water or groundwater.
- (71) *Environmental Claim* means any and all administrative, regulatory, judicial or other actions, suits, demands, decrees, claims, Liens, judgments, warning notices, directions, notices of non-compliance or violation, investigations, proceedings, removal or remedial actions or orders, whether actual or contingent, relating to any Environmental Laws, any Release of, or exposure to, Hazardous Materials or any Environmental Permit issued under any such Environmental Laws (including any liability for damages, fines, penalties or indemnities) (hereafter in this definition "**Claims**"), including (a) any and all Claims by Governmental Authorities for enforcement, cleanup, removal, response, remedial or other actions or damages pursuant to any applicable Environmental Law, and (b) any and all Claims by any third party seeking damages, contribution, indemnification, cost recovery, compensation or injunctive relief resulting from Hazardous Materials or arising from alleged injury or threat of injury to health, safety or the environment.
- (72) *Environmental Laws* means Applicable Laws relating to the environment, occupational health and safety, health protection matters, or any Environmental Activity in respect of the Works and Project Lands, including but not limited to, all such requirements relating to: (a) the protection, preservation or remediation of the environment (including all components of the earth, air, all layers of the atmosphere, property, soils, water, ground water, organic and inorganic matters, living species and organisms or any combination of any of the above or the general environment); (b) generation,

handling, treatment, storage, disposal or transportation of Hazardous Materials; (c) consumer, occupational or public safety and health; and (d) Hazardous Materials.

(73) ***Environmental Permits*** means any certificate, certificate of authorization, registration, notice, decree, filing, approval, consent, waiver, exemption, variance, franchise, order, permit, authorization, right or license of or from a Governmental Authority, as required pursuant to any Environmental Laws.

(74) ***Estimated Cost to Complete*** means the amount equal to the aggregate, without duplication, of:

- (a) all Construction Costs, net of the Legislative Holdback, to reach Substantial Completion (as determined by the Lenders' Consultant, acting reasonably),
- (b) all Borrowing Costs, other than Compensable Financing Costs, to be incurred prior to the date which is ten (10) Business Days after the then-scheduled Substantial Completion Date (as determined by the Administrative Agent, acting reasonably);
- (c) any Increased Financing Costs associated with any Forecasted Delay; and
- (d) any costs associated with any Variation to the extent not adequately compensated for by Variation Confirmations or Variation Directives issued under the Project Agreement (as determined by the Lenders' Consultant, acting reasonably);

provided that, in calculating the "Estimated Cost to Complete" the Lenders' Consultant shall not take into account any Construction Costs or costs associated with any Variation that is, at the time of calculation, subject to a dispute resolution under the Project Agreement (which dispute has not been finally resolved in accordance with the applicable dispute resolution terms) or any Borrowing Costs associated therewith.

(75) ***Event of Default*** means any of the events or circumstances specified in Section 10.1.

(76) ***Excluded Taxes*** has the meaning given to it in Section 1 of the CBA Schedule.

(77) ***Facility*** has the meaning given to it in the Project Agreement.

(78) ***FATCA*** means sections 1471 through 1474 of the Internal Revenue Code of 1986.

(79) ***Fees*** means all the fees payable from time to time under this Agreement or any other Loan Documents, including without limitation, all Standby Fees, the Upfront Fee and the Agency Fee.

(80) ***Final Completion*** has the meaning given to it in the Project Agreement.

(81) ***Financial Assistance*** means, with respect to any Person and without duplication, any loan to or investment in or other form of direct or indirect financial support of any other Person or any obligation (contingent or other) intended to enable another Person to incur or pay any Debt or to comply with agreements relating thereto or otherwise to assure or protect creditors of the other

Person against loss in respect of Debt of the other Person and includes any guarantee of the Debt of the other Person and any absolute or contingent obligation:

- (a) to advance or supply funds for the payment or purchase of any Debt of any other Person;
- (b) to purchase, sell or lease (as lessee or lessor) any property, assets, goods, services, materials or supplies primarily for the purpose of enabling any Person to make payment of Debt or to assure the holder thereof against loss in respect of any Debt;
- (c) to indemnify or hold harmless any creditor of any other Person from or against any losses, liabilities or damages in respect of any Debt;
- (d) to make a payment to another for goods, property or services regardless of the non-delivery or non-furnishing thereof; or
- (e) to make an Investment in or to maintain the capital, working capital, solvency or general financial condition of another Person.

The amount of any Financial Assistance is the amount of any loan or Investment or direct or indirect financial support, without duplication, made or given, or all Debt of the obligor to which the Financial Assistance relates, unless the Financial Assistance is limited to a determinable amount, in which case the amount of the Financial Assistance is the determinable amount.

(82) **Financial Closing Date** means January 27, 2015 or such other date upon which this Agreement has been executed and delivered to each of the parties hereto.

(83) **Financial Model** means the financial model in respect of the Works attached as Schedule 1.1(83) to this Agreement, as amended, supplemented or replaced from time to time in accordance with this Agreement and the Material Project Documents.

(84) **Fiscal Year** means, with respect to any Person, the fiscal year of such Person for the purposes of financial reporting.

(85) **Forecasted Delay** means any delay in achieving Tower Interim Completion or Substantial Completion which is forecast by the Lenders' Consultant (taking into account any remedial plans that may have been provided by the Borrower) to be of a duration of (i) greater than forty-five (45) days, if such forecast is made during the period from the Financial Closing Date to the end of the tenth (10th) month of the Construction Period, or (ii) any amount of time, if such forecast is made after the beginning of the eleventh (11th) month of the Construction Period; provided that "**Forecasted Delay**" shall not include any delay in respect of which compensation for increased Cost of the Financing (as defined in the Project Agreement) is payable under the Project Agreement on a basis whereby such increased Cost of the Financing is payable on a monthly basis to pay current interest, unless SMH disputes such availability or fails to pay compensation on a monthly basis to pay current interest.

(86) **Foreign Lender** has the meaning given to it in Section 1 of the CBA Schedule.

- (87) **Funding** means any amount released by the Administrative Agent from the Agent's Funding Account to the Borrower Proceeds Account in accordance with this Agreement.
- (88) **Funding Date** means any Interest Payment Date, or the earliest date thereafter, upon which all of the conditions precedent to the release of Funding have been satisfied or waived by the Administrative Agent and the Administrative Agent releases Funding to the Borrower, provided that there may not be more than one Funding Date in any calendar month.
- (89) **Funding Period** means (i) the period commencing on the initial Funding Date and ending on (but excluding) the next Funding Date and (ii) each subsequent period commencing on the subsequent Funding Date and ending on (but excluding) the next Funding Date.
- (90) **Funding Request** has the meaning given to it in Section 3.5(1).
- (91) **GAAP** means generally accepted accounting principles in effect in Canada at the time any calculation or determination is made or required to be made in accordance with generally accepted accounting principles, applied in a consistent manner from period to period, including the accounting recommendations published in the Handbook of the Canadian Institute of Chartered Accountants (and/or, if applicable, IFRS).
- (92) **Governmental Authority** has the meaning given to it in Section 1 of the CBA Schedule.
- (93) **Hazardous Materials** means any substance, matter, pollutant or contaminant, as defined or regulated under any Environmental Laws, the Release of which in the environment could cause harm or damage to or impairment of the environment or any risk to human health or safety or property.
- (94) **Hedge Provider** means a Person that is a provider of an Interest Rate Swap pursuant to an Interest Rate Swap Document with the Borrower with respect to the Credit Facility and who satisfies the requirements of Section 3.10(3), together with its successors and assigns.
- (95) **HST** means the Harmonized Sales Tax as imposed under the provisions of the *Excise Tax Act* (Canada).
- (96) **IFRS** means International Financial Reporting Standards adopted by the Canadian Accounting Standards Board or the Financial Accounting Standards Board, as the context may require.
- (97) **Increased Financing Costs** means, in respect of any Forecasted Delay, the aggregate of the amount, calculated on a per diem basis, equal to (A) the number of days of the Forecasted Delay, divided by (B) 365, multiplied by (C) the sum of the CDOR Rate then in effect plus the Applicable Margin, multiplied by (D) the Total Commitment (as it may have been reduced in accordance with the Loan Documents).
- (98) **Indemnified Taxes** has the meaning given to it in Section 1 of the CBA Schedule.
- (99) **Independent Certifier** has the meaning given to it in the Project Agreement.
- (100) **Insurance** means, collectively, the Project Insurance and the Additional Insurance.

(101) **Insurance Requirements** means all terms and conditions of any Insurance and all requirements of the issuer of any such Insurance.

(102) **Insurance Trust Account** means the bank account maintained by the Insurance Trustee to receive and disburse the proceeds of the Project Insurance, the Contractor P3 Bond and the Contractor Labour and Material Payment Bond on the terms and conditions set forth in the Insurance Trust Agreement.

(103) **Insurance Trust Agreement** has the meaning given to it in the Project Agreement.

(104) **Insurance Trustee** means the trustee appointed or to be appointed under the Insurance Trust Agreement, and shall include any successors and permitted assigns.

(105) **Intellectual Property** means patent rights (including patent applications, disclosures, and registrations), registered or unregistered trade marks, utility models, copyrights (including applicable applications and registrations), *sui generis* rights of extraction relating to databases, designs (including applicable applications and registrations), trade secrets, moral rights, know-how and any other similar rights or intangible assets recognized under any law(s) or international convention(s) in any country or jurisdiction in the world where such rights accrue and/or may be secured which relate to or form part of the Works.

(106) **Interest Payment Date** means (i) at all times up to and including the Maturity Date, the last day of each calendar month, and (ii) each other date on which a Loan becomes due and payable in accordance with the terms of this Agreement.

(107) **Interest Period** means, as applicable, (i) the period from and including the Financial Closing Date to but excluding the next Interest Payment Date thereafter, (ii) the period from and including the immediately preceding Interest Payment Date to but excluding the next Interest Payment Date thereafter and (iii) the period from and including the last Interest Payment Date prior to the Maturity Date to but excluding the Maturity Date.

(108) **Interest Rate Swap Documents** means, with respect to each Hedge Provider, the ISDA Master Agreement (2002) (together with the Schedule thereto) entered into between such Hedge Provider and the Borrower and each Transaction, including each related Confirmation, entered into (and as defined) thereunder, in each case, as amended, modified, supplemented, restated or replaced from time to time in accordance with their terms and the terms hereof.

(109) **Interest Rate Swaps** means the interest rate swap transactions between the Borrower and the Hedge Providers pursuant to the Interest Rate Swap Documents and **Interest Rate Swap** means any one of them.

(110) **Investment** means, for any Person, the acquisition (whether for cash, property, services, securities or otherwise) of shares, bonds, notes, debentures, partnership or other ownership interests or other securities of any other Person or any agreement to make that acquisition.

(111) **Irrevocable Direction** means the Irrevocable Direction dated as of the Financial Closing Date given by the Borrower to SMH, directing SMH to pay to the Administrative Agent on behalf of the Lenders, or as the Administrative Agent shall direct, the Legislative Holdback and, after a Default

has occurred, all Additional SMH Payments and all other amounts payable by SMH to the Borrower or the Contractor pursuant to the Material Project Documents.

(112) *ITA* means the *Income Tax Act* (Canada), as amended, and any successor thereto, and any regulations promulgated thereunder.

(113) *Judgment Currency* has the meaning given to it in Section 14.4.

(114) *Legislative Holdback* has the meaning given to it in the Project Agreement.

(115) *Lead Arranger* means each Lender, in its capacity as mandated lead arranger of the Credit Facility.

(116) *Lender Longstop Date* means the date which is 90 days before the Longstop Date.

(117) *Lenders* means all of the banks named on the signature pages of this Agreement, whether in their respective capacities as Lead Arrangers, providers of the Commitments under the Credit Facility or as Hedge Providers, as applicable, and their permitted successors and assigns, and "*Lender*" means any one of them.

(118) *Lenders' Consultant* means Pelican Woodcliff Inc. with respect to all construction matters relating to the Works or any other qualified consultant appointed by the Lenders for the purpose of advising the Lenders on the technical proposal of the Borrower and the Contractor relating to the Works and includes any replacement advisors appointed by the Lenders from time to time in respect of the foregoing.

(119) *Lenders' Consultant's Certificate* has the meaning given to it in Section 8.2(6)(c).

(120) *Lenders' Direct Agreement* means the Lenders' Direct Agreement dated as of the Financial Closing Date between SMH, the Administrative Agent and the Borrower.

(121) *Lenders' Insurance Advisor* means Aon Corporation or any other qualified consultant appointed by the Lenders for the purpose of advising the Lenders on insurance matters relating to the Works and includes any replacement advisors appointed by the Lenders from time to time in respect of the foregoing.

(122) *Lien* means any mortgage, charge, lien, hypothec or encumbrance, whether fixed or floating on, or any security interest in, any property, whether real, personal or mixed, tangible or intangible, any pledge or hypothecation of any property, any conditional sale agreement, other title retention agreement or equipment trust Capital Lease or other arrangement of any kind intended to create or grant security.

(123) *Limited Recourse Guarantee and Pledge Agreements* means the limited recourse guarantee and pledge agreement from the Contractor dated as of the Financial Closing Date in favour of the Administrative Agent for the benefit of the Lenders guaranteeing the obligations of the Borrower under this Agreement and pledging its shares in the Borrower as security for such guarantee.

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(124) **Liquidated Damages** means any amounts payable by the Contractor to the Borrower pursuant to the Contractor Support Agreement whether on account of delay or otherwise, and whether or not such amounts constitute liquidated damages at law.

(125) **Loan** has the meaning given to it in Section 1 of the CBA Schedule.

(126) **Loan Documents** means, collectively:

- (a) this Agreement;
- (b) the Interest Rate Swap Documents;
- (c) the Lenders' Direct Agreement;
- (d) the Insurance Trust Agreement;
- (e) the Trust Account Agreement;
- (f) the Blocked Account Agreement;
- (g) the Security Documents; and
- (h) all guarantees, certificates, instruments, agreements and other documents delivered, or to be delivered, to any Lender or to the Administrative Agent, for itself or for the benefit of any of the Lenders, under this Agreement or any other Loan Document,

and, when used in relation to any Person, the term "**Loan Documents**" means the Loan Documents executed and delivered by such Person.

(127) **Longstop Date** has the meaning given to it in the Project Agreement.

(128) **Major Project Party** means each of:

- (a) the Borrower;
- (b) the Contractor; and
- (c) SMH.

(129) **Market Disruption Event** means the occurrence of an event whereby:

- (a) the CDOR Rate is not available on the Reuters Screen CDOR Page and none of the Lenders supplies a rate to the Administrative Agent to determine the CDOR Rate for the relevant Interest Period; or
- (b) the Administrative Agent has received notice from one or more Lenders whose aggregate Commitments exceed 35% of the Total Commitments that, due to one or more similar events, circumstances or conditions affecting the relevant Lenders, the cost to such Lenders of funding their participations in any Loans under the Credit

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Facility in the relevant interbank markets would be in excess of the CDOR Rate as determined in accordance with the definition thereof.

(130) **Material Adverse Effect** means a material adverse effect on (a) the Works, (b) where used in relation to a Major Project Party, the ability of such Major Project Party to perform and discharge its material obligations under this Agreement, any of the other Loan Documents or any of the Material Project Documents to which it is a party.

(131) **Material Project Documents** means:

- (a) the Project Agreement;
- (b) the Construction Contract;
- (c) the Contractor Support Agreement;
- (d) the Lenders' Direct Agreement;
- (e) the Insurance Trust Agreement;
- (f) the Trust Account Agreement;
- (g) the Performance Guarantee of Construction Guarantor;
- (h) all Material Subcontracts (including any subcontractor performance support provided thereunder); and
- (i) the SMH Funding Letter.

(132) **Material Subcontract** means (i) each Construction Subcontract listed in Schedule 1.1(132) and any replacements thereof and (ii) each Construction Subcontract entered into by the Contractor after the Financial Closing Date which the Lenders' Consultant determines, acting reasonably, is material to the completion of the Works, having regard to its subject matter or the potential consequence of breach or termination of which (prior to its scheduled termination date) could reasonably be expected to have a Material Adverse Effect.

(133) **Maturity Date** means the earlier of (i) 3 Business Days immediately following the date the Borrower receives the Substantial Completion Payment, (ii) the Lender Longstop Date, and (iii) March 27, 2021.

(134) **MoHLTC** means Her Majesty the Queen in Right of Ontario as represented by the Minister of Health and Long-Term Care, and includes any agent thereof or any successors thereto or Persons exercising delegated power under the Minister's authority.

(135) **Moody's** means Moody's Investor Services, Inc. and includes any successor to its rating business.

(136) **Obligations** means all loans, advances, debts, liabilities and obligations for the performance of covenants, tasks or duties or for the payment of monetary amounts (whether or not performance is

then required or contingent, and whether or not those amounts are liquidated or determinable) owing by the Borrower to the Administrative Agent or any Lender under any or all of the Loan Documents and all covenants and duties regarding those amounts, of any kind or nature, present or future, whether or not evidenced by any agreement or other instrument, owing under any or all of the Loan Documents including all obligations owed by the Borrower to the Administrative Agent or any of the Lenders in respect of the Credit Facility and the Interest Rate Swaps.

(137) ***Performance Guarantee of Construction Guarantor*** has the meaning given to it in the Project Agreement.

(138) ***Permitted Contest*** means a contest of any claim, Tax, Lien or Applicable Law in good faith and by appropriate proceedings diligently conducted and for which adequate reserves in the opinion of the Administrative Agent have been established or provided, so long as the proceedings do not (1) involve any risk of criminal or quasi-criminal liability or material unindemnified liability on the part of the Administrative Agent or any Lender or of the loss of priority of the interest of any of the Liens on any of the Collateral pursuant to any of the Security Documents, (2) pose any risk of sale, forfeiture or loss of any interest in the Collateral or any material part thereof, (3) interfere in any material manner with the performance by the Borrower or the Contractor of its respective obligations under the Material Project Documents, or (4) pose any risk of interference with, or impairment or reduction in, the payment of any amounts under the Material Project Documents or the Loan Documents.

(139) ***Permitted Debt*** means any of the following:

- (a) Debt secured by a Permitted Lien;
- (b) Debt under or in connection with this Agreement;
- (c) unsecured Debt incurred by the Borrower to the Contractor to remedy any default under a Material Project Document provided that any such unsecured Debt shall be on terms and conditions satisfactory to the Lenders and fully subordinated and postponed to the Obligations (which subordination and postponement shall be on terms satisfactory to the Lenders), which unsecured Debt shall be assigned to the Lenders as security for the Obligations on terms and conditions satisfactory to the Lenders and in respect of which Debt all subrogation rights shall have been waived;
- (d) any Debt contemplated under the Material Project Documents; and
- (e) any other Debt which has been approved in writing by the Lenders.

(140) ***Permitted Disposal*** means any of the following: (a) any disposal expressly permitted by the Material Project Documents and not prohibited under this Agreement; (b) any disposal by the Borrower of redundant, obsolete or surplus assets for a consideration equivalent to their fair value; (c) any disposal under a Permitted Lien or (d) any disposal by the Borrower of assets in exchange for or replaced by other assets of at least comparable value and utility in accordance with Good Industry Practice (as defined in the Project Agreement).

(141) **Permitted Liens** means:

- (a) Liens for Taxes that either (i) are not yet due or delinquent or (ii) are being contested pursuant to a Permitted Contest and for which the person owing such Taxes has, if required by GAAP, taken an adequate reserve in accordance with GAAP;
- (b) Liens arising by operation of law, including materialmen's, warehousemen's, mechanics', worker's, repairer's, common carriers' and other like Liens in connection with the Works arising in the ordinary course of business; provided that such Liens (i) secure only amounts that are not yet due and payable or, if due and payable, have not yet been registered or filed and of which none of the Borrower, Contractor or the Administrative Agent has received written notice and in respect of which no enforcement action has been taken, or (ii) are being contested pursuant to a Permitted Contest and have been bonded for not less than the full amount in dispute (or as to which other security arrangements satisfactory to the Lenders have been made), which bonding (or arrangements) shall comply with Applicable Laws, and shall have effectively stayed any execution or enforcement of such Liens;
- (c) any security interest in respect of deposits of money or property by way of security for the performance of any statutory obligations arising in the ordinary course of business;
- (d) any right of title retention in connection with the acquisition of assets in the ordinary course of business and in compliance with the terms hereof;
- (e) with respect to SMH's interest in the Project Lands, any Lien arising from time to time that the Contractor is not required to satisfy and remove under the Construction Contract;
- (f) the Liens created by the Security Documents and any other security provided to the Administrative Agent or a Lender as security for the Obligations;
- (g) any Liens against the assets and undertaking of the Contractor arising in the normal course of the Contractor's business; and
- (h) Liens to which the Required Lenders have given their consent.

(142) **Person** has the meaning given to it in Section 1 of the CBA Schedule.

(143) **Planning and Design Documents** means all documents provided by SMH or the Independent Certifier to the Contractor which are in the possession of the Contractor or the Borrower relating to the planning and design of the Works.

(144) **Project** has the meaning given to it in the Project Agreement.

(145) **Project Accounts** means the Borrower Proceeds Account, the Insurance Trust Account and the Trust Account.

(146) **Project Agreement** means the Project Agreement dated as of January 27, 2015, between SMH and the Borrower with respect to the Works, as such agreement may be amended from time to time.

(147) **Project Insurance** means the insurance coverages which the Borrower or the Contractor is required to maintain or caused to be maintained pursuant to the Project Agreement.

(148) **Project Lands** means the Site and Facility.

(149) **Project Lands Licence** means the licence granted to the Borrower and the Contractor pursuant to Section 16.1 of the Project Agreement.

(150) **Release** means disposing, depositing, discharging, injecting, spilling, leaking, dumping, pumping, pouring, emitting, escaping, emptying, seeping, flowing, leaching, placing and any similar method of release, into or upon any land or water or air, or otherwise entering into or migrating into the environment and “Released” shall have a corresponding meaning.

(151) **Remedial Plan** has the meaning given to it in Section 9.1(12).

(152) **Requested Funding** means the amount of the Loans requested by the Borrower in a Funding Request to be made available on the related Funding Date and, in each case, will include amounts sufficient to reimburse the Borrower for amounts paid or due to the Lenders hereunder and to the Hedge Providers under the Interest Rate Swaps (after crediting to the Borrower amounts paid or due to the Borrower under the Interest Rate Swaps).

(153) **Required Lenders** means, subject to Section 3.10(7), any two or more Lenders whose Commitments hereunder, in the aggregate, represent 66⅔% or more of the aggregate Commitments of all Lenders; provided however that if at any time there are only two (2) Lenders under this Agreement, **Required Lenders** shall mean all such Lenders, and if at any time there is only one (1) Lender under this Agreement, **Required Lenders** shall mean such Lender.

(154) **Responsible Officer** means, with respect to any Person, the Chairman or Vice Chairman of the Board of Directors, the Chairman or Vice Chairman of the Executive Committee of the Board of Directors, the President, any Vice-President, the Secretary, the Treasurer or any Assistant Treasurer of such Person or any individual specifically authorized by resolution, and when used in relation to the Borrower means a Responsible Officer of the Borrower.

(155) **Responsible Officer's Certificate** means a certificate signed by one Responsible Officer.

(156) **Reuters Screen CDOR Page** means the display designated as page CDOR on the Reuters Monitor Money Rates Service or other page as may, from time to time, replace that page on that service for the purpose of displaying bid quotations for bankers' acceptances accepted by leading Canadian banks.

(157) **RFP** has the meaning given to it in the Project Agreement.

(158) **S&P** means Standard and Poor's Rating Group, a division of McGraw Hill, and includes any successor to its rating business.

- (159) ***Scheduled Substantial Completion Date*** has the meaning given to it in the Project Agreement.
- (160) ***Scheduled Tower Interim Completion Date*** has the meaning given to it in the Project Agreement.
- (161) ***Schedules*** means the schedules attached to and forming part of this Agreement, as particularized in Section 1.16.
- (162) ***Security Documents*** has the meaning given to it in Section 7.1.
- (163) ***Site*** has the meaning given to it in the Project Agreement.
- (164) ***SMH*** means St. Michael's Hospital, a non-share capital corporation incorporated under the laws of the Province of Ontario, its successors and permitted assigns.
- (165) ***SMH Funding Letter*** means the letter from MoHLTC to SMH dated January 8, 2015 evidencing the commitment of MoHLTC to fund a portion of SMH's financial obligations under the Material Project Documents.
- (166) ***Standby Fee*** has the meaning given to it in Section 4.2(2).
- (167) ***Standby Fee Payment Date*** has the meaning given to it in Section 4.2(2).
- (168) ***Subcontractor*** has the meaning given to it in the Project Agreement.
- (169) ***Subsidiary*** of a Person means (a) any corporation of which the Person and/or any one of its Affiliates holds, directly or beneficially, other than by way of security only, securities to which are attached more than 50% of the votes that may be cast to elect directors of such corporation, (b) any corporation of which the Person and/or any one of its Affiliates has, through operation of law or otherwise, the ability to elect or cause the election of a majority of the directors of such corporation and (c) any partnership, limited or unlimited liability company, trust, joint venture or other incorporated or unincorporated entity in which such Person and/or one or more Subsidiaries of such Person shall have, directly or indirectly, more than 50% of the votes that may be cast to elect the governing body of such entity.
- (170) ***Substantial Completion*** has the meaning given to it in the Project Agreement.
- (171) ***Substantial Completion Date*** has the meaning given to it in the Project Agreement.
- (172) ***Substantial Completion Payment*** has the meaning given to it in the Project Agreement.
- (173) ***Substantial Completion Payment Date*** has the meaning given to it in the Project Agreement.
- (174) ***Swap Adjustment Costs*** means, for any date, any amounts that would be payable to a Hedge Provider in connection with any Interest Rate Swaps pursuant to Section 6(e)(ii)(2)(A) of the applicable ISDA Master Agreement as if all such Interest Rate Swaps were being terminated as of that date.

(175) **Swap Breakage Costs** means, as applicable, Swap Adjustment Costs or Swap Termination Costs.

(176) **Swap Termination Costs** means all amounts, whether constituting fees, costs, expenses or other amounts (howsoever arising) due and payable to a Hedge Provider on the early termination of any Interest Rate Swap in whole or in part whether by reason of any Termination Event or otherwise by reason of a default under the Interest Rate Swap Documents in accordance with (and as defined under) the applicable Interest Rate Swap Documents.

(177) **Taxes** has the meaning given to it in Section 1 of the CBA Schedule.

(178) **Term** means the period commencing on the Financial Closing Date and ending on the Maturity Date.

(179) **Total Commitment** means up to an aggregate of \$230,563,776, as such amount may be reduced or cancelled in accordance with this Agreement.

(180) **Tower Interim Completion** has the meaning given to it in the Project Agreement.

(181) **Tower Interim Completion Date** has the meaning given to it in the Project Agreement.

(182) **Tower Interim Completion Holdback** has the meaning given to it in the Project Agreement.

(183) **Tower Interim Completion Payment** has the meaning given to it in the Project Agreement.

(184) **Tower Interim Completion Payment Date** has the meaning given to it in the Project Agreement.

(185) **Transaction Expenses** means all costs and expenses incurred in connection with the consummation of the transactions contemplated by this Agreement and the preparation, negotiation, syndication, execution and delivery of the Loan Documents and the Material Project Documents, including:

- (a) the payment of Insurance premiums;
- (b) all costs and fees in connection with searches obtained for the Financial Closing Date or any Funding Date and the preparation, registering, filing and recording of appropriate instruments evidencing the interests granted pursuant to the Security Documents, and evidencing any supplements or amendments thereto;
- (c) the Insurance Trustee's fees and reasonable costs and expenses in connection with the negotiation, preparation, closing, execution and delivery of the Insurance Trust Agreement and the transactions contemplated thereby;
- (d) the Trust Account Trustee's fees and reasonable costs and expenses in connection with the negotiation, preparation, closing, execution and delivery of the SMH Trust Agreement and the transactions contemplated thereby;

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- (e) the reasonable fees and out-of-pocket expenses of each of the Lenders' Consultant and the Lenders' Insurance Advisor in connection with the negotiation, preparation, closing, execution and delivery of the Loan Documents, the Material Project Documents and related documentation and in connection with the transactions occurring on each Funding Date;
- (f) the reasonable fees, out-of-pocket expenses and disbursements of counsel to the Administrative Agent, the Lenders, the Borrower and the Contractor for their services rendered in connection with the negotiation, preparation, closing, execution and delivery of the Loan Documents, the Material Project Documents and related documentation;
- (g) the reasonable fees, out-of-pocket expenses and disbursements of counsel to the Administrative Agent, the Lenders, the Borrower and the Contractor for their services rendered in connection with the transactions occurring on each Funding Date;
- (h) the cost of reproducing and printing the Loan Documents and the Material Project Documents;
- (i) the reasonable out-of-pocket expenses, disbursements and costs of the Administrative Agent, the Lenders, the Borrower and the Contractor (including reasonable legal fees and out-of-pocket expenses) paid or incurred in connection with the negotiation, preparation and closing of the transactions contemplated by the Material Project Documents and the Loan Documents (including the transactions occurring on each Funding Date);
- (j) the reasonable out-of-pocket expenses, disbursements and costs of the Administrative Agent, the Lenders, the Borrower and the Contractor (including reasonable legal fees and out-of-pocket expenses) paid or incurred in connection with (i) any supplements, amendments, modifications or alterations of or to any of the Loan Documents or the Material Project Documents (whether or not such supplements, amendments, modifications or alterations are finalized), and (ii) the giving or withholding of waivers and consents under any Loan Document or any Material Project Document;
- (k) all out-of-pocket expenses, disbursements and costs of the Administrative Agent and the Lenders (including reasonable legal fees and out-of-pocket expenses) incurred as a result of or in connection with a Default or Event of Default or the enforcement or preservation of any of the rights and remedies of the Administrative Agent or the Lenders in respect of the Loan Documents or the Material Project Documents; and
- (l) any other expenditure which is not inconsistent with the Financial Model;

provided that, prior to the occurrence and continuation of a Default or Event of Default, the Borrower shall only be responsible for the reasonable fees, out-of-pocket expenses and disbursements of one set of counsel for the Administrative Agent and the Lenders, collectively.

(186) *Trust Account* means the bank account maintained by the Trust Account Trustee to receive and disburse the payments made by MoHLTC to SMH pursuant to the SMH Funding Letter in accordance with the terms and conditions set forth in the Material Project Documents.

(187) *Trust Account Agreement* means the trust account agreement dated as of the Financial Closing Date between the Trust Account Trustee, SMH, the Borrower and the Administrative Agent on behalf of the Lenders, regarding the operation of the Trust Account and the distribution of payments therefrom.

(188) *Trust Account Trustee* means BNY Trust Company of Canada, as trustee under the Trust Account Agreement, and its successors and permitted assigns.

(189) *Upfront Fee* has the meaning given to it in Section 4.2(1).

(190) *US Tax Obligor* means a United States person within the meaning of section 7701(a)(30) of the Internal Revenue Code of 1986.

(191) *Variation* has the meaning given to it in the Project Agreement.

(192) *Variation Confirmation* has the meaning given to it in the Project Agreement.

(193) *Variation Directive* has the meaning given to it in the Project Agreement.

(194) *Variation Enquiry* has the meaning given to it in the Project Agreement.

(195) *Warranty Letter of Credit* has the meaning given to it in the Project Agreement.

(196) *Works* has the meaning given to it in the Project Agreement.

(197) *Works Schedule* has the meaning given to it in the Project Agreement.

(198) *written* or *in writing* includes printing, typewriting, or any electronic means of communication capable of being legibly reproduced at the point of reception.

1.2 Headings and Table of Contents

See Section 2(1) of the CBA Schedule.

1.3 Number and Gender

See Section 2(1) of the CBA Schedule.

1.4 References

See Section 2(1) of the CBA Schedule.

1.5 Statutory References

See Section 2(1) of the CBA Schedule.

1.6 Entire Agreement

See Section 13(a) of the CBA Schedule.

1.7 Business Day

If under this Agreement any calculation is to be made, or any other action is to be taken, on or as of a day which is not a Business Day, that calculation is to be made, and that other action is to be taken, as applicable, on or as of the next day that is a Business Day. Any payments which may be due and payable on a day which is not a Business Day shall be paid in accordance with the provisions of Section 6.1 and, for greater certainty, where an Interest Payment Date is adjusted in accordance with Section 6.1 the corresponding Funding Date shall be adjusted accordingly.

1.8 Conflict

If there is a conflict between any provision of this Agreement and any provision of another document contemplated by or delivered under or in connection with this Agreement, the relevant provision of this Agreement is to prevail. If there is a conflict or inconsistency between the terms of the CBA Schedule and the other terms of this Agreement, the other terms of this Agreement shall govern to the extent necessary to resolve the conflict or inconsistency.

1.9 Currency

Unless otherwise specified, all amounts are stated in Canadian dollars.

1.10 Time

Time shall be of the essence in all provisions of this Agreement.

1.11 GAAP

Unless otherwise expressly provided, all accounting terms used in this Agreement shall be interpreted and all financial information shall be prepared in accordance with GAAP, consistently applied.

1.12 Time of Day

Unless otherwise specified, references to time of day or date mean the local time or date in the City of Toronto, Province of Ontario.

1.13 Governing Law

This Agreement and each of the Loan Documents are governed by, and are to be construed and interpreted in accordance with, the laws of the Province of Ontario and the laws of Canada applicable in the Province of Ontario, but without prejudice to or limitation of any other rights or remedies available under the laws of any jurisdiction where property or assets of the Borrower may be found.

1.14 Severability

If any provision of this Agreement is or becomes illegal, invalid or unenforceable in any jurisdiction, the illegality, invalidity or unenforceability of that provision will not affect:

- (a) the legality, validity or enforceability of the remaining provisions of this Agreement;
or
- (b) the legality, validity or enforceability of that provision in any other jurisdiction.

1.15 No Recourse

All covenants, stipulations, promises, agreements and obligations of the Borrower contained in this Agreement shall be deemed to be the covenants, stipulations, promises, agreements and obligations of the Borrower and not of any Person (including any shareholder, director, officer or employee of the Borrower) in its or his or her individual or personal capacity or the Contractor or any shareholder, director, officer or employee of the Contractor, and, provided further that no recourse shall be had against the Contractor (or any shareholder, director, officer or employee of the Sponsor) for the payment of the principal or interest on or any other amount owing in respect of the Credit Facility or any part thereof or for any claim based on this Agreement or the other Loan Documents, except as expressly provided by and pursuant to the Security Documents.

1.16 Schedules

The following Schedules are attached to and form part of this Agreement; without limiting the generality of the foregoing, the Borrower is bound by, and agrees to comply with and fulfill, the covenants and other obligations contained in the CBA Schedule to be complied with and fulfilled by it:

<u>Schedule</u>	<u>Description</u>
A	- CBA Schedule
1.1(30)	- Lenders' Branches of Account
1.1(42)	- Commitments
1.1(45)	- Form of Compliance Certificate
1.1(83)	- Financial Model
1.1(132)	- Material Subcontracts
2.1(25)	- Corporate Organization Chart
3.5(1)	- Form of Funding Request
5.4	- Notice of Repayment
5.5	- Notice of Cancellation of Credit Facility
8.2(6)(b)	- Form of Statutory Declaration

8.2(6)(c)	-	Form of Lenders' Consultant Certificate
9.1(19)	-	Financial Model Updates
9.1(22)	-	Additional Insurance

SECTION 2 – REPRESENTATIONS AND WARRANTIES

2.1 Representations and Warranties

The Borrower makes the following representations and warranties to the Administrative Agent and each Lender, all of which shall survive the execution and delivery of this Agreement:

(1) ***Existence, Power and Qualification – Borrower.*** The Borrower (a) is a corporation duly incorporated, organized and validly existing under the laws of the Province of Ontario, (b) is up to date in all filings required under those laws, (c) has the requisite corporate power and authority to own, operate and lease its properties and assets and to conduct the businesses in which it is presently engaged, and (d) is duly qualified under the laws of each jurisdiction where its ownership, lease or operation of properties or assets or the conduct of its business requires qualification, except where the failure to do so would not reasonably be expected to cause a Material Adverse Effect. No resolutions have been passed by the Contractor, which is the sole shareholder of the Borrower, limiting or restricting the scope of business that the Borrower may carry on or prohibiting or limiting the authority of the Borrower to enter into arrangements as contemplated under this Agreement, and no steps or proceedings have been taken, or are contemplated to be taken, with respect to the dissolution, liquidation or termination of the Borrower. The Borrower has all requisite power and authority to own the assets of the Borrower, to conduct the business of the Borrower as presently carried on by it, and to execute, deliver and perform the obligations of the Borrower under this Agreement.

(2) ***Existence, Power and Qualification – Contractor.*** To the Borrower's Knowledge, the Contractor (a) is a corporation duly incorporated, organized and validly existing under the laws of the Province of Ontario, (b) is up to date in all filings required under those laws, (c) has the requisite corporate power and authority to own, operate and lease its properties and assets and to conduct the businesses in which it is presently engaged, and (d) is duly qualified under the laws of each jurisdiction where its ownership, lease or operation of properties or assets or the conduct of its business requires qualification, except where the failure to do so would not reasonably be expected to cause a Material Adverse Effect. To the Borrower's Knowledge, no resolutions have been passed by the shareholders of the Contractor limiting or restricting the scope of business that the Contractor may carry on or prohibiting or limiting the authority of the Contractor to enter into arrangements as contemplated under this Agreement, and no steps or proceedings have been taken, or are contemplated to be taken, with respect to the dissolution, liquidation or termination of the Contractor. To the Borrower's Knowledge, the Contractor has all requisite power and authority to own the assets of the Contractor, to conduct the business of the Contractor as presently carried on by it, and to execute, deliver and perform the obligations of the Contractor under this Agreement.

(3) ***Power and Authority.*** The execution, delivery and performance by the Borrower and, to the Borrower's Knowledge, the Contractor, of this Agreement, the Security Documents, the other Loan

Documents and the Material Project Documents to which each of them is a party (a) are within the powers of the Borrower and the Contractor, (b) have been duly authorized by all necessary corporate or shareholder action with respect to each of the Borrower and the Contractor, (c) do not conflict with, result in a breach or violation of, or constitute a default under (i) the constating documents or any shareholders' agreement of the Borrower or the Contractor, respectively, (ii) any Applicable Law or (iii) any other document to which the Borrower or the Contractor is a party or by which the Borrower or the Contractor is bound, (d) do not conflict with or result in the breach or termination of, constitute a default under, or accelerate any performance required by any Material Project Document, and (e) do not and will not result in the creation of any Lien, except as set out in the Security Documents, upon any of the assets or properties of the Borrower under any agreement or other document.

(4) **Authorization, Execution, Delivery and Binding Effect.** Each of this Agreement, the Security Documents, the other Loan Documents and the Material Project Documents executed by the Borrower and, to the Borrower's Knowledge, by the Contractor, has been duly authorized, executed and delivered by, and constitutes a legal, valid and binding obligation of, the Borrower and the Contractor, respectively, enforceable in accordance with its terms, subject to (a) applicable bankruptcy, insolvency, moratorium, reorganization or other similar laws affecting creditors' rights generally, (b) the fact that specific performance and injunctive relief may only be given at the discretion of the courts, and (c) the equitable or statutory powers of the courts to stay proceedings before them and to stay the execution of judgments. The Loan Documents and the Material Project Documents represent all of the agreements and documents material and necessary to carry out the Works and to fully perform all obligations of the Borrower under the Project Agreement.

(5) **Consents.** (a) The Borrower has obtained all Consents which are necessary for the conduct of its business as presently conducted, each of which is in full force and effect and is a good, valid and subsisting Consent which has not been surrendered, forfeited or become void or voidable, except where such action would not reasonably be expected to cause a Material Adverse Effect, (b) there is no default under any such Consent, nor are there any proceedings in progress or, to the Borrower's Knowledge, pending or threatened, which default or proceedings may result in the revocation, suspension or material adverse modification of any such Consent, and (c) no further Consent is necessary in order to ensure the legality, validity, binding effect and enforceability of this Agreement, the Security Documents, or any other Loan Document or the execution, delivery or performance of the Obligations.

(6) **No Other Business.** The Borrower is a single purpose entity created solely for the purpose of entering into the Material Project Documents and the Loan Documents to which it is a party and undertaking the Works. The Borrower has not engaged in any business or activities, either alone or in partnership or joint venture, other than those contemplated by the Material Project Documents and the Loan Documents. The Borrower has no Subsidiaries.

(7) **Shareholder.** The Contractor is the sole shareholder of the Borrower. All shares of the Borrower owned by the Contractor are fully issued to the Contractor and subject to no assessment. There are no outstanding rights to purchase interests in the Borrower or agreements pursuant to which the Borrower may be required to issue, sell, repurchase or redeem any interest in its capital. No Person has an agreement or option or any other right or privilege (whether by law, pre-emptive

or contractual) capable of becoming an agreement or option for the purchase, subscription, allotment or issuance of any interest in the capital of the Borrower.

(8) **Financial Statements.** Each of the Borrower's and, to the Borrower's Knowledge, the Contractor's most recent financial statements, copies of which have been furnished to the Administrative Agent, were prepared in accordance with GAAP applied on a basis consistent with preceding periods, except as stated therein or in the notes, and those financial statements present fairly in accordance with GAAP the Borrower's and, to the Borrower's Knowledge, the Contractor's financial position and results of operations for and as at the end of the relevant fiscal period.

(9) **Material Adverse Change.** Since the date of the financial statements referred to in Sections 8.1(1)(bb) and 8.1(1)(cc), except as otherwise disclosed to the Administrative Agent in writing, there have been no changes in the respective financial conditions of the Borrower or, to the Borrower's Knowledge, the Contractor or the results of their respective operations that could reasonably be expected to have a Material Adverse Effect with respect to the Borrower or, to the Borrower's Knowledge, the Contractor.

(10) **Financial Model and Budgets.** Each of the Financial Model and the Construction Budget has been prepared by or on behalf of the Borrower or the Contractor or under the direction of the Borrower or the Contractor and each of the Financial Model, the Construction Budget and each other estimate, budget, forecast and projection provided by or on behalf of the Borrower or the Contractor has been prepared with due care and skill, is based on all information known at the time which could reasonably be relevant to the preparation thereof, is subject only to assumptions that are reasonable in the circumstances and, where applicable, has been prepared in accordance with the Project Agreement and in accordance and compliance with Section 9.1(19) and Schedule 9.1(19) hereof.

(11) **Contingent Liabilities and Debt.** Neither the Borrower nor, to the Borrower's Knowledge, the Contractor has any contingent liabilities which are not disclosed in the most recent financial statements furnished to the Administrative Agent or otherwise disclosed to the Administrative Agent in writing which could reasonably be expected to have a Material Adverse Effect, nor has the Borrower or, to the Borrower's Knowledge, the Contractor incurred any Debt which could reasonably be expected to have a Material Adverse Effect which is not disclosed in those financial statements or otherwise disclosed to the Administrative Agent in writing.

(12) **Solvency.** No event described in Section 10.1(7) or (to the Borrower's Knowledge) Section 10.1(8) in respect of the Borrower has occurred and is continuing. To the Borrower's Knowledge, no event described in Sections 10.1(7) or 10.1(8) in respect of the Contractor has occurred and is continuing.

(13) **Debt.** The Borrower has no Debt other than Permitted Debt. To the Borrower's Knowledge, the Contractor has no Debt except as disclosed in the most recent annual audited financial statements of the Contractor provided to the Administrative Agent.

(14) **Title to Assets and Liens.** The Borrower is the legal and beneficial owner of, or validly leases, all of its real and personal properties and assets free and clear of any Liens, other than Permitted Liens. To the Borrower's Knowledge, the Contractor is the legal and beneficial owner of

the Collateral over which it is granting security, free and clear of any Liens other than Permitted Liens.

(15) **Real Property Leases.** The Borrower is not party to any oral or written agreement with any lessor, tenant or sub-tenant with respect to any lease or licence respecting real property other than pursuant to the Project Agreement.

(16) **Creation of Liens.** The Security Documents create, and with respect to all subsequently acquired personal property will create, valid and enforceable first ranking Liens upon the Collateral on the terms set out therein, subject only to the terms of this Agreement and to Permitted Liens, and the Security Documents have been registered or recorded in all places where registration or recording is necessary to perfect and protect the charges and security interests created therein.

(17) **Location of Assets, Places of Business.** All of the Borrower's tangible and intangible property and assets and places of business are located in Ontario. Each of the Borrower's and the Contractor's respective registered and chief executive offices is in Concord, Ontario.

(18) **No Default or Event of Default.** There exists no Default or Event of Default.

(19) **Compliance.** The Borrower and, to the Borrower's Knowledge, the Contractor is in compliance in all material respects with the Material Project Documents to which it is a party and the Borrower and, to the Borrower's Knowledge, the Contractor is in compliance in all material respects with all Applicable Laws.

(20) **Litigation.** No litigation, investigation or proceeding of or before any Governmental Authority, arbitrator, court or administrative agency is in progress or, to the Borrower's Knowledge, pending or threatened against the Borrower or against its properties, assets or revenues, including the Collateral or the Project, which, if determined adversely, could reasonably be expected to have a Material Adverse Effect, and, to the Borrower's Knowledge, no litigation, investigation or proceeding of or before any Governmental Authority, arbitrator, court or administrative agency is in progress or is pending or threatened against the Contractor which has a material likelihood of success and, if determined adversely, could reasonably be expected to have a Material Adverse Effect.

(21) **Tax Returns.** The Borrower and, to the Borrower's Knowledge, the Contractor has filed or caused to be filed all federal, provincial and local returns, filings, elections and reports which are required to have been filed by it with respect to Taxes, and has paid all Taxes shown to be due and payable on those returns or on any assessments made against it and all other Taxes, fees or other charges imposed on it by any Governmental Authority, other than (i) those subject to a Permitted Contest, and (ii) in the case of the Contractor, those where failure to pay would not reasonably be expected to have a Material Adverse Effect. No Liens for Taxes payable by the Borrower have been filed and, to the Borrower's Knowledge, no claims are being asserted with respect to any Taxes payable by the Borrower other than those subject to a Permitted Contest.

(22) **Canadian Benefit and Pension Plans.** The Borrower does not maintain any Canadian Pension Plans or Canadian Benefit Plans.

(23) **Labour Matters.** The Borrower does not employ any employees. There are no strikes or other labour disputes against the Contractor that are pending which could reasonably be expected to have a Material Adverse Effect. The Borrower has no obligations under any consulting or management agreement.

(24) **Insurance.** The Insurance has been obtained in compliance with Sections 9.1(20) and 9.1(22), all premiums and other sums of money currently due and payable for that purpose have been paid, each of the Borrower and, to the Borrower's Knowledge, the Contractor, as the case may be, is in compliance in all material respects with all Insurance Requirements in respect thereof, and neither the Borrower nor, to the Borrower's Knowledge, the Contractor has received any notice of cancellation in respect of the Insurance.

(25) **Corporate Organization.** The corporate organization chart set out in Schedule 2.1(25) is a complete and accurate representation of the ownership of the Borrower as at the Financial Closing Date.

(26) **Construction Liens.** The Borrower is not aware of any construction Lien or analogous Lien reflecting a claim for payment which is overdue with respect to work or services to be performed or materials supplied in connection with the Works (and for which the Borrower or the Contractor is responsible under the Project Agreement), which Lien has not been fully satisfied and released and, if registered, duly discharged or vacated, except for Permitted Liens.

(27) **Consents to Security.** Except for those Material Project Documents in respect of which a consent has been obtained, all Material Project Documents may be, without consent but in accordance with the applicable Direct Agreement, assigned to the Administrative Agent under the Security Documents and may be, subject to and in accordance with the terms thereof and the applicable Direct Agreement, further assigned by the Administrative Agent.

(28) **Material Project Documents.**

- (a) True and complete copies of all Material Project Documents have been delivered to the Administrative Agent, and neither the Borrower nor, to the Borrower's Knowledge, the Contractor, is party to any other material agreements relating to the Works, other than the Material Project Documents, the Loan Documents and any agreements related to insurance and bonding that are necessarily incidental thereto;
- (b) Each of the Material Project Documents is in full force and effect, enforceable in accordance with the provisions thereof and for the entire stated term thereof subject to (a) applicable bankruptcy, insolvency, moratorium, reorganization or other similar laws affecting creditors' rights generally, (b) the fact that specific performance and injunctive relief may only be given at the discretion of the courts, and (c) the equitable or statutory powers of the courts to stay proceedings before them and to stay the execution of judgments;
- (c) There are no uncured breaches or defaults by either the Borrower or, to the Borrower's Knowledge, the Contractor under any Material Project Document;

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- (d) To the Borrower's Knowledge, there are no uncured breaches or defaults by SMH under any Material Project Documents in respect of which any cure periods that apply under the relevant Material Project Documents have expired;
- (e) The Project Lands Licence and the other rights granted pursuant to the Material Project Documents:
 - (i) comprise all of the property interests necessary or appropriate to secure any right material to the construction, installation and completion of the Works in accordance with all Applicable Law and the Material Project Documents;
 - (ii) are sufficient to enable the Works to be completed on the Project Lands as contemplated in the Material Project Documents; and
 - (iii) provide adequate ingress and egress for any reasonable purpose in connection with the Works under the Material Project Documents; and
- (f) To the Borrower's Knowledge, SMH has the rights of possession, rights of access to and rights to carry out the Works through or by the Borrower and the Contractor on the Project Lands, and the right and power to grant such rights to the Borrower and the Contractor as contemplated in the Material Project Documents.

(29) **Project Compliance.** The Works are being carried out in compliance in all material respects with the Material Project Documents and all Applicable Laws and Consents (including all Environmental Laws), and the Borrower and, to the Borrower's Knowledge, the Contractor (i) have provided or caused to be provided to the Administrative Agent and the Lenders' Consultant full details of all environmental and site due diligence, if any, carried out by it or on its behalf with respect to the Works and (ii) have obtained all Consents as and when required by the Borrower or the Contractor under the Material Project Documents with respect to the Works and the continuing construction thereof and, to the extent obtained, all such Consents are in full force and effect and the Borrower and, to the Borrower's Knowledge, the Contractor are in compliance in all material respects thereunder.

(30) **Environmental Matters.**

- (a) **Reports.** The Borrower and, to the Borrower's Knowledge, the Contractor have provided or made available to the Administrative Agent and the Lenders' Consultant all environmental due diligence materials made available by SMH to the Borrower or the Contractor in connection with the Works.
- (b) **No Prior Violations.** (i) Borrower is not in violation of any Environmental Laws, which violation could reasonably be expected to result in a Material Adverse Effect; (ii) neither the Borrower nor, to the Borrower's Knowledge, the Contractor or any other Person has used, Released, discharged, generated, manufactured, produced or stored in, on, at, under, or about the Project Lands, or transported thereto or therefrom, any Hazardous Materials to the extent that any such activities would reasonably be expected to have a Material Adverse Effect; and (iii) there is or has been no condition, circumstance, action, activity or event that, to the actual

knowledge of the Borrower (after due enquiry), could reasonably be expected to form the basis of any material violation of, or potentially give rise to any material liability to the Administrative Agent, the Lenders or the Borrower under, any Environmental Laws, or subject the Administrative Agent, the Lenders or the Borrower to any Environmental Claims.

- (c) **No Current Claims.** There are no existing Environmental Claims relating, directly or indirectly, to the Borrower or, to the Borrower's Knowledge, the Project Lands which would reasonably be expected to have a Material Adverse Effect.
 - (d) **No Current Investigations.** To the Borrower's Knowledge, there is no proceeding, investigation or inquiry by any Governmental Authority or any non-governmental third party with respect to the presence or Release of Hazardous Materials in, on, under, from or to the Project Lands, and no notice of such proceeding, investigation or inquiry has been received by the Borrower or the Contractor.
 - (e) **Compliance.** The Borrower's and, to the Borrower's Knowledge, the Contractor's business, processes and undertakings in respect of the Works are in compliance with all Environmental Laws, except where non-compliance with such Environmental Laws would not reasonably be expected to have a Material Adverse Effect, and neither the Borrower nor, to the Borrower's Knowledge, the Contractor has knowledge of any facts which could give rise to a proceeding, investigation or inquiry by any Governmental Authority or any non-governmental third party with respect to the presence or Release of Hazardous Materials in, on, under, from or to the Project Lands, or to a notice of non-compliance by it or, to the Borrower's Knowledge, the Contractor with any Environmental Laws in respect of the Works, except, in each case, for any such non-compliance which has been rectified or which could not reasonably be expected to have a Material Adverse Effect.
 - (f) **Hazardous Materials.** To the Borrower's Knowledge, the Contractor has complied or is complying with all of its obligations under the Construction Contract in respect of Hazardous Materials, including its obligations thereunder with respect to compliance with Environmental Laws, except where non-compliance with such Environmental Laws would not reasonably be expected to have a Material Adverse Effect.
- (31) **Intellectual Property.** Each of the Borrower and, to the Borrower's Knowledge, the Contractor, as applicable, has available to it, or will have available to it prior to the date on which such property is required for the Works, all Intellectual Property necessary for the implementation of the Works as contemplated by, and the performance of their respective obligations under, the Material Project Documents, other than such Intellectual Property which the failure to have available would not have a Material Adverse Effect. To the Borrower's Knowledge, neither the Borrower nor the Contractor is infringing in any material respect on the rights of any person with respect to any Intellectual Property and neither the Borrower nor the Contractor knows of any fact which is likely to result in the successful assertion against the Borrower or the Contractor of a claim for such an infringement.

(32) **Provision of Information.** All information provided by the Borrower and, to the Borrower's Knowledge, by the Contractor to the Administrative Agent, the Lenders or the Lenders' Consultant in connection with the completion of the Works and the provision by the Lenders' Consultant of the certificates and reports to be provided by it under the Loan Documents, including for greater certainty information regarding any event, circumstance or omission which would reasonably be expected to result in a delay in the achievement of Substantial Completion, was true and correct in all material respects when provided, and did not omit any information known to the Borrower or the Contractor regarding the completion of the Works required to make any such information provided by the Borrower or the Contractor to the Administrative Agent, the Lenders or the Lenders' Consultant not materially misleading.

(33) **Compliance with Other Documents.** Neither the Borrower nor, to the best of the Borrower's Knowledge, the Contractor is in default in the performance or observance of any of the obligations, covenants or conditions contained in any document, instrument, agreement, franchise, licence, judgment, decree or deed (other than the Material Project Documents) to which it is party where such default has or would reasonably be expected to have a Material Adverse Effect.

(34) **Residency.** Neither the Borrower nor the Contractor is a non-resident of Canada for the purposes of the ITA.

(35) **FATCA Status.** The Borrower is not a US Tax Obligor.

(36) **Registration for HST.** The Borrower is duly registered for the purposes of HST under registration number 827386194 RT0001.

(37) **Works Related Matters.**

- (a) The Borrower and the Contractor have the right to enter onto the Project Lands for the purposes of performing, and to the extent required to perform, their obligations under the Material Project Documents.
- (b) Neither the Borrower nor, to the Borrower's Knowledge, the Contractor is party to any contract or agreement to sell, transfer or encumber any interest in the Material Project Documents, other than pursuant to the Material Project Documents and the Loan Documents.
- (c) To the Borrower's Knowledge and except as otherwise disclosed in writing to the Administrative Agent, no notices, complaints or orders of violation or non-compliance or liability have been issued or threatened by any Person with respect to the Works, except for any such notices, complaints or orders which have been complied with or, if not complied with, which do not have a Material Adverse Effect.
- (d) To the Borrower's Knowledge and except as otherwise disclosed in writing to and waived in writing by the Administrative Agent, there are no outstanding directives, work orders or notices of deficiency capable of resulting in work orders issued by any Governmental Authority with respect to the Works, except for any such directives, work orders or notices of deficiency which do not have a Material Adverse Effect or which the Contractor is complying with.

(38) **Full Disclosure.** No statement furnished by the Borrower or on its behalf to the Administrative Agent in connection with this Agreement contains any untrue statement of a material fact or omits a material fact necessary to make those statements not misleading, and all those statements, taken as a whole, do not contain any untrue statement of a material fact or omit a material fact necessary to make the statements not misleading. All expressions of expectation, intention, belief and opinion contained therein were honestly made on reasonable grounds after reasonable inquiry by a Responsible Officer of the Borrower and, to the Borrower's Knowledge, any other Person who furnished the statements. There is no fact or circumstance known to the Borrower which the Borrower has not disclosed to the Administrative Agent in writing which has or could reasonably be expected to have a Material Adverse Effect.

(39) **Prohibited Acts.** Neither the Borrower nor, to the Borrower's Knowledge, any of its agents, the Contractor or any of its Subcontractors has committed a Prohibited Act (as defined in the Project Agreement).

2.2 Deemed Repetition

The representations and warranties made in Section 2.1 shall (a) continue in effect until payment and performance of all the Obligations, and (b) be deemed to be repeated on each Funding Date, *mutatis mutandis*, as if made on that date except where any representation or warranty relates to a specified date in which case that representation or warranty shall be made as of the date to which it relates.

SECTION 3 – THE CREDIT FACILITY

3.1 Establishment of Credit Facility

Subject to the terms and conditions of this Agreement, the Lenders hereby establish in favour of the Borrower a committed partially revolving construction credit facility (the "Credit Facility") in the amount of the Total Commitment. Each Lender severally agrees to make its Commitment available to the Borrower by way of Loans bearing interest calculated by reference to the CDOR Rate, subject to the terms and conditions of this Agreement.

3.2 Obligations of the Lenders and the Administrative Agent

(1) **Applicable Percentage.** Subject to the provisions of this Agreement and the satisfaction or waiver by each Lender of the conditions precedent set out in Section 8.2, each Lender agrees to make available its Applicable Percentage of each Loan to the Borrower on the terms set out in this Agreement.

No Lender shall be responsible for a Commitment of any other Lender. The failure of a Lender to make available a Loan in accordance with its obligations under this Agreement shall not release any other Lender from its obligations. Notwithstanding anything to the contrary in this Agreement, no Lender shall be obligated to make Loans available to the Borrower in excess of its Commitment.

(2) **Separate Obligation.** The obligation of each Lender to make its Commitment available to the Borrower is a separate obligation between each Lender and the Borrower, and that obligation is not the several or joint and several obligation of any other Lender.

3.3 Availability of Credit Facility

Subject to Section 8, the Borrower may only borrow Loans up to the amount of the Total Commitment.

3.4 Purpose

The proceeds of the Loans received by the Borrower under this Agreement shall be used by the Borrower only for (a) the making of Base Progress Payments to the Contractor, (b) the payment of HST, Fees and Transaction Expenses and (c) the payment of Borrowing Costs payable on or prior to the Maturity Date in accordance with the Financial Model. For greater certainty, proceeds of the Loans shall not be used by the Borrower to fund payment of amounts payable by the Borrower in respect of the Legislative Holdback or Additional SMH Payments.

3.5 Procedures for Making of Loans

(1) **Funding Requests.** Prior to 10:00 a.m. at least five (5) Business Days prior to each Funding Date, the Borrower shall deliver to the Administrative Agent and the Lenders' Consultant an irrevocable written notice substantially in the form of Schedule 3.5(1) (a "**Funding Request**") together with all required exhibits and other attachments thereto. A Funding Request may not exceed the lesser of:

- (a) the aggregate amount set forth in Schedule 3.2(1) opposite such date, together with any amount set forth in Schedule 3.2(1) in respect of a prior date which remains undrawn as at the date of the Funding Request; and
- (b) the aggregate of (i) the amount certified by the Lenders' Consultant, plus (ii) the amounts on account of Borrowing Costs and Fees as they become due, and (iii) other project costs not captured under (i) and (ii) as set forth in the Financial Model.

(2) [not used]

(3) **Notification of Lenders.** The Administrative Agent shall as soon as practicable prior to the Funding Date advise each Lender of the amount of the Loans to be advanced on such Funding Date and each Lender's participation in such Loans.

(4) **Loans on Funding Dates.** Subject to the terms and conditions of this Agreement, including the satisfaction or waiver pursuant to Section 8.3 of all of the conditions precedent to the making of Loans on each Funding Date as set forth in Section 8.2, at or before 1:00 p.m. on each Funding Date, each Lender shall make the Loans requested by the Borrower available for deposit by way of wire transfer in immediately available funds to the Agent's Funding Account in the amount of its Applicable Percentage of the Loans to be made on such Funding Date.

(5) **Release of Funds.** At or before 3:00 p.m. on each Funding Date, provided that the conditions precedent to the making of Loans on each Funding Date as set forth in Section 8.2 have been satisfied or waived pursuant to Section 8.3, the Administrative Agent shall, to the extent that each Lender has sent to the Administrative Agent its Applicable Percentage of the Loans to be made on such Funding Date in accordance with Section 3.5(4), release the Requested Funding from the Agent's Funding Account to the Borrower Proceeds Account.

(6) **Balance at End of Term.** If, on the Maturity Date, there remains any Agent's Funding Account Balance, such balance shall be distributed in accordance with the provisions of Section 6.6(5).

(7) **Payment of Interest, Swap Payments and Fees.** During the period from the Financial Closing Date to and including the Maturity Date, on each Interest Payment Date, Standby Fee Payment Date or Agency Fee Payment Date, as the case may be, the Borrower shall pay an amount equal to the applicable interest, Standby Fees or Agency Fee due on such date to the Agent's Funding Account or shall ensure that such amount is available in the Borrower Proceeds Account and authorizes the Administrative Agent to debit such accounts and distribute such payment to the Lenders in accordance with their respective Applicable Percentages, as applicable, and shall be entitled to retain the Agency Fee for its own account.

3.6 Determination Final

With respect to all matters referred to in this Section 3 and the calculation of interest and fees referred to in Section 4, the determination by the Administrative Agent shall be final, conclusive and binding on the Borrower and the Lenders, absent manifest error.

3.7 Reliance on Oral Instructions

See Section 7.4 of the CBA Schedule.

3.8 Deposit of Proceeds of Loans

The Administrative Agent shall credit to the Agent's Funding Account on the applicable Funding Date, in accordance with Section 3.5(4), the proceeds of each Loan made available by the Lenders on such Funding Date.

3.9 Evidence of Obligations

The Administrative Agent shall open and maintain accounts and records evidencing the Obligations of the Borrower to each Lender. The Administrative Agent shall record in those accounts by appropriate entries all amounts on account of those Obligations and all payments on account thereof. Those accounts and records will constitute, in the absence of manifest error, *prima facie* evidence of those Obligations from time to time, the date each Loan was made and the amounts that the Borrower has paid from time to time on account of those Obligations.

3.10 Interest Rate Swaps

(1) The Borrower shall enter into, and maintain at all times, the Interest Rate Swaps with the Hedge Providers with an aggregate notional principal amount equal to (a) at Financial Close, 100% of the aggregate principal amount of the Credit Facility, and (b) after Financial Close, not less than 95% and not more than 115% of the aggregate principal amount of the Credit Facility. The Interest Rate Swap Documents shall provide for:

- (a) a schedule of notional principal amounts designed to match the scheduled principal advances and repayments of the Credit Facility; and
- (b) the Borrower, on each date corresponding to an Interest Payment Date, to pay a fixed rate as set out in the applicable Interest Rate Swap Document to the applicable Hedge Provider and receive from the applicable Hedge Provider a floating rate equal to the CDOR Rate in respect of the amount of notional principal amounts set out in the Interest Rate Swap Document, which obligations will be settled as between the parties on a net basis.

(2) The Borrower shall ensure that payment dates in respect of each of the Interest Rate Swaps shall coincide with Interest Payment Dates hereunder.

(3) The Borrower may not enter into an Interest Rate Swap with a Person other than a Lender or an Affiliate of a Lender. A Hedge Provider who has entered into an Interest Rate Swap with the Borrower may not transfer any of its rights or interests under the applicable Interest Rate Swap Documents to a Person other than another Lender or an Affiliate of a Lender and, for clarity, upon any assignment by a Lender of its interest in the Credit Facility and the Loan Documents to any assignee, a proportionate interest in any Interest Rate Swap to which such Lender in its capacity as a Hedge Provider is party must also be assigned to such assignee or to an Affiliate of such assignee.

(4) Each Interest Rate Swap will be subject to a swap credit spread of 0.12% per annum.

(5) Each Interest Rate Swap shall mature on the Maturity Date, as such date may be changed by agreement of the parties to the Interest Rate Swap Documents in respect of such Interest Rate Swaps.

(6) Upon the request of the Administrative Agent, the Borrower shall provide details regarding the notional amounts and terms of its outstanding Interest Rate Swaps and the outstanding amount of the liabilities incurred in connection therewith.

(7) In determining the amount of a Lender's Commitment for the purpose of the definition of Required Lenders, a Lender's commitment to provide Interest Rate Swaps and any Obligations owed to such Lender in respect thereof shall not be included, and Lenders shall have no voting rights under this Agreement in respect of any such Interest Rate Swaps.

(8) A Lender may not commence enforcement proceedings under an Interest Rate Swap unless the Administrative Agent has commenced enforcement under Section 10.3 of this Agreement.

SECTION 4 – INTEREST, FEES AND EXPENSES

4.1 Interest on Loans

(1) **Rate.** Interest on Loans shall be paid on each Interest Payment Date in accordance with Section 3.5(7) at a rate per annum equal to the sum of (a) the CDOR Rate as determined on the first Business Day of the Interest Period ending on such Interest Payment Date plus (b) the Applicable Margin.

(2) **No Notice.** The CDOR Rate will change from time to time at the beginning of each Interest Period pursuant to Section 4.1(1) without the necessity of any notice to the Borrower.

(3) **Calculation.** Interest on Loans shall be payable monthly in arrears on every Interest Payment Date and on the Maturity Date in respect of the Interest Period ending on such Interest Payment Date or Maturity Date, as the case may be, and shall be calculated for each day of such Interest Period based on the CDOR Rate in effect for such Interest Period, as determined in accordance with Section 4.1(1), and the principal amount of the Loans remaining unpaid on such day, on the basis of the actual number of days elapsed in a year of 365 days.

(4) **Market Disruption Event.** If a Market Disruption Event occurs in relation to a Loan for any Interest Period, then the Interest Rate on the share of such Loan for such Interest Period held by any Lender affected by such Market Disruption Event (an “Affected Lender”) shall be the rate of interest per annum which is the sum of:

- (a) the Applicable Margin; and
- (b) the rate notified to the Administrative Agent by such Affected Lender as soon as practicable and, in any event, before interest is due to be paid in respect of that Interest Period, to be that rate which expresses as a percentage rate per annum the cost to such Affected Lender of funding its participation in such Loan from whatever source it may reasonably select.

If a Market Disruption Event occurs and the Administrative Agent or the Borrower so requires, the Administrative Agent and the Borrower shall enter into negotiations (for a period of not more than 30 days) with a view to agreeing as to a substitute basis for determining the rate of interest applicable in respect of each Affected Lender. Any alternative basis agreed pursuant to this Section shall, with the prior consent of all the Lenders, be binding on all parties, it being recognized that such alternative basis applies only to the Affected Lenders affected by the relevant Market Disruption Event.

4.2 Fees

(1) **Upfront Fee.** On the later of the Financial Closing Date and the initial Funding Date, the Borrower shall pay to the Agent, for the account of each Lender, a non-refundable upfront fee in Canadian Dollars (the “Upfront Fee”) in an amount equal to 0.95% of such Lender’s Commitment.

(2) **Standby Fee.** On each Interest Payment Date during the term of this Credit Facility (from the Financial Closing Date to the Maturity Date) and on the Maturity Date or on the termination of

the Total Commitment (each a “**Standby Fee Payment Date**”), the Borrower shall pay in arrears to the Agent, for the account of the Lenders, a non-refundable standby fee in Canadian Dollars (the “**Standby Fee**”) based on the amount of the unutilized and uncanceled portion of the Total Commitment at a rate per annum equal to 0.3325%. The Standby Fee shall be paid by the Borrower on each Standby Fee Payment Date in accordance with Section 3.5(7).

(3) **Calculation.** The Standby Fee shall be payable for the period from and including the Financial Closing Date or the last Standby Fee Payment Date, as the case may be, to but excluding the next Standby Fee Payment Date or the Maturity Date, as applicable, and shall be calculated on a daily basis on the unutilized and uncanceled portion of the Total Commitment in effect from time to time on the basis of the actual number of days elapsed and a year of 365 days or 366 days, as applicable.

(4) **Agency Fee.** On the Financial Closing Date and on each anniversary date of the Financial Closing Date during the term of this Credit Facility (from the Financial Closing Date to the Maturity Date) (each, an “**Agency Fee Payment Date**”), the Borrower shall pay to the Administrative Agent a non-refundable fee in Canadian Dollars (the “**Agency Fee**”) in an amount equal to \$30,000 per annum; provided that the Agency Fee payable on the final Agency Fee Payment Date hereunder for the period from the immediately prior Agency Fee Payment Date to the final Agency Fee Payment Date, if such period is less than 365 days, will be pro-rated to account for the actual number of days elapsed during such period by multiplying the amount of the annual Agency Fee provided for herein by a fraction having as its numerator the actual number of days elapsed in such period and a denominator of 365. The Agency Fee shall be paid by the Borrower to the Administrative Agent, for its own account, on the Financial Closing Date and on each Agency Fee Payment Date in accordance with Section 3.5(7).

4.3 Interest on Overdue Amounts

The Borrower shall pay to the Administrative Agent on behalf of the Lenders interest on overdue amounts both before and after demand, default and judgment at a rate per annum equal to the aggregate of the CDOR Rate (or the alternative interest rate payable under Section 4.1(4), if applicable), the Applicable Margin, and 2.5% per annum; in each case calculated on a daily basis on the actual number of days elapsed in a 365 day year, computed from the date the amount becomes due for so long as the amount remains overdue. Such interest shall be payable upon demand made by the Administrative Agent and shall be compounded on each Interest Payment Date.

4.4 Interest Act

For the purposes of the *Interest Act* (Canada) and disclosure under such act, whenever interest to be paid under this Agreement is to be calculated on the basis of a year of 365 days or any other period of time that is less than a calendar year, the yearly rate of interest to which the rate determined pursuant to such calculation is equivalent is the rate so determined multiplied by the actual number of days in the calendar year in which the same is to be ascertained and divided by either 365 or such other period of time, as the case may be.

4.5 Limit on Rate of Interest

(1) **Adjustment.** If any provision of this Agreement or any of the other Loan Documents would obligate the Borrower to make any payment of interest or other amount payable to any Lender in an amount or calculated at a rate which would be prohibited by law or would result in a receipt by that Lender of interest at a criminal rate (as construed under the *Criminal Code (Canada)*), then notwithstanding that provision, that amount or rate shall be deemed to have been adjusted with retroactive effect to the maximum amount or rate of interest, as the case may be, as would not be so prohibited by law or result in a receipt by that Lender of interest at a criminal rate, the adjustment to be effected, to the extent necessary, as follows:

- (a) *first*, by reducing the amount or rate of interest required to be paid to the affected Lender under this Section 4; and
- (b) *thereafter*, by reducing any fees, commissions, premiums and other amounts required to be paid to the affected Lender which would constitute interest for purposes of Section 347 of the *Criminal Code (Canada)*.

(2) **Reimbursement.** Notwithstanding Section 4.5(1), and after giving effect to all adjustments contemplated thereby, if any Lender shall have received an amount in excess of the maximum permitted by the *Criminal Code (Canada)*, then the Borrower shall be entitled, by notice in writing to the affected Lender, to obtain reimbursement from that Lender in an amount equal to the excess, and pending reimbursement, the amount of the excess shall be deemed to be an amount payable by that Lender to the Borrower.

(3) **Actuarial Principles.** Any amount or rate of interest referred to in this Section 4.5 shall be determined in accordance with generally accepted actuarial practices and principles as an effective annual rate of interest over the term that any Loan remains outstanding on the assumption that any charges, fees or expenses that fall within the meaning of *interest* (as defined in the *Criminal Code (Canada)*) shall, if they relate to a specific period of time, be pro-rated over that period of time and otherwise be pro-rated over the period from the Financial Closing Date to the Maturity Date and, in the event of a dispute, a certificate of a Fellow of the Canadian Institute of Actuaries appointed by the Administrative Agent shall be conclusive for the purposes of that determination.

4.6 Calculation of Break Costs

(1) If there are any Break Costs in respect of the Credit Facility owing by the Borrower, the Borrower shall deposit the amount of such Break Costs forthwith to the Agent's Funding Account and, upon receipt of such funds into the Agent's Funding Account, the Administrative Agent shall pay such Break Costs to the Person to whom it is owing.

(2) The calculation as to the amount of any Break Costs shall be prepared by the Lender providing the applicable portion of the Credit Facility, in good faith in accordance with the standard market practices and shall be final, conclusive and binding, absent demonstrable error. Each Lender shall provide its calculation to the Administrative Agent which shall use such calculations to determine the aggregate Break Costs payable by the Borrower.

4.7 Calculation of Swap Breakage Costs

- (1) If there are any Swap Breakage Costs in respect of an Interest Rate Swap Document, the Borrower shall deposit the amount of such Swap Breakage Costs forthwith to the Agent's Funding Account and, upon receipt of such funds into the Agent's Funding Account, the Administrative Agent shall pay such Swap Breakage Costs to the Person to whom the amount is owing.
- (2) The calculation as to the amount of any Swap Breakage Costs shall be prepared by the applicable Hedge Provider in good faith and in accordance with the applicable Interest Rate Swap Documents.

4.8 Payment of Affected Borrowing

Notwithstanding any other term or condition of this Agreement, if a Lender gives the certificate referred to in Section 3.1(c) of the CBA Schedule with respect to any Loan (an "**Affected Borrowing**"), the Borrower may, at its option, upon 15 Business Days' notice to that Lender (which notice shall be irrevocable), repay to the Lender in full the Affected Borrowing outstanding together with accrued and unpaid interest on the principal amount so repaid up to the date of repayment, together with such additional compensation as may be applicable to the date of payment.

4.9 Change in Circumstances

- (1) *Reduction in Rate of Return.* See Section 3.1 of the CBA Schedule.
- (2) *Taxes, Reserves, Capital Adequacy, etc.* See Section 3.1 of the CBA Schedule.
- (3) *Payment of Additional Compensation.* See Section 3.1 of the CBA Schedule.
- (4) *Commercially Reasonable.* See Section 3.3(a) of the CBA Schedule.

4.10 Illegality

See Section 3.4 of the CBA Schedule.

4.11 Indemnity

- (1) *General.* See Section 9(b) of the CBA Schedule.
- (2) *Certificate.* See Section 9(e) of the CBA Schedule.
- (3) *Survival.* It is the intention of the Borrower, the Administrative Agent and each Lender that all provisions in this Agreement entitling them to indemnification (including Sections 3.2(c) and 9(b) of the CBA Schedule) shall supersede any other provisions in this Agreement which in any way limit the liability of the Borrower and that the Borrower shall be liable for any obligations arising under those provisions even if the amount of the liability incurred exceeds the amount of the other Obligations. The obligations of the Borrower under those provisions are absolute and unconditional and shall not be affected by any act, omission or circumstance whatsoever, whether or not occasioned by the fault of the Administrative Agent or a Lender, except in respect of gross

negligence or wilful misconduct by it. The obligations of the Borrower under those provisions shall survive the repayment of the other Obligations and the termination of the Credit Facility.

SECTION 5 – REDUCTION AND REPAYMENT

5.1 Term and Maturity

The term of the Credit Facility shall commence on the Financial Closing Date and end on the Maturity Date.

5.2 Repayment

Provided that the Loans and other amounts outstanding under the Credit Facility are not prepaid in accordance with Section 5.3 or Section 5.4 or earlier accelerated in accordance with Section 10, all amounts outstanding under the Credit Facility, including principal, all accrued and unpaid interest and any unpaid Fees, shall be paid by the Borrower as follows:

- (a) *first*, an amount equal to the amount of the Tower Interim Completion Payment on the Tower Interim Completion Payment Date (and such amount so repaid may be partially re-borrowed during the Term in accordance with Section 3.5);
- (b) *second*, amounts equal to the amounts received from time to time by way of reductions of the Tower Interim Completion Holdback;
- (c) *third*, an amount equal to the Substantial Completion Payment on the Substantial Completion Payment Date;
- (d) *fourth*, amounts equal to the amounts received from time to time by way of reductions of the Completion Holdback;
- (e) *fifth*, an amount equal to the amount of the Legislative Holdback on the Legislative Holdback Payment Date; and
- (f) *sixth*, the balance of the amount outstanding under the Credit Facility, including principal, all accrued and unpaid interest and Fees, to be paid on the Maturity Date.

Upon repayment of the Credit Facility in accordance with Section 5.2(a), the Borrower shall be deemed to have cancelled a portion of the Credit Facility in an amount equal to the difference between (i) the Total Commitment, and (ii) the amount shown in the Financial Model on the Tower Interim Completion Payment Date as the total principal amount that will be outstanding under the Credit Facility on the then-scheduled Tower Interim Completion Date, in accordance with Section 5.5, and the Commitments and Total Commitment will be reduced accordingly.

5.3 Mandatory Prepayment

- (1) Subject to Sections 5.6 and 5.7, the Borrower shall be required to prepay the entire Loans upon receipt by the Borrower of any Compensation Payment. In addition, the Borrower

shall, upon receipt of any of the following amounts, prepay the Loans in an amount equal to the aggregate of such amounts received in respect of:

- (a) proceeds (net of expenses agreed by the Administrative Agent, acting reasonably) of Insurance (other than proceeds in respect of delayed start-up, business interruption insurance and soft costs or proceeds of liability insurance which are paid to reimburse the Borrower for amounts paid to third party claimants), unless the Borrower uses such proceeds within 30 days of receipt to repair a damaged asset or replace a lost or destroyed asset with an asset of at least comparable value and utility in accordance with sound operating practice (and in which case, if the amount of insurance proceeds exceeds \$1,000,000, the Lenders' Consultant shall be required to confirm the adequacy of the replacement assets), and in any event subject to any express provisions of the Material Project Documents, including the Insurance Trust Agreement, which provide otherwise for the application of proceeds of Insurance;
- (b) proceeds of any payment made to the Borrower (or the Administrative Agent) by SMH under the Project Agreement or the Lenders' Direct Agreement, including the Tower Interim Completion Payment and the Substantial Completion Payment but excluding Additional SMH Payments;
- (c) proceeds received in respect of any total Condemnation or partial Condemnation of the Project, subject to any express provisions of the Material Project Documents which provide otherwise for the application of such amounts; and
- (d) proceeds (net of expenses agreed by the Administrative Agent, acting reasonably) from any asset sales by the Borrower (unless the Borrower uses the proceeds of such asset sale for the purposes of asset performance or substitution, within 30 days of such asset sale).

Except in respect of a prepayment from the proceeds of and in the amount of the Tower Interim Completion Payment (which amount may be partially re-borrowed during the Term in accordance with Section 3.5), the Total Commitment shall be permanently reduced by the amount of such prepayment and may not be reinstated.

5.4 Voluntary Prepayment

Subject to Sections 5.6, 5.7 and 5.8 and provided no Default or Event of Default would result, in the case of a Market Disruption Event prior to the Maturity Date, the Borrower may permanently prepay, without premium or penalty, in whole or in part, the Loans provided that all accrued interest with respect to the amount to be prepaid shall have been paid. The Borrower shall give to the Administrative Agent not less than three (3) Business Days prior written notice substantially in the form attached hereto as Schedule 5.4 indicating its desire to make any permanent prepayment as a result of a Market Disruption Event and the amount of the permanent prepayment. Each such prepayment shall be in the minimum aggregate amount of \$500,000 or whole multiples of \$100,000 in excess thereof and shall be applied rateably in accordance with each Lender's Applicable Percentage. The Total Commitment shall be permanently reduced by the amount of such

prepayment and may not be reinstated. The Borrower may not otherwise prepay, in whole or in part, the Loans, without the prior written consent of the Lenders.

5.5 Cancellation

Subject to Sections 5.6, 5.7 and 5.8, the Borrower may at any time cancel undrawn amounts of the Credit Facility without premium or penalty, in minimum amounts of \$500,000 and in multiples of \$100,000 subject to giving the Administrative Agent not less than one (1) Business Day prior written notice; provided such notice is received by the Administrative Agent no later than 10:00 am and is substantially in the form attached as Schedule 5.5. Cancellations shall be applied rateably to the Commitments of the Lenders in accordance with each Lender's Applicable Percentage. Amounts cancelled will not be reinstated and the Commitments and Total Commitment will be reduced accordingly.

5.6 Break Costs Upon Cancellation or Prepayment

Upon any prepayment or cancellation of the Credit Facility pursuant to Sections 5.3, 5.4 or 5.5, the Borrower shall pay the Break Costs, if any, resulting from such prepayment or cancellation.

5.7 Swap Breakage Costs Upon Cancellation or Prepayment

Upon any prepayment or cancellation of the Credit Facility pursuant to Sections 5.3, 5.4 or 5.5, the Borrower shall terminate or amend the Interest Rate Swaps, rateably in accordance with each Hedge Provider's proportion of the then outstanding aggregate notional principal amount of the Interest Rate Swaps, so that the aggregate notional principal amount of the Interest Rate Swaps equals the remaining aggregate principal amount of the Loans and/or the Total Commitment and shall pay the Swap Breakage Costs, if any, relating to any termination or amendment of the Interest Rate Swaps resulting from such prepayment or cancellation.

5.8 Limitation on Cancellation/Prepayment

Any prepayment or cancellation of the Credit Facility pursuant to Sections 5.4 or 5.5 shall be subject to the Lenders' satisfaction, upon consultation with the Lenders' Consultant, that the Available Commitment plus any cash collateral contributed to the Agent's Funding Account and any marketable securities pledged by the Borrower to the Administrative Agent after such prepayment or cancellation will be sufficient to ensure:

- (a) that Tower Interim Completion and Substantial Completion will be achieved on or before the then-scheduled Tower Interim Completion Date and Substantial Completion Date, respectively;
- (b) that no Cost to Complete Deficiency will exist as a result of such prepayment or cancellation; and
- (c) all Construction Costs, Borrowing Costs and Transaction Expenses will be paid as they fall due.

SECTION 6 – PAYMENTS AND TAXES

6.1 Payments Generally

All amounts owing in respect of the Credit Facility or the Interest Rate Swaps, whether on account of principal, interest or fees or otherwise, shall be paid in Canadian Dollars. Each payment under this Agreement shall be made for value on the day the payment is due, provided that if such day is not a Business Day, the payment shall be due on the Business Day next following such day, unless the Business Day next following such day is in the next following month, in which event the payment shall be made on the immediately preceding Business Day. All interest and other fees shall continue to accrue until payment has been made by the Borrower in accordance with Section 3.5(7). Each payment shall be made, and each payment made hereunder shall be credited for same day value if received at the Agent's Funding Account at or before 1:00 p.m. on the day the payment is due. Receipt by the Administrative Agent from the Borrower of funds under this Agreement, as principal, interest, Fees or otherwise, shall be deemed to be receipt of those funds by the Lenders.

6.2 Taxes

- (1) *Payments.* See Section 3.2 of the CBA Schedule.
- (2) *Indemnity.* See Section 3.2 of the CBA Schedule.
- (3) *Evidence of Payment.* See Section 3.2 of the CBA Schedule.
- (4) *Excluded Taxes.* See Section 1 of the CBA Schedule for the definition.
- (5) *Survival.* The Borrower's obligations under Section 3.2 of the CBA Schedule shall survive the termination of this Agreement and the payment of all amounts payable under or with respect to this Agreement.
- (6) *Tax Credit.* See Section 3.2 of the CBA Schedule.

6.3 No Set-Off

All payments to be made by the Borrower shall be made without set-off or counterclaim and without any deduction of any kind.

6.4 Directions as to Payment

- (1) The Borrower has, under Sections 4.4, 4.6 and 4.9 of the Project Agreement, irrevocably authorized and directed SMH to make the Substantial Completion Payment, the Tower Interim Completion Payment, the Completion Holdback, the Tower Interim Completion Holdback and any Compensation Payment which becomes payable to the Borrower in accordance with the Project Agreement to the Administrative Agent (or as the Administrative Agent may otherwise direct). SMH has acknowledged such authorization and direction and has agreed that it will make the Substantial Completion Payment, the Tower Interim Completion Payment, the Completion Holdback, the Tower Interim Completion Holdback and any Compensation Payment which becomes

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payable to the Borrower in accordance with the Project Agreement to the Administrative Agent (or as the Administrative Agent may otherwise direct).

(2) The Borrower has, pursuant to the Irrevocable Direction, directed SMH to pay to the Administrative Agent on behalf of the Lenders, or as the Administrative Agent shall direct, the Legislative Holdback and the Warranty Cash Amount.

(3) Upon the full and final payment by or on behalf of the Borrower of all amounts owing under this Agreement and the other Loan Documents, the Administrative Agent shall provide an irrevocable direction to SMH to pay all amounts payable to the Administrative Agent in accordance with the Irrevocable Direction to the Borrower or as the Borrower may direct.

6.5 Acknowledgement as to Payments

(1) ***Deposits to Agent's Funding Account.*** The Borrower agrees that, so long as any Obligations are outstanding, it shall immediately deposit to the Agent's Funding Account any payments or proceeds it receives on account of the following, which shall, subject to Section 6.5(2), be distributed in accordance with the provisions of Section 6.6(2):

- (a) any payments from SMH (including the Tower Interim Completion Payment, the Substantial Completion Payment, the Legislative Holdback, reductions to the Tower Interim Completion Holdback, reductions to the Completion Holdback, return of the Warranty Cash Amount (as defined in the Project Agreement) or any Compensation Payment (including any monies received pursuant to the Trust Account Agreement)) other than Additional SMH Payments (excluding any Cost of the Financing (as defined in the Project Agreement) included in such payment) payable to the Contractor in respect of the Works;
- (b) any and all amounts, including Liquidated Damages, payable by the Contractor under the Contractor Support Agreement;
- (c) all amounts payable by the Hedge Providers to the Borrower under the Interest Rate Swap Documents;
- (d) any cash or liquid security provided by the Borrower or the Contractor in respect of the Tower Interim Completion Holdback, the Completion Holdback or Increased Financing Costs associated with any Forecasted Delay;
- (e) any proceeds paid to the Borrower resulting from any claims by the Administrative Agent against the Contractor P3 Bond or the Contractor Labour and Material Payment Bond to the extent that such proceeds are claimed by the Administrative Agent and are based upon the failure of the Contractor to pay Liquidated Damages in accordance with the Contractor Support Agreement or to post the Warranty Letter of Credit;
- (f) any payments made by the Contractor to the Borrower in respect of the liability of the Contractor under the Construction Contract; and

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- (g) any interest paid to the Borrower in respect of amounts on deposit in the Agent's Funding Account,

which payments or proceeds shall be credited to the Agent's Funding Account Balance and shall be applied by the Administrative Agent in accordance with the terms of this Agreement. Until so deposited, all of the amounts described in this Section 6.5(1) shall be held by the Borrower in trust for the parties entitled to receive a distribution of such funds in accordance with this Agreement.

(2) ***Return of Surplus Cash or Liquid Security.*** Provided no Event of Default has occurred and is then continuing, any surplus cash or liquid security provided by the Borrower or the Contractor in respect of the Completion Holdback or Increased Financing Costs associated with any Forecasted Delay shall be returned to the Borrower or the Contractor, as the case may be, upon the remediation of any shortfall or delay in respect of which such cash or liquid security was provided.

6.6 Distributions

(1) ***Distributions from Borrower Proceeds Account.*** At all times other than where an Event of Default has occurred and is continuing, all credit balances in the Borrower Proceeds Account from time to time shall be available to the Borrower in accordance with the provisions of this Agreement for the purposes of making the following payments:

- (a) *first*, the Base Progress Payments owing to the Contractor;
- (b) *second*, any Transaction Expenses owing; and
- (c) *third*, to the Agent's Funding Account, any outstanding Borrowing Costs.

At all times where an Event of Default has occurred and is continuing, all credit balances in the Borrower Proceeds Account from time to time shall be applied by the Administrative Agent acting upon the instructions of the Lenders.

(2) ***Tower Interim Completion Payment, Substantial Completion Payment, Legislative Holdback or Compensation Payments.*** All amounts payable to the Borrower by SMH on account of the Tower Interim Completion Payment, the Substantial Completion Payment, the Legislative Holdback or any Compensation Payment (including any monies received pursuant to the Trust Account Agreement) shall be paid directly to the Agent's Funding Account and shall be distributed by the Administrative Agent as follows:

- (a) *first*, in payment to the Administrative Agent and each Lender of any Fees or Transaction Expenses owing to the Administrative Agent or such Lender under the Loan Documents;
- (b) *second*, in payment of any Break Costs and Swap Breakage Costs then due and payable by the Borrower;
- (c) *third*, in payment of any interest (including any interest on overdue principal or interest) then due and payable by the Borrower on or in respect of the Credit Facility, rateably in accordance with each Lender's Applicable Percentage;

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- (d) *fourth*, in payment of the principal of the Loans then due and payable, if any, rateably in accordance with each Lender's Applicable Percentage; and
- (e) *fifth*, in payment of any other amounts due and owing to the Lenders under the Loan Documents, rateably in accordance with each Lender's Applicable Percentage.

After indefeasible payment in full to the Lenders of all amounts due and owing hereunder and under the other Loan Documents (which amounts cannot be redrawn in accordance with the terms of this Agreement), any monies received or realized by the Administrative Agent shall be distributed by the Administrative Agent to the Borrower or as the Borrower may direct or as otherwise directed by any Governmental Authority.

(3) ***Payments under the Contractor Support Agreement.*** All amounts payable by the Contractor under the Contractor Support Agreement shall be paid directly to the Agent's Funding Account and shall be distributed by the Administrative Agent as follows:

- (a) *first*, in payment to the Administrative Agent and each Lender of any Fees or Transaction Expenses owing to the Administrative Agent or such Lender under the Loan Documents;
- (b) *second*, in payment of any Break Costs and Swap Breakage Costs then due and payable by the Borrower;
- (c) *third*, in payment of any interest (including any interest on overdue principal or interest) then due and payable by the Borrower on or in respect of the Credit Facility, rateably in accordance with each Lender's Applicable Percentage;
- (d) *fourth*, in payment of the principal of the Loans then due and payable, if any, rateably in accordance with each Lender's Applicable Percentage; and
- (e) *fifth*, in payment of any other amounts due and owing to the Lenders under the Loan Documents, rateably in accordance with each Lender's Applicable Percentage.

(4) ***Payments of Proceeds of Disposition on Event of Default.*** The Administrative Agent acknowledges and agrees that all proceeds received by it on the enforcement of the Security Documents including without limitation any proceeds of the Contractor Bonds and any judgment against the Borrower or the Contractor collected under the Material Project Documents or the Loan Documents after the exercise of any rights arising under Section 10.2, shall be held in trust for the Administrative Agent and the Lenders and shall be forthwith deposited into the Agent's Funding Account for distribution by the Administrative Agent as follows:

- (a) *first*, in payment of the reasonable costs and expenses of the Administrative Agent of any realization against the Borrower, the Contractor or its or their property and assets, including the out-of-pocket expenses of the Administrative Agent and the reasonable fees and out-of-pocket expenses of counsel, consultants and other advisors employed in connection therewith and in payment of all costs and expenses incurred by the Administrative Agent in connection with the administration and enforcement of this Agreement, the Security Documents or the other Loan

Documents, to the extent that those costs and expenses shall not have been reimbursed to the Administrative Agent;

- (b) *second*, in payment to the Administrative Agent and each Lender of any Fees or Transaction Expenses owing to the Administrative Agent or such Lender under the Loan Documents;
- (c) *third*, in payment of any Break Costs and Swap Breakage Costs then due and payable by the Borrower rateably in accordance with each Lender's Applicable Percentage to whom such Break Costs and Swap Breakage Costs are due and payable;
- (d) *fourth*, in payment of the principal of the Loans then due and payable, if any, and any interest (including any interest on overdue principal or interest) then due and payable by the Borrower on or in respect of the Credit Facility, rateably in accordance with each Lender's Applicable Percentage to whom such principal or interest is due and payable; and
- (e) *fifth*, in payment of any other amounts due and owing to the Lenders under the Loan Documents, rateably in accordance with each Lender's Applicable Percentage.

After indefeasible payment in full to the Lenders of all amounts due and owing hereunder and under the other Loan Documents (which amounts cannot be redrawn in accordance with the terms of this Agreement), any monies received or realized by the Administrative Agent shall be distributed by the Administrative Agent to the Borrower or as the Borrower may direct or as otherwise directed by any Governmental Authority.

(5) ***Other Payments.***

- (a) Any payment received by the Administrative Agent for which no provision as to the application thereof is made in the Loan Documents or elsewhere in this Section (including, without limitation, any proceeds received by the Administrative Agent resulting from any claims by the Administrative Agent against the advance payment provision of the Contractor P3 Bond) shall be distributed by the Administrative Agent:
 - (i) *first*, in payment of all amounts then due and payable to the Administrative Agent under the Loan Documents; and
 - (ii) *second*, in payment of any amounts then due and owing to the Lenders, rateably in accordance with the amounts due to each Lender under the Loan Documents.
- (b) Any payment received by the Borrower or the Administrative Agent for which provision as to the application thereof is made in a Loan Document but not elsewhere in this Section shall be distributed by the recipient to the Person and for the purpose for which such payment was made in accordance with the terms of such Loan Document.

- (c) After indefeasible payment in full to the Lenders of all amounts due and owing hereunder and under the other Loan Documents (which amounts cannot be redrawn in accordance with the terms of this Agreement), any monies received or realized by the Administrative Agent shall be distributed by the Administrative Agent to the Borrower or as the Borrower may direct or as otherwise directed by any Governmental Authority.

SECTION 7 – SECURITY DOCUMENTS

7.1 Security Documents

The Borrower shall cause the following documents to be duly authorized, executed and delivered to the Administrative Agent on behalf of the Lenders to secure the Obligations, those documents to be in form and substance satisfactory to the Administrative Agent and the Lenders (collectively, the “**Security Documents**”):

- (a) the Borrower General Security Agreement;
- (b) the Assignment of Accounts;
- (c) the Limited Recourse Guarantee and Pledge Agreement together with the certificates evidencing such shares and duly executed stock powers in respect thereof;
- (d) the Lenders’ Direct Agreement;
- (e) the Contractor Direct Agreement;
- (f) the Contractor Support Agreement;
- (g) the Irrevocable Direction;
- (h) the Blocked Account Agreement;
- (i) the Contractor Assignment of Material Documents;
- (j) the Contractor Bonds;
- (k) all necessary acknowledgements, agreements and consents from the counterparties to each contract assigned by the Borrower or the Contractor as collateral security to the Administrative Agent; and
- (l) any Loan Documents creating Liens on the assets of the Borrower in favour of the Administrative Agent on behalf of itself and the Lenders, and all other instruments, agreements and documents which have been or may hereafter from time to time be executed in connection therewith.

7.2 Step-Down

Upon receipt by the Administrative Agent of the Tower Interim Completion Payment and the Administrative Agent being satisfied (and the Borrower having certified to the Lenders in writing) that that no liquidated damages are and remain unpaid under terms of the Contractor Support Agreement in respect of the period up to and including Tower Interim Completion, the Administrative Agent shall execute a step down rider in the form attached to the Contractor P3 Bond as Rider 1 thereto and this provision is the Administrative Agent's sole and sufficient authority for so doing.

SECTION 8 – CONDITIONS PRECEDENT

8.1 Conditions Precedent to the Financial Closing Date

The effectiveness and coming into force of this Credit Agreement on the Financial Closing Date is subject to and conditional upon the satisfaction of the following conditions:

(1) ***Delivery of Documents.*** The Lenders shall have received copies or originals, as specified by the Administrative Agent, in form and substance satisfactory to the Lenders, of the following:

- (a) this Agreement, duly executed by each party hereto;
- (b) the Security Documents, duly executed by each party thereto;
- (c) copies of all of the documents listed in Schedule 2 to the Project Agreement, in form and substance satisfactory to the Lenders, shall have been provided;
- (d) each other Loan Document delivered on the Financial Closing Date, duly executed by each party thereto;
- (e) a certified copy of the Construction Contract, duly executed by each party thereto;
- (f) a certified copy of the Project Agreement, duly executed by each party thereto;
- (g) a certified copy of the Contractor Support Agreement, duly executed by each party thereto;
- (h) a certified copy of the Performance Guarantee of Construction Guarantor, duly executed by each party thereto;
- (i) the Lenders' Direct Agreement, duly executed by each party thereto;
- (j) the Insurance Trust Agreement, duly executed by each party thereto;
- (k) the Trust Account Agreement, duly executed by each party thereto;
- (l) a certified copy of each Material Subcontract that has been entered into as of the Financial Closing Date, duly executed by each party thereto;

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- (m) a copy of the SMH Funding Letter, duly executed by MoHLTC;
- (n) the Lenders shall be satisfied that SMH is able to fund its local share of the Construction Costs;
- (o) all necessary acknowledgements, agreements and consents from the other parties to each contract assigned by the Borrower under the Security Documents;
- (p) any required waivers or confirmations reasonably required by counsel to the Administrative Agent and the Lenders to confirm the priorities and ranking of the security provided for in the Security Documents in favour of the Lenders;
- (q) evidence satisfactory to the Lenders that the following accounts have been opened:
 - (i) the Borrower Proceeds Account;
 - (ii) the Agent's Funding Account;
 - (iii) the Insurance Trust Account; and
 - (iv) the Trust Account;
- (r) the Blocked Account Agreement, duly executed by each party thereto;
- (s) the Construction Budget;
- (t) the Works Schedule;
- (u) the Planning and Design Documents or forms thereof which are available on the date of the Financial Closing Date;
- (v) the Lenders shall have received and approved the terms of the engagement of the Lenders' Consultant and the Lenders' Insurance Advisor;
- (w) no less than two Business Days prior to the Financial Closing Date, the Lenders' Consultant's final report addressed to the Lenders and stating, among other things, that:
 - (i) the Lenders' Consultant has reviewed the Planning and Design Documents, the Works Schedule, the Construction Budget, the Construction Contract and each Material Subcontract provided to the Lenders pursuant to the provisions of this Agreement and that such documents are in form and substance satisfactory to the Lenders' Consultant and that completion of the Works in accordance with the foregoing will comply with all Consents required in respect of the completion of the Works;
 - (ii) all necessary Consents, including any building permits, construction permits and permissions, required to commence construction of the Works, any Environmental Permits required as of the Financial Closing Date and any

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Consents required to be obtained by the Borrower or the Contractor from SMH or any other Governmental Authority, have been obtained, and that such Consents and Environmental Permits continue to be in force;

- (iii) the Total Commitment is sufficient to achieve completion of the Project in accordance with the Planning and Design Documents and to pay all Construction Costs, subject to any Variations agreed to between SMH and the Contractor; and
 - (iv) Substantial Completion is capable of being achieved on or prior to the date specified for Substantial Completion under the Construction Contract for the amount set forth in the Construction Budget;
 - (x) the Lenders shall be satisfied with environmental due diligence in respect of the Project, including that there are no outstanding and unremedied Environmental Claims, prosecutions, convictions, administrative orders, directions or other notices from any Governmental Authority with respect to Environmental Claims, which could reasonably be expected to have a Material Adverse Effect;
 - (y) a report or certificate of the Lenders' Insurance Advisor addressed to the Administrative Agent and the Lenders in respect of the Insurance under which the Administrative Agent is named as additionally insured and loss payee in accordance with the terms of this Agreement;
 - (z) an updated Financial Model:
 - (i) together with evidence that such Financial Model is the same financial model that has been provided to SMH, save for any differences required by or arising from compliance with the terms of this Agreement; and
 - (ii) in respect of which any changes thereto and to the Construction Budget following the date of the Contractor's response to the RFP shall be in form and substance satisfactory to the Lenders, acting reasonably;
- and the Lenders shall have received no less than two Business Days prior to Financial Close a final report of Corality Financial Group (as model auditor) satisfactory to the Lenders;
- (aa) each of the following certificates, resolutions and documents addressed to the Administrative Agent and the Lenders:
 - (i) a Responsible Officer's Certificate of the Contractor, in form and substance satisfactory to the Administrative Agent and the Lenders, certifying, without limitation, (i) true copies of the constating documents of the Contractor, (ii) true copies of all corporate authorizations and approvals relating to the entering into, execution, delivery and performance by the Contractor of the Loan Documents and the Material Project Documents to which it is a party, (iii) the incumbency of the persons listed therein who are authorized to

execute and deliver on behalf of the Contractor the Loan Documents and the Material Project Documents to which it is a party, and (iv) that to the best of their knowledge, no action or proceeding has been instituted or threatened, nor has any governmental action been instituted or threatened before any court, tribunal or Governmental Authority, nor has any order, judgment or decree been issued or proposed to be issued by any court, tribunal or Governmental Authority: (a) to set aside, restrain, enjoin or prevent the full performance of any of the Loan Documents or any Material Project Document or any of the transactions contemplated thereby, or (b) that questions the validity of the Loan Documents or the Material Project Documents; and

- (ii) a Responsible Officer's Certificate of the Borrower, in form and substance satisfactory to the Administrative Agent and the Lenders, certifying, without limitation, (i) true copies of the constating documents of the Borrower, (ii) true copies of all corporate authorizations and approvals relating to the entering into, execution, delivery and performance by the Borrower of the Loan Documents and the Material Project Documents to which it is a party, (iii) the incumbency of the persons listed therein who are authorized to execute and deliver on behalf of the Borrower the Loan Documents and the Material Project Documents to which it is a party, (iv) that to the best of their knowledge, no action or proceeding has been instituted or threatened, nor has any governmental action been instituted or threatened before any court, tribunal or Governmental Authority, nor has any order, judgment or decree been issued or proposed to be issued by any court, tribunal or Governmental Authority: (a) to set aside, restrain, enjoin or prevent the full performance of any of the Loan Documents or any Material Project Document or any of the transactions contemplated thereby, or (b) that questions the validity of the Loan Documents or the Material Project Documents;
- (bb) the most recent annual audited financial statements of the Contractor, consisting of a balance sheet, statements of income and of surplus, and a statement of changes in financial position, all prepared in accordance with GAAP applied on a basis consistent with that of the preceding year (except as otherwise noted) and the most recent quarterly unaudited financial statements of the Contractor, consisting of an unaudited balance sheet and an unaudited statement of income, all prepared in accordance with GAAP applied on a consistent basis (except as otherwise noted) and to be completed on a "percentage-of-completion" method consistent with the Contractor's audited financial statements;
- (cc) the most recent *pro forma* unaudited financial statements of the Borrower for the period from the date of its formation to the Financial Closing Date, consisting of a balance sheet, and statements of income and of surplus, all prepared in accordance with GAAP (except as otherwise noted);
- (dd) opinions of counsel to the Borrower and the Contractor, addressed to the Administrative Agent, the Lenders and their counsel, acceptable to the

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Administrative Agent and the Lenders, with respect to, *inter alia*, existence, capacity, due authorization, execution, delivery and enforceability of each of the Loan Documents and the Material Project Documents and the creation of valid security interests and perfection of the Liens under the Security Documents;

- (ee) an opinion of counsel to SMH, addressed to the Administrative Agent, the Lenders and their counsel, in the form attached as Appendix F to Schedule 2 to the Project Agreement;
- (ff) a report of the Lenders' counsel confirming its receipt and review of such Project Documents as it determines, addressing other customary matters and otherwise in form and substance satisfactory to the Lenders;
- (gg) a compliance certificate or certificate of status dated the Financial Closing Date for each of the following entities:
 - (i) the Borrower; and
 - (ii) the Contractor;
- (hh) such other customary documents as the Administrative Agent may reasonably request on behalf of the Lenders.

(2) ***Contractor Bonds.***

- (a) The Borrower shall deliver or cause to be delivered on or before the Financial Closing Date a public-private partnership performance bond (the "**Contractor P3 Bond**") in the form required under the Project Agreement and otherwise in form and substance satisfactory to the Administrative Agent and the Lenders, to be held by the Insurance Trustee in accordance with the provisions of the Insurance Trust Agreement. The Contractor P3 Bond shall (i) provide for a multiple obligee rider whereby, *inter alia*, the Administrative Agent on behalf of the Lenders will be an obligee under the Contractor P3 Bond, (ii) contain riders with respect to the credit downgrade of Zurich Insurance Company Ltd. and a potential step-down of the amount of the advance payment component to \$5,547,689.10 in certain circumstances following Tower Interim Completion, and (iii) be in an aggregate amount of not less than \$156,325,362.60 with an advance payment component in the amount of \$14,211,396.60;
- (b) The Borrower shall deliver or cause to be delivered on or before the Financial Closing Date a labour and material payment bond (the "**Contractor Labour and Material Payment Bond**") in the form required under the Project Agreement and otherwise in form and substance satisfactory to the Administrative Agent and the Lenders, to be held by the Insurance Trustee in accordance with the provisions of the Insurance Trust Agreement, securing the payment by the Contractor of all of the labour and materials to be supplied by the Contractor directly and not subcontracted to arm's length third parties. The Contractor Labour and Material Payment Bond shall (i) provide for a multiple obligee rider whereby, *inter alia*, the Administrative

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Agent on behalf of the Lenders will be an obligee under the Contractor Labour and Material Payment Bond, and (ii) be in an initial aggregate amount of not less than \$142,113,966.00.

(3) **Evidence of Certain Events.** The Administrative Agent shall have received evidence of each of the following, in form and substance satisfactory to the Administrative Agent:

- (a) a report from the Lenders' Insurance Advisor addressed to the Lenders confirming that the Insurance policies required under this Agreement as of the Financial Closing Date with respect to the Works are in full force and effect, together with evidence showing compliance with the requirements of this Agreement with respect to each such policy, including, without limitation, certificates of insurance in form and substance satisfactory to the Lenders;
- (b) that all material Consents required in connection with the Project or the entering into or performance of the Material Project Documents and the Loan Documents have been obtained;
- (c) that all registrations, recordings, and filings of or with respect to the Security Documents which in the opinion of counsel to the Lenders are necessary to provide the Lenders with a first ranking security interest in the assets charged thereby, subject only to the interest of SMH provided for under the Material Project Documents and Permitted Liens in respect of which the Administrative Agent has received written notice and details to the Administrative Agent's satisfaction, acting reasonably, and to render effective the security intended to be created thereby have been completed with respect to the Province of Ontario and any other applicable jurisdiction; and
- (d) that all environmental reports produced on behalf of or available to the Borrower or the Contractor have been provided to the Lenders and the Lenders' Consultant.

(4) **No Adverse Change.** The Lenders shall be satisfied that (i) no event or change has occurred on or prior to the Financial Closing Date which could materially adversely affect the Works, and (ii) no event or change has occurred on or prior to the Financial Closing Date which has a Material Adverse Effect.

(5) **Searches.** The Lenders shall have received satisfactory Lien (with respect to the Borrower only), insolvency and judgment searches against the Borrower and the Contractor in such jurisdictions and offices as reasonably determined by the Lenders.

(6) **Representations and Warranties.** All representations and warranties of the Borrower and the Contractor in the Loan Documents and the Material Project Documents shall be true and correct.

(7) **No Default.** No Default or Event of Default shall have occurred and be continuing on the Financial Closing Date.

(8) **Fees and Transaction Expenses.** All fees and expenses (to the extent agreed or, if not agreed, to the extent reasonable) payable to the Administrative Agent and the Lenders (including all reasonable fees and expenses of the Lenders' advisors) shall have been paid or will be paid in full

from the proceeds of the Loan advanced on the initial Funding Date or that other satisfactory arrangements have been made for the payment thereof.

(9) **Commitments.** Satisfactory commitments shall have been obtained from the Lenders in an aggregate amount that will be sufficient to fund the debt component of the Project in accordance with the Financial Model.

(10) **Client Identification Procedures and Money Laundering and Anti-Terrorism Legislation.** The Administrative Agent and each of the Lenders shall have received from the Borrower sufficient information and required documents to complete client identification procedures and comply with money laundering and anti-terrorism legislation (including without limitation, if necessary, identification of directors and major shareholders of the Borrower in compliance with applicable money laundering rules and know your client requirements of the Lenders).

(11) **Funding Matters.** The Borrower shall have provided evidence satisfactory to the Lenders with respect to the authorization and funding of the Project which may include (i) evidence that SMH has funded any local share of capital cost to be funded by it, and (ii) copies or evidence of the SMH Funding Letter (as defined in the Project Agreement, and which shall include the approval of the Ministry of Health and Long-Term Care pursuant to section 4 of the *Public Hospitals Act* (Ontario)) and the SMH Development Accountability Agreement (as defined in the Project Agreement) or the standard form for Ontario hospital BF projects.

8.2 Conditions Precedent to Initial Funding Date and each Funding Date

The obligation of each Lender to make its Applicable Percentage of Loans available under this Agreement on each Funding Date is subject to and conditional upon each of the following terms and conditions being satisfied on or prior to such Funding Date:

- (1) **No Event of Default.** No Default or Event of Default shall have occurred and be continuing.
- (2) **No Lender Notice of Default.** The Lenders shall not have issued any notice under Sections 10.2 or 10.3(1) in respect of Defaults or Events of Default.
- (3) **No Projected Default.** No Event of Default or Default will result from the making of the Loans requested on the Funding Date.
- (4) **Material Project Documents.** Each Material Project Document and the Contractor Bonds shall be in full force and effect and the Administrative Agent shall have received certified copies of each thereof (including any amendments thereto) to the extent not previously provided to the Administrative Agent.
- (5) **No Contest.** SMH shall not be contesting the legality, validity, binding nature or enforceability of the Material Project Documents, or any provision thereof, and SMH shall not have denied that it has any further liabilities or obligations thereunder.
- (6) **Additional Documents for Funding Date.** The Administrative Agent shall have received not less than five (5) Business Days before the relevant Funding Date (unless otherwise indicated), in form and substance satisfactory to the Administrative Agent, the following:

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- (a) a duly executed and properly completed Funding Request together with all required exhibits and other attachments thereto;
 - (b) a statutory declaration of Contractor in the form of Schedule 8.2(6)(b) in respect of the Funding Date;
 - (c) a certificate of the Lenders' Consultant in the form of Schedule 8.2(6)(c) (the "**Lenders' Consultant's Certificate**") in respect of the Funding Date, provided that a Lenders' Consultant's Certificate shall not be required in respect of the initial Funding Date; and
 - (d) such other documents as the Administrative Agent may have reasonably requested on behalf of the Lenders.
- (7) **Liquidated Damages.** If applicable, the Contractor shall have paid all amounts then due and owing under the Contractor Support Agreement on account of Liquidated Damages then due and owing.
- (8) **Loan Availability Limit.** After making the Loans on such Funding Date, the aggregate amount of the outstanding Loans shall not exceed the Total Commitment.
- (9) **Funding Limit.** After the release by the Administrative Agent of the Requested Funding to the Borrower Proceeds Account in accordance with Section 3.5(5), the aggregate amount of such Requested Funding plus all other Requested Fundings previously released to the Borrower Proceeds Account shall not exceed the Total Commitment as at such Funding Date.
- (10) **Representations and Warranties.** The representations and warranties of the Borrower shall be true and correct in all material respects; provided that, if any representation and warranty is given in respect of a particular date or period and relates only to such date or period, then such representation and warranty shall continue to be given as at such date or for such period.
- (11) **Fees and Transaction Expenses.** All previously invoiced Fees and Transaction Expenses payable to the Administrative Agent, the Lenders, the Lenders' Consultant, the Lenders' Insurance Advisor and the Lenders' legal counsel shall have been paid in full or arrangements shall have been made in the Funding Request issued in connection with such Funding Date for the payment of such amounts.
- (12) **Searches.** The Lenders shall have received from the Borrower's counsel a confirmation, based on a title search of the Project Lands dated the Funding Date (which search shall accompany such confirmation), that there exist upon the Project Lands no Liens other than Permitted Liens.
- (13) **Sufficient Funding and Completion.** The Administrative Agent shall be satisfied that:
- (a) the Borrower has sufficient funds available to it pursuant to the Credit Facility, on deposit in the Borrower Proceeds Account and in its Agent's Funding Account Balance to complete the Works in accordance with the Construction Budget and to pay all Borrowing Costs or, if a Cost to Complete Deficiency exists, as certified by

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the Lenders' Consultant's Certificate, the Administrative Agent shall be satisfied with the Borrower's remediation plan in respect thereof; and

- (b) Substantial Completion is capable of being achieved on or prior to the date specified for Substantial Completion in the Construction Contract, for the amount set forth in the Construction Budget.

(14) **Financial Closing Date.** All conditions set out in Section 8.1 shall have been satisfied or waived in accordance with the terms hereof, and the Financial Closing Date shall have occurred.

(15) **Insurance Premiums.** The Administrative Agent shall have received confirmation that all premiums payable in respect of all Insurance have been paid by the Borrower or the Contractor.

8.3 Waiver of a Condition Precedent

The conditions stated in Sections 8.1 and 8.2 are inserted for the sole benefit of the Administrative Agent and Lenders and may be waived by the Administrative Agent with the consent of all the Lenders in the case of Section 8.1 and the Required Lenders in the case of Section 8.2, in whole or in part, with or without terms or conditions, in respect of all or any portion of the Loans, without affecting the right of the Lenders to assert terms and conditions in whole or in part in respect of any other Loan.

SECTION 9 – COVENANTS

9.1 Affirmative Covenants of the Borrower

While any amount owing under this Agreement or any of the other Loan Documents remains unpaid, or the Administrative Agent or the Lenders have any obligations under this Agreement or any of the other Loan Documents, the Borrower covenants with the Administrative Agent and each Lender as follows:

(1) **Payment.** The Borrower shall duly and punctually pay or cause to be paid all sums of money due and payable by it under this Agreement and the other Loan Documents on the dates, at the places and in the currency and the manner set forth herein and therein.

(2) **Use of Proceeds.** The Borrower shall use all proceeds of Loans solely for the purposes set out in Section 3.4.

(3) **Existence.** The Borrower shall do or cause to be done all things necessary to remain a single-purpose entity. The Borrower shall and shall ensure that each of the other Major Project Parties shall do or cause to be done all things necessary or desirable to keep in full force and effect its respective existence and all Consents necessary to own its respective properties and assets and perform its respective obligations under the Transaction Documents.

(4) **Compliance with Laws.** The Borrower shall comply, and shall cause the Contractor to comply at all times with the requirements of Applicable Law, including all Environmental Laws, with respect to the Borrower, the Contractor, the Works or the Collateral, except where such

compliance is the responsibility of SMH under the Material Project Documents, and, in any event, where the failure to do so could reasonably be expected to give rise to or result in a Material Adverse Effect or a risk of criminal or quasi-criminal liability being imposed upon the Borrower, the Contractor, the Administrative Agent or any Lender.

(5) **Consents.** The Borrower shall obtain, and shall cause the Contractor to obtain (to the extent not in existence on the Financial Closing Date) as and when required, maintain in good standing and comply in all material respects with, all Consents required for it and them (i) to perform their obligations under the Material Project Documents and to complete the Works, other than Consents which SMH is responsible for obtaining and/or maintaining under the Material Project Documents, and (ii) except where the failure to do so would not result in a Material Adverse Effect, to carry on their respective businesses.

(6) **Litigation.** Promptly upon becoming aware thereof, the Borrower shall, and shall cause the Contractor to (a) give notice to the Administrative Agent of any litigation, proceeding or dispute, threatened or commenced against the Borrower, the Contractor, SMH or any other Person in connection with the Works, the Material Project Documents or the Loan Documents, (b) advise the Administrative Agent of the extent to which any adverse determination is covered by insurance, (c) provide all reasonable information requested by the Administrative Agent concerning the status of such litigation, proceeding or dispute, and (d) unless SMH has carriage of such litigation, proceeding or dispute under the Material Project Documents, take all necessary action to defend any material litigation in relation to the Works or any of their respective properties or assets, which has a reasonable likelihood of being successful, and, if adversely determined, could reasonably be expected to have a Material Adverse Effect.

(7) **Pay Claims and Taxes.** The Borrower shall promptly pay and discharge when due all Taxes charged to or payable by it and all obligations which may result in Liens (other than Permitted Liens) on its properties or assets unless the relevant Tax or obligation is subject to a Permitted Contest or where the failure to do so would not reasonably be likely to have a Material Adverse Effect. The Borrower shall notify the Administrative Agent of each contest promptly upon forming the intention to contest the relevant payment, Tax or obligation.

(8) **Performance of Covenants and Works.** The Borrower shall, and shall cause the Contractor to perform all of their respective covenants and obligations under the Material Project Documents and the Loan Documents to which either of them is party in all material respects and to perform the Works in accordance with Applicable Law and the Material Project Documents.

(9) **Maintenance of Security.** The Borrower shall maintain the existence and priority of the Liens created under the Security Documents for the benefit of the Administrative Agent and the Lenders.

(10) **Environmental Matters.** The Borrower shall, and shall cause the Contractor to:

- (a) maintain proper procedures to monitor its compliance with Environmental Laws;
- (b) comply with all of its obligations in respect of Hazardous Materials under the Project Agreement, including its obligations thereunder with respect to compliance with Environmental Laws;

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- (c) diligently cure or have dismissed to the reasonable satisfaction of the Lenders any actions and proceedings described in Section 9.1(14)(c) for which the Borrower or the Contractor are responsible under Applicable Law or under any Material Project Document;
- (d) promptly provide to the Administrative Agent a copy of any environmental notice from any Governmental Authority or any pending or threatened action, claim or proceeding involving any violation of Environmental Laws with respect to the Project; and
- (e) provide such information and certificates which the Administrative Agent may reasonably request from time to time to evidence compliance with this Section 9.1(10).

(11) **Construction Lien Legislation.** The Borrower shall, and shall cause the Contractor to comply with the *Construction Lien Act* (Ontario) (including any requirement to maintain holdbacks) and pay or cause to be paid when due all claims and demands of contractors, subcontractors, labourers, suppliers of material, builders, workmen and others engaged in the performance of the Works which, if unpaid, might result in the creation of a construction Lien or analogous Lien against the Works or any part thereof or on the revenue, income or profits arising therefrom, and if registered, such Lien or claim shall be duly discharged or vacated, unless, with the exception of any Liens or claims which are required to be discharged or vacated under the Material Project Documents, in any of the preceding circumstances there is a Permitted Contest and adequate security has been posted.

(12) **Remedial Plan.** In the event that the Lenders' Consultant certifies at any time that:

- (a) Substantial Completion will not occur on or before the then-Scheduled Substantial Completion Date; or
- (b) the Tower Interim Completion Payment will not be received by the Scheduled Tower Interim Completion Date and a Cost to Complete Deficiency exists,

and that a remedial plan is required, the Borrower shall deliver to the Administrative Agent, within 30 days of such certification by the Lenders' Consultant, a remedial plan showing that Substantial Completion shall occur prior to the Lender Longstop Date and otherwise in form and substance satisfactory to the Lenders' Consultant and the Lenders (a "**Remedial Plan**").

(13) **Remedial Action Under Project Agreement.** The Borrower shall consult with the Administrative Agent and the Lenders' Consultant when preparing any remedial plan of action required under the Project Agreement.

(14) **Notices and Information.** The Borrower shall, and shall cause the Contractor to provide, immediately upon obtaining knowledge or receipt thereof, notice to the Administrative Agent of, and, where applicable, a copy of any notices received in respect of:

- (a) the occurrence of any Default or Event of Default, setting forth its details and the action taken or to be taken to remedy it;

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- (b) the occurrence of any termination, any material default or any event of default under any Material Project Document;
- (c) any material notices under the Material Project Documents, including, without limitation, (i) notices of default or events of default under the Material Project Documents, (ii) notice of any Variation Enquiry, Variation Confirmation or Variation Directive that has a value in excess of \$100,000, (iii) notices of any material design issue in respect of any design contingency, (iv) notices of matters to be referred to dispute resolution under the Material Project Documents, (v) notice of any decision of any project mediator, adjudicator, arbitrator or court regarding any material dispute under the Material Project Documents, (vi) orders regarding the suspension of the Works, (vii) notices of the Minor Deficiencies List, the Tower Interim Completion Holdback and the Completion Holdback, (viii) notices regarding the exercise by SMH of any right of set-off or deduction under the Material Project Documents, (ix) notice of any claim by SMH under any indemnities in the Material Project Documents, (x) any environmental notices from any Governmental Authority or any pending or threatened action, claim or proceeding involving any violation of Environmental Laws with respect to the Project, (xi) notice of any casualty with respect to the Works in excess of \$1,000,000, condemnation, delay of the Project or Force Majeure, (xii) notices of the Tower Interim Completion Payment, Substantial Completion and Final Completion, received by the Borrower or the Contractor from SMH or any other Person (other than the Administrative Agent) party to any of the Material Project Documents, (xiii) notice of the occurrence of any Delay Event, Compensation Event or event of Force Majeure (each as defined in the Project Agreement), and (xiv) other notices received by the Borrower or the Contractor from SMH in respect of the Project;
- (d) any notice, demand or order, other than a notice relating to a Permitted Lien, alleging a violation by the Borrower, the Contractor or any Subcontractor of Applicable Law in connection with the performance of the Works;
- (e) the occurrence of an event or circumstance which could reasonably be expected to have a Material Adverse Effect;
- (f) any previously undisclosed material action, suit, litigation or other proceeding which has been commenced or threatened against any Major Project Party or the Works which would have a reasonable likelihood of succeeding if pursued and, if adversely determined, could reasonably be expected to have a Material Adverse Effect;
- (g) any proposal to suspend or abandon the Works;
- (h) any notices of default that could reasonably be expected to result in termination of a Material Subcontract received from any Subcontractor under such Material Subcontract;
- (i) the occurrence of any event described in either of Sections 10.1(7) or 10.1(8) in respect of the Borrower or the Contractor;

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- (j) any material change to the anticipated aggregate Construction Costs, Borrowing Costs and Transaction Expenses;
- (k) any failure by the Borrower or the Contractor to keep or maintain any required Consent relating to the Works; and
- (l) the commencement of any proceeding for the expropriation of any property or assets of the Borrower or the Contractor with respect to the Works.

(15) ***Notice of Variation Confirmations and Variation Directives.*** The Borrower shall provide, immediately upon obtaining knowledge or receipt thereof, notice of any Variation Confirmation (as defined in the Construction Contract) or Variation Order (as defined in the Construction Contract) or any other variation of the Construction Contract that alters the Cost of the Works under the Construction Contract to Zurich Insurance Company Ltd. and any other surety of the Contractor Bonds, with a copy thereof to the Administrative Agent.

(16) ***Consultation Regarding Variation Confirmations and Variation Directives.*** The Borrower shall, and shall cause the Contractor to consult with the Lenders' Consultant regarding any Variation Enquiries which would reasonably be expected to cost in excess of \$1,000,000 individually or, when aggregated with all previous Variation Confirmations and Variation Directives, \$2,500,000 in the aggregate, when determining the appropriate time and cost adjustments resulting from the implementation of such Variation Enquiry. The Administrative Agent agrees to consult with the Borrower and the Lenders' Consultant in calculating any Break Costs and Swap Breakage Costs resulting from the implementation of such Variation Enquiry. The Borrower shall not agree to or undertake, or permit the Contractor to agree to or undertake any material Variation Enquiry without seeking the Administrative Agent's consent (acting on the instructions of the Required Lenders). The Administrative Agent shall provide its consent to a Variation Enquiry with respect to which its consent is required if (a) the Lenders' Consultant has certified that any extension of time or compensation for additional costs or expenses provided for in such Variation Enquiry is sufficient and (b) SMH has confirmed to the Administrative Agent in writing (and such confirmation is satisfactory to the Administrative Agent acting reasonably), that it has made adequate provision with respect to the funding of such Variation Enquiry. The Borrower shall provide a copy of any Variation Enquiry, Variation Confirmation or Variation Directive to the Lenders' Consultant and the Administrative Agent promptly after receipt or delivery thereof. If a Variation Directive would have required the consent of the Administrative Agent if it were a Variation Enquiry, the Administrative Agent may participate in any dispute resolution procedure related to such Variation Directive and the Borrower may not settle the amount to be received for such Variation Directive without the Consent of the Administrative Agent (acting on the instructions of the Required Lenders). In the event that a Variation is implemented under section 11.16A(g) of the Project Agreement, then either (i) such Variation shall only permit the Borrower to deliver the warranty bond contemplated by such Variation in satisfaction of the obligation to deliver the Warranty Letter of Credit such that, if the Borrower does not deliver such warranty bond, the Borrower shall still be required to deliver the Warranty Letter of Credit under Section 11.16A(a), or (ii) provide to the Administrative Agent such evidence as shall be satisfactory to the Lenders, acting reasonably, that the obligation of the Borrower to deliver the warranty bond contemplated by such Variation remains a bonded obligation under the Contractor P3 Bond with the remedies contemplated by the last paragraph of Section 6 thereof.

(17) **Initiation of Dispute Resolution.** The Borrower shall, and shall cause the Contractor to initiate dispute resolution procedures under the Project Agreement regarding any matter specified by the Required Lenders, acting reasonably, and shall, or shall cause the Contractor to contest such matter pursuant to such dispute resolution procedures at its own expense. The Borrower shall, and shall cause the Contractor, as the case may be, to keep the Administrative Agent fully apprised of the status of such proceedings and shall provide the Administrative Agent with all information with respect to such proceedings as the Administrative Agent shall reasonably request. If so required by the Required Lenders, acting reasonably, the Borrower shall, or shall cause the Contractor to appeal any decision or award resulting from one level of the dispute resolution procedures under the Project Agreement to the next level until a final determination of the matter is made by an arbitrator or a court, as the case may be.

(18) **Enforcement of Rights.** The Borrower shall, and shall cause the Contractor to, enforce all of its rights against each other party to the Material Project Documents where the failure to do so could reasonably be expected to have a Material Adverse Effect. The failure to enforce rights to payment will be deemed to have a Material Adverse Effect.

(19) **Updates to Financial Model.** The Borrower shall deliver or cause to be delivered to the Administrative Agent and the Lenders' Consultant an updated Financial Model, in the same form as the form available at the Financial Closing Date or in such other form as may be agreed by the Administrative Agent acting reasonably, which shall be prepared in accordance with Schedule 9.1(19), (i) as soon as available and, in any event, no later than sixty (60) days before the close of each Fiscal Year, unless the Borrower has certified in the most recent Compliance Certificate delivered to the Administrative Agent that no changes have been made to the most recent Financial Model delivered to the Administrative Agent, (ii) no later than the tenth (10th) Business Day after the date upon which the Borrower notifies the Administrative Agent or the Administrative Agent notifies the Borrower that in its (or the Lenders' view) if a new Financial Model were prepared, it would differ from the current Financial Model, and (iii) contemporaneously with the requirement to deliver, and the determination of, an amended Financial Model under the Project Agreement or the Construction Contract.

(20) **Collaborate with Lender's Consultant.** The Borrower shall collaborate with the Lenders' Consultant in reviewing the progress of the Works and shall provide to the Administrative Agent and the Lenders' Consultant copies of all notices from SMH and all copies received from SMH or the Independent Certifier or evaluations of the Works and the timing thereof. The Borrower confirms that the Lenders' Consultant will be required by the Lenders, and the Borrower will cause the Lenders' Consultant, to provide to the Lenders monthly reviews of the Works in form and substance satisfactory to the Lenders.

(21) **Project Insurance and General Insurance Requirements.**

- (a) The Borrower shall maintain, or shall cause the Contractor to maintain, at its sole cost and expense, at a minimum, the Project Insurance and comply in all material respects with all Insurance Requirements with respect thereto.

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- (b) The Borrower shall provide to the Administrative Agent a broker's binder as soon as reasonably practicable and in any event no later than 30 days following Financial Close.
- (c) The Borrower shall provide, or shall cause the Contractor to provide, to the Administrative Agent copies of every policy of Insurance or such other evidence of Insurance as may be reasonably required (including any policies replacing any of the policies required under Section 9.1(22)) within ten (10) days of such Insurance becoming effective, together with evidence of payment of the premiums thereunder. If the Borrower or the Contractor defaults in insuring or continuing to maintain the Insurance, the Administrative Agent may insure against any risk in respect of which such default has occurred and recover any premiums from the Borrower as part of the Obligations. On the Financial Closing Date and at least thirty (30) days prior to expiry of the policies, the Borrower shall deliver or cause to be delivered to the Administrative Agent satisfactory evidence from the Borrowers' insurance agent confirming that the insurance premiums then due and payable with respect to the policies of Insurance then in place have been paid, that such policies are in force, and that, with respect to the Additional Insurance, such policies meet the insurance requirements set forth in Section 9.1(22). The Borrower shall also furnish or cause to be furnished a certificate of insurance evidencing that all the Insurance coverages have been renewed and continue to be in full force and effect for such period as shall be then stipulated, and (i) specifying the insurers with whom the Insurance is carried and (ii) containing such other certifications and undertakings as are customarily provided to lenders, as reasonably requested by the Administrative Agent. Further, upon the annual expiry of each policy of Insurance, the Administrative Agent shall have the right, but not the obligation, to appoint the Lenders' Insurance Advisor to confirm the efficacy and sufficiency of the Insurance (and the evidence thereof) provided by the Borrower, the Contractor or their insurance brokers or insurers as complying with the insurance requirements under the Material Project Documents and this Agreement. The supply to the Administrative Agent of any draft insurance policy or certificate of insurance or other evidence of compliance with this Section 9.1(21) shall not imply acceptance by the Administrative Agent for the Lenders that the extent of insurance coverage is sufficient and its terms are satisfactory.
- (d) Any direct or indirect damage insurance policies included in the Project Insurance shall:
 - (i) name the Borrower, SMH and the Contractor as a named insured and include as additional insureds the Administrative Agent, the Lenders and all those required to be insureds under the Material Project Documents;
 - (ii) name the Administrative Agent and the Lenders as mortgagee and loss payee and include a standard mortgage clause as approved by the Insurance Bureau of Canada;

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- (iii) provide that no cancellation or adverse material change therein, for any reason whatsoever, shall take effect unless the insurer concerned has given the Administrative Agent not less than sixty (60) days' prior written notice of such proposed action, except in connection with cancellation for non-payment of premium in which case the insurer shall be required to give not less than fifteen (15) days prior written notice as per the statutory conditions;
 - (iv) contain a waiver of the insurer's rights of subrogation against the Administrative Agent and the Lenders;
 - (v) contain a breach of conditions clause;
 - (vi) otherwise be in such form as the Administrative Agent shall require, acting reasonably.
- (e) Any third party liability insurance policies (excepting professional liability and automobile liability) shall:
- (i) name each of the Borrower and the Contractor as a named insured;
 - (ii) name the Administrative Agent, the Lenders and SMH as additional insureds;
 - (iii) provide that no cancellation or adverse material change therein, for any reason whatsoever, shall take effect unless the insurer concerned has given the Administrative Agent not less than sixty (60) days' prior written notice of such proposed action, except in connection with cancellation for non-payment of premium where the insurer shall be required to give not less than fifteen (15) days' prior written notice to the Administrative Agent;
 - (iv) contain a waiver of the insurer's rights of subrogation against the Administrative Agent and all Lenders;
 - (v) contain a cross liability and a severability of interests clause;
 - (vi) provide that the Administrative Agent and the Lenders shall have no responsibility for premiums; and
 - (vii) otherwise be in such form as the Administrative Agent shall require, acting reasonably.
- (f) All Insurance required under this Section 9.1(21) will be (i) placed with insurance companies having a minimum AM Best rating of not less than A VIII and licensed to do business in the Province of Ontario, and (ii) subject to deductibles as are customary for projects of a similar kind and size and, in any event, as acceptable to the Lenders, upon consultation with the Lenders' Insurance Advisor.

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- (g) Neither failure to comply nor full compliance with the insurance provisions of this Agreement shall relieve the Borrower of its liabilities and obligations under this Agreement.
- (h) The Borrower shall, upon obtaining knowledge thereof, provide, or cause to be provided, prompt notice in writing to the Administrative Agent of any event which could give rise to a claim under any policy of Insurance in excess of \$1,000,000.
- (i) The Borrower shall deliver to the Administrative Agent notice of (i) any cancellation, change or reduction in any policy of Insurance, (ii) any policy of Insurance becoming void or voidable, or (iii) any other circumstance or correspondence relating to any policy of Insurance which may have a Material Adverse Effect, and upon receipt of any such notice the Administrative Agent shall have the right, but not the obligation, to appoint the Lenders' Insurance Advisor to advise the Administrative Agent.
- (j) All insurance proceeds payable under the Project Insurance shall be paid and distributed in accordance with the Insurance Trust Agreement.

(22) *Additional Insurance.*

- (a) The Borrower shall maintain, or shall cause the Contractor or applicable Subcontractor to maintain, at its sole cost and expense, with effect from the Financial Closing Date until all Obligations of the Borrower have been satisfied in full and the termination of this Agreement, at a minimum, the Additional Insurance that is described in Schedule 9.1(22) and comply in all material respects with all Insurance Requirements with respect thereto.
- (b) All Additional Insurance set forth in Schedule 9.1(22) will be (i) placed with insurance companies having a minimum AM Best rating of A VIII and licensed to do business in the Province of Ontario, and (ii) subject to deductibles as are customary for projects of a similar kind and size and, in any event, as acceptable to the Lenders, upon consultation with the Lenders' Insurance Advisor.
- (c) Any third party liability insurance policies referred to in Schedule 9.1(22), shall:
 - (i) name each of the Borrower and the Contractor as a named insured;
 - (ii) name the Administrative Agent, the Lenders and SMH as additional insureds;
 - (iii) provide that no cancellation or adverse material change therein, for any reason whatsoever, shall take effect unless the insurer concerned has given the Administrative Agent not less than sixty (60) days' prior written notice of such proposed action, except in connection with cancellation for non-payment of premium where the insurer shall be required to give not less than fifteen (15) days' prior written notice to the Administrative Agent;
 - (iv) contain a waiver of the insurer's rights of subrogation against the Administrative Agent and all Lenders;

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- (v) contain a cross liability and a severability of interests clause;
- (vi) provide that the Administrative Agent and the Lenders shall have no responsibility for premiums; and
- (vii) otherwise be in such form as the Administrative Agent shall require, acting reasonably.

(23) **Material Project Documents.** The Borrower shall promptly, and in any event not more than five (5) Business Days after the receipt or delivery thereof, provide to the Administrative Agent from time to time during the Term, true and complete copies of all Material Project Documents entered into after the Financial Closing Date by the Borrower or the Contractor relating to the Works, together with any and all amendments to such documents.

(24) **Borrower Proceeds Account.** The Borrower shall establish and at all times maintain the Borrower Proceeds Account in accordance with the terms of the Blocked Account Agreement and this Agreement. In the event that the Blocked Account Agreement is terminated, the Borrower shall cause a new account to be opened at a replacement bank acceptable to the Lenders and direct the Administrative Agent to transfer all amounts on deposit in the Borrower Proceeds Account into such new account, provided that any such account shall be subject to a blocked account agreement between the Administrative Agent, the Borrower and the replacement bank on terms and conditions satisfactory to the Administrative Agent, the Borrower and the Lenders, acting reasonably.

(25) **Subcontractors.** The Borrower shall, and shall cause the Contractor to, pay all Subcontractors on time according to the terms and conditions set out in the Project Agreement.

(26) **Completion Holdbacks.** The Borrower shall cause the Contractor to pay to the Borrower: (i) all amounts retained by SMH as part of the Tower Interim Completion Holdback and the Completion Holdback, and (ii) all delay damages and increased interest costs not covered by the Tower Interim Completion Payment and the Substantial Completion Payment or by the amount of the increased Cost of the Financing for the Project as a result of any delays in the performance of the Works for which SMH is not responsible.

(27) **Lien Holdbacks.** Provided that there are no construction Liens or trust claims by Subcontractors or the Contractor outstanding at the time of the payment of the Legislative Holdback by SMH, the Borrower shall cause the Contractor to instruct the Borrower to pay any portion of the Legislative Holdback to the Administrative Agent in respect of any outstanding indebtedness under this Agreement and the other Loan Documents.

(28) **Additional SMH Payments.** The Borrower shall cause the Contractor to pay to the Borrower any portion of the Additional SMH Payments relating to the increased Cost of the Financing for the Project received by the Contractor.

(29) **Performance Security.**

- (a) The Borrower shall comply, and shall cause the Contractor to comply, with the terms of the Contractor Bonds.

- (b) The Borrower shall ensure, and shall cause the Contractor to ensure, that the Contractor Bonds remain in full force and effect.
- (c) If any Subcontractor party to a Material Subcontract posts a bond or similar security in favour of the Borrower or the Contractor in connection with the Works, then the Borrower shall, and shall cause the Contractor to ensure that such bond names the Administrative Agent for the benefit of the Lenders as an obligee under such bond and the Borrower shall, and shall cause the Contractor to promptly notify the Administrative Agent of the amount and terms of such bond or similar security.

(30) ***Implementation of Works; Assignments.***

- (a) The Borrower shall, and shall cause the Contractor to ensure that the Works are implemented and carried out in accordance with the Project Agreement, the Construction Contract and the Construction Budget to the extent that the failure to do so could reasonably be expected to have a Material Adverse Effect.
- (b) Where the Borrower or the Contractor has consent rights with respect thereto and the right to withhold such consent, the Borrower shall not, and shall not permit the Contractor to consent to or permit any assignment, novation or other transfer of any Material Project Document to which the Borrower or the Contractor, respectively, are parties.

(31) ***Defend Title.*** The Borrower will defend the title of its property and assets against the claims and demands of all Persons other than the Administrative Agent, the Lenders and holders of Permitted Liens.

(32) ***Monthly Meeting Attendance.*** The Borrower shall cause the Contractor to provide to the Lenders' Consultant reasonable advance notice of the meetings to be attended by the Contractor in respect of the Works and shall cause the Contractor to invite the Lenders' Consultant to attend such meetings. If the Lenders' Consultant is unable for any reason to attend any such meeting, the Borrower shall cause the Contractor, upon the request of the Lenders' Consultant, to provide a complete set of any minutes of such meeting to the Lenders' Consultant.

(33) ***Know Your Client Information.*** The Borrower shall provide to the Administrative Agent and to each Lender all information required to complete their respective know-your-client requirements pursuant to applicable anti-money laundering and anti-terrorism financing legislation.

(34) ***Minimum Balance.*** The Borrower will ensure that the Borrower Proceeds Account has at all times a minimum balance of at least the Required Amount, which amount shall be funded from draws under the Credit Facility; provided that the balance in the Borrower Proceeds Account may fall below the Required Amount immediately following (and in the amount of) any payment to the Administrative Agent (whether by way of direct debit under section 3.5(7) or otherwise) of interest or fees under the Credit Facility as long as the balance in the Borrower Proceeds Account is restored to at least the Required Amount prior to the immediately following Interest Payment Date or Standby Fee Payment Date, as the case may be. For the purposes hereof, the "Required Amount" shall mean (i) up to and including the date on which the Tower Interim Completion Payment is received by the Lenders, \$850,000, and (ii) thereafter, \$510,000.

(35) **Further Assurances.** The Borrower shall, and shall cause the Contractor to, at its cost and expense, (a) cause to be promptly and duly taken, executed, acknowledged and delivered all such further acts, documents and assurances as the Administrative Agent or any Lender reasonably may request from time to time in order to carry out the intent and purposes of this Agreement, the Loan Documents and the Material Project Documents; and (b) cause all financing statements, security agreements and other documents to be recorded or filed at such places and times in such manner, and will take all such other actions or cause such actions to be taken, as may be necessary, or as may be reasonably requested by the Administrative Agent or any Lender, in order to establish, preserve, protect and perfect the Liens granted in favour of the Administrative Agent for the benefit of the Lenders under the Security Documents.

9.2 Negative Covenants of the Borrower

While any amount owing under this Agreement or any of the other Loan Documents remains unpaid, or the Administrative Agent or the Lenders have any obligations under this Agreement or any of the other Loan Documents, the Borrower covenants with the Administrative Agent and each Lender that it shall not without the prior consent of the Required Lenders:

- (1) **Restriction on Use of Credit Facility.** Use or permit to be used any of the Credit Facility for any purpose other than the purposes specified in this Agreement.
- (2) **Debt.** Create, incur, assume, suffer or permit to exist any Debt except for Permitted Debt.
- (3) **Business.** Undertake or engage in any business other than the undertaking of the Project in accordance with the Material Project Documents or to form, hold or acquire any interest in any other company, partnership, trust, joint venture or other association (whether incorporated or unincorporated).
- (4) **No Liens.** Create, permit the creation of or allow to exist any Liens against the Borrower's interest in the Collateral, the Works, any Material Project Document, any other property or assets of the Borrower or any income or profit therefrom or any proceeds thereof, other than Permitted Liens, and shall ensure that the Contractor does not create, permit the creation of or allow to exist any Liens against the Contractor's interest in the Works or any Material Project Document or any Collateral other than Permitted Liens.
- (5) **Negative Pledge Agreements.** Assume, create, incur or permit to exist any contract, agreement or understanding (other than this Agreement and the Security Documents) which in any way prohibits or restricts the granting, conveying, creation or imposition of any Lien on any of the property of the Borrower, or which requires the consent of or notice to other Persons in connection therewith except under the Material Project Documents in accordance with their terms.
- (6) **Distributions.** Make any Distributions.
- (7) **No Transfer of Assets.** Except for Permitted Disposals, sell, transfer, lease or dispose of (or permit the Contractor to sell, transfer, lease or dispose of) any property or assets (in the case of the Contractor, limited to assets relating exclusively to the Project or its interest in the Project Documents and the Borrower), whether in a single transaction or a series of transactions and whether voluntary or involuntary, without the prior written consent of the Lenders, acting reasonably.

- (8) **No Change in Control.** Permit a Change in Control of the Borrower without the prior written consent of the Lenders.
- (9) **No Investment.** Make or own, or permit to exist, directly or indirectly, any investment in, or make, hold or accrue any loans or advances of money to or indebtedness of any other Person through the direct or indirect holding of securities or otherwise.
- (10) **Fundamental Change.** (a) Undertake or engage directly or indirectly in any business activity other than the undertaking of the Works in accordance with the Material Project Documents; (b) change the Borrower's Fiscal Year end from December 31 to another fiscal year end; (c) materially amend the Borrower's articles of incorporation or other constating documents; or (d) create or acquire any Subsidiaries.
- (11) **No Transfer of Documents.** Assign or transfer all or any part of its rights or obligations under the Loan Documents or Material Project Documents to which it is a party (except pursuant to the Security Documents), nor permit the Contractor to assign or transfer all or any part of the Contractor's rights or obligations under the Loan Documents and Material Project Documents to which the Contractor is a party (except pursuant to the Security Documents).
- (12) **Change of Name or Address.** Change, or permit the Contractor to change its corporate name, its jurisdiction of formation, its registered office, its chief executive office or its principal place of business within Ontario without giving the Administrative Agent at least thirty (30) days prior written notice; provided that the Borrower will not change its jurisdiction of formation outside of Canada without the prior consent of all Lenders.
- (13) **Investments and Financial Assistance.** Make any Investments or grant any Financial Assistance.
- (14) **Expenditures.** Make, or permit the Contractor to make any expenditures (other than in respect of or in relation to any Cost Overruns which are funded by the Contractor and in connection with Variations as permitted pursuant to the Lenders' Direct Agreement) relating to the Works which are materially inconsistent with the Financial Model or the Construction Budget.
- (15) **Pension and Benefit Plans.** Create or maintain any Canadian Pension Plans or Canadian Benefit Plans.
- (16) **Modifications of Material Project Documents.** Without the prior written consent of the Lenders, acting reasonably, and subject to Section 9.1(15), (a) terminate, repudiate, vary, alter, amend, supplement, surrender, revise or modify any Material Project Document other than as permitted pursuant to the Lenders' Direct Agreement, (b) waive any default or breach under any Material Project Document, (c) take any other action in connection with any Material Project Document that could reasonably be expected to have a Material Adverse Effect, or (d) permit the Contractor to do or consent to any of the foregoing; provided that the Borrower or the Contractor may waive any default or breach under a Material Subcontract provided such waiver could not reasonably be expected to have a Material Adverse Effect.
- (17) **No Contracts.** (i) Enter into any material contracts or agreements, other than (a) the Loan Documents, the Material Project Documents or documents incidental or ancillary thereto without the

prior written consent of the Lenders, acting reasonably, or (b) the management and/or consulting agreements relating to the management of the Borrower and/or the Project, an executed copy of which has been provided to the Administrative Agent on or prior to the Financial Closing Date or (ii) permit the Contractor to enter into any material contracts or agreements related to the Project, other than the Loan Documents and Material Project Documents to which the Contractor is party or any documents incidental or ancillary thereto without the prior written consent of the Lenders, acting reasonably.

(18) **Transactions with Contractor.** The Borrower shall not enter into any transactions with the Contractor (or any Affiliate thereof) other than the transactions contemplated by this Agreement, the Loan Documents, the Material Project Documents or documents incidental or ancillary thereto unless such transactions contain terms no less favourable to the Borrower than those that would be included in an arms' length transaction entered into by a prudent person with a non-affiliated third party.

(19) **Settlement of Claims.** After the occurrence and during the continuance of a Default or Event of Default, agree or permit the Contractor to agree to any settlement in respect of liquidated damages, warranty claims or other claims relating to the Works without the prior written consent of the Lenders, acting reasonably, unless such claims are to be funded by proceeds of Insurance, SMH or the Contractor.

(20) **No Amalgamation.** Amalgamate or consolidate with or into any other person or enter into an arrangement or plan of arrangement with any other person.

(21) **No Accounts.** Have any bank accounts or have any interest in any bank accounts other than the Project Accounts and the Cash Allowance Account (as defined in the Project Agreement).

(22) **Insurance.** Do anything, or permit anything to be done (including by the Contractor), which would result in any policy of Insurance required under the Project Agreement or hereunder lapsing or otherwise being rendered void, voidable or ineffective, vary or permit to be varied in any material respect, or cancel or permit to be cancelled any such policy of Insurance or take any action that would reduce the amount of coverage under any such policy of Insurance.

(23) **Insolvency Proceedings.** Commence, or permit the Contractor to commence, any action, proceeding or other course of action described in Section 10.1(7) without giving the Administrative Agent and Lenders at least thirty (30) days prior written notice.

(24) **No Swaps.** Other than the Interest Rate Swaps, engage in any transaction involving interest rate, currency, commodity, equity, credit or other swaps, options, futures, caps, collars, floors swaptions, puts, calls or any similar contracts or derivative transactions for speculative purposes or in any other case without the prior written consent of the Lenders, acting reasonably.

(25) **No Repudiation of Security.** Take any action to repudiate its obligations under this Agreement and the Security Documents, as the case may be, nor shall it assert in any manner that it has no obligations, under any or all of this Agreement and the Security Documents, as the case may be.

(26) **Material Project Documents.** Do or permit any act or omission that constitutes or which would result in an event of default under the Material Project Documents which could reasonably be expected to have a Material Adverse Effect.

(27) **Lenders' Consultant Services Agreement.** Amend or waive any material provision of, or terminate, the services agreement with the Lenders' Consultant without the prior written consent of the Lenders.

9.3 Accounting, Financial Statements and Other Information

While any amount owing under this Agreement or any of the other Loan Documents remains unpaid, or the Administrative Agent or the Lenders have any obligations under this Agreement or any of the other Loan Documents, the Borrower covenants with each Lender and the Administrative Agent as follows:

(1) **General.** The Borrower shall, and shall cause the Contractor to, keep, or cause to be kept, proper and adequate records and books of account in which true and complete entries are made in accordance with GAAP. The Borrower shall, and shall cause the Contractor to (i) provide all information reasonably requested by the Administrative Agent or the Lenders' Consultant in relation to the assets, liabilities, financial condition, business, operation or prospects of the Borrower, the Contractor or the Works promptly following request therefor and (ii) provide the Administrative Agent and the Lenders' Consultant with reasonable rights of inspection of and access to the Works and to such books, records, premises and other information that any of the foregoing may from time to time reasonably require in connection with the Loan Documents or the Material Project Documents in order to ensure that each such party is able to carry out all of its duties and obligations thereunder or in connection therewith.

(2) **Quarterly Reports.** The Borrower shall provide, or shall cause to be provided to the Administrative Agent, copies of the following reports on a quarterly basis, promptly upon availability, and in any event within forty-five (45) days of the end of each of the first three fiscal quarters in each Fiscal Year of the Persons listed below:

- (a) the unaudited unconsolidated financial statements of the Borrower, including an unaudited balance sheet and an unaudited statement of income for each such fiscal quarter, all prepared in accordance with GAAP on a consistent basis (except as otherwise noted);
- (b) the unaudited unconsolidated financial statements of the Contractor, including an unaudited balance sheet and an unaudited statement of income for each such fiscal quarter, all prepared in accordance with GAAP on a consistent basis (except as otherwise noted); and
- (c) a Compliance Certificate.

(3) **Annual Reports.** The Borrower shall provide, or shall cause to be provided to the Administrative Agent, copies of the following reports, promptly upon availability, and in any event within 120 days of the end of the Fiscal Year of the Persons listed below:

- (a) (i) the annual audited, unconsolidated financial statements of the Borrower consisting of a balance sheet, statements of income and of surplus, and a statement of changes in financial position, all prepared in accordance with GAAP applied on a basis consistent with that of the preceding year (except as otherwise noted) and subject to a review engagement and (ii) a certificate of the auditors for the Borrower setting forth that they have examined such statements and have conducted a general review of accounting procedures and such tests of accounting records and other supporting evidence as they consider necessary and confirming that in their opinion such statements present fairly the financial position of the Borrower and the results of the Borrower's operations for the fiscal year reported on and have been prepared in accordance with GAAP applied on a basis consistent with that of the preceding year (except as otherwise noted);
 - (b) (i) the annual audited, unconsolidated financial statements of the Contractor consisting of a balance sheet, statements of income and of surplus, and a statement of changes in financial position, all prepared in accordance with GAAP applied on a basis consistent with that of the preceding year (except as otherwise noted) and (ii) a certificate of the auditors for the Contractor setting forth that they have examined such statements and have conducted a general review of accounting procedures and such tests of accounting records and other supporting evidence as they consider necessary and confirming that in their opinion such statements present fairly the financial position of the Contractor and the results of the Contractor's operations for the fiscal year reported on and have been prepared in accordance with GAAP applied on a basis consistent with that of the preceding year (except as otherwise noted); and
 - (c) a Compliance Certificate.
- (4) **Other Information.** The Borrower shall, and shall cause the Contractor to, provide the Administrative Agent with:
- (a) upon reasonable request from time to time therefor, such other reports and information regarding the financial condition, business, property, operations and prospects of the Borrower or the Contractor or regarding the Works;
 - (b) written notice of any litigation pending or, to the Borrower's knowledge, threatened against the Borrower or the Contractor involving claims against the Borrower, the Contractor or the Project in excess of \$250,000 (provided that in the case of the Contractor such Claims relate to the Project) in the aggregate or involving any material, injunctive, declaratory or other equitable relief;
 - (c) written notice of any dispute or disputes which may exist between the Borrower, the Contractor and SMH or any Governmental Authority in relation to the Project and which involve (i) claims against the Borrower or the Contractor which in the aggregate exceed \$250,000; (ii) injunctive or declaratory relief; or (iii) failure to obtain when needed, revocation, material modification, suspension or the like of any Applicable Consent or imposition of additional material conditions with respect thereto;

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- (d) promptly and, in any event within ten (10) Business Days after written request by the Administrative Agent, copies of any regular and periodic forms and reports (including material change reports) filed by the Borrower with any securities commission, regulatory authority or exchange or other Governmental Authority having jurisdiction over the issuance and sale of, and other matters relating to, the securities of the Borrower, to the extent applicable;
 - (e) promptly following the occurrence thereof, a certificate from the Borrower, in form and substance satisfactory to the Administrative Agent and the Lenders' Consultant, that Substantial Completion has been achieved;
 - (f) promptly following the occurrence thereof, a certificate from the Borrower, in form and substance satisfactory to the Administrative Agent and the Lenders' Consultant, that Final Completion has been achieved; and
 - (g) promptly following the occurrence thereof, a certificate of the Independent Certifier confirming that Substantial Completion has been achieved.
- (5) **Notices under Material Project Documents.** If the Borrower is provided with a notice of default on the part of the Borrower with respect to any of the Material Project Documents (each a "**Default Notice**"), the Borrower shall provide as soon as reasonably possible thereafter, a copy of such Default Notice to the Administrative Agent with a description of the applicable default or circumstance giving rise thereto, and a report indicating the status of such default or circumstance and the steps taken and to be taken (as applicable) to cure such default or circumstance. If such default or circumstance is not cured within five (5) Business Days after the receipt by the Borrower of the Default Notice, the Borrower will so advise the Administrative Agent and thereafter will keep the Lenders' Consultant and the Administrative Agent promptly informed with respect to the steps the Borrower is taking to cure such default.
- (6) **Project Reports.** The Borrower shall deliver, and shall cause the Contractor to deliver, to the Administrative Agent and the Lenders' Consultant:
- (a) promptly copies of any Variation Enquiries, Variation Confirmations and Variation Directives issued under the Construction Contract and copies of any certificates, notices, reports or other documents issued by the Independent Certifier under or in connection with the Project Agreement; and
 - (b) a Works report on or before the twentieth (20th) day of each month for the prior month until Final Completion has occurred, which report shall include (i) Construction Costs incurred in such prior month by major expense category; (ii) a description of any Cost Overruns detailing variances from the Construction Budget or Financial Model; (iii) the estimated dates of Tower Interim Completion, Substantial Completion and Final Completion; (iv) a calculation demonstrating that there is no Cost to Complete Deficiency; and (v) a description of material disputes with contractors, materialmen, suppliers or others and any related claims against the Borrower.

(7) Each of the statements required by this Section 9.3 shall set forth in comparative form the corresponding figures for the corresponding period of the preceding fiscal period (if any), all in reasonable detail.

SECTION 10 – DEFAULT AND ENFORCEMENT

10.1 Events of Default

The occurrence of one or more of the following events or circumstances constitutes an Event of Default under this Agreement:

- (1) ***Non-payment of Principal, Interest or Fees.*** The Borrower or the Contractor fails to make when due, whether by acceleration or otherwise, any payment of principal, interest or Fees required to be made by the Borrower or the Contractor under this Agreement or any other Loan Document, unless such non-payment is due to a technical or clerical error and in any event such payment is made not later than two (2) Business Days after such payment became due and payable.
- (2) ***Non-payment of Fees or Other Amounts.*** The Borrower or the Contractor fails to make when due, whether by acceleration or otherwise, any payment of fees, costs or any other payment under this Agreement or any other Loan Document (other than payments contemplated in Section 10.1(1)) and such failure is not remedied within five (5) Business Days from the date on which the Borrower receives written notice of such failure from the Administrative Agent.
- (3) ***Breach of Covenants, etc.*** The Borrower fails to perform or observe:
 - (a) any term, condition, covenant or undertaking contained in Sections 6.5(1), 9.1(2), 9.1(3), 9.1(9), 9.1(11), 9.1(18), 9.1(30)(b) or Section 9.2, excluding 9.2(12);
 - (b) its covenants and undertakings contained in Sections 9.2(12), 9.3(2) or 9.3(3) and such failure is not remedied within seven (7) Business Days from the date on which the Borrower received written notice of such failure from the Administrative Agent; or
 - (c) any other term, condition, covenant or undertaking contained in this Agreement which is not otherwise specifically addressed in this Section 10.1 and that failure, if capable of being remedied, is not remedied within thirty (30) days from the date such failure came to the Borrower's Knowledge or the Borrower received written notice of such failure; provided that, in the case of any such default which can be cured by due diligence but which cannot be cured within such thirty (30) day period, if the Borrower is at such time diligently pursuing the remediation of such default, the time to cure shall be extended for such further period as may be necessary to remedy the default with all due diligence as detailed in a remedial plan which the Borrower has delivered to and agreed with the Lenders, which further period shall not exceed thirty (30) days after the expiry of the initial 30 day cure period.
- (4) ***Representations and Warranties.*** Any representation, warranty or statement which is made by the Borrower or the Construction Contractor in any Loan Document or Material Project

Document or which is contained in any certificate, written statement or written notice provided under or in connection with any Loan Document or which is deemed to have been made is untrue or incorrect when made or deemed to have been made and such inaccuracy of representation, warranty or statement, if capable of being remedied (in the reasonable opinion of the Agent), is not remedied (in the reasonable opinion of the Agent) within thirty (30) days of the earlier of (i) notice of the relevant misrepresentation having been given to the Borrower by the Lenders; and (ii) the Borrower or the Contractor becoming aware of such inaccuracy.

(5) ***Cross-Default to Loan Documents and Contractor Support Agreement.*** The occurrence of an event of default under or material breach of any Loan Document that has not been cured, waived or otherwise remedied prior to the time at which the non-defaulting party is entitled to enforce its right to exercise any remedy in respect of such event of default or material breach under such Loan Document and any default by the Contractor of its obligation to pay Liquidated Damages or any other amount when due under the Contractor Support Agreement.

(6) ***Cross-Default to Material Project Documents.*** The occurrence of an event of default under or material breach of any Material Project Document to which the Borrower or the Contractor is a party (other than a Material Project Document which is also a Loan Document) by the Borrower or the Contractor that has not been cured, waived or otherwise remedied prior to the time at which the non-defaulting party is entitled to enforce its right to exercise any remedy in respect of such event of default or material breach under such Material Project Document.

(7) ***Voluntary Proceedings.*** The Borrower or the Contractor:

- (a) institutes proceedings for substantive relief in any bankruptcy, insolvency, debt restructuring, reorganization, readjustment of debt, dissolution, liquidation, winding-up or other similar proceedings (including proceedings under the *Bankruptcy and Insolvency Act* (Canada), the *Winding-up and Restructuring Act* (Canada), the *Companies' Creditors Arrangement Act* (Canada), the incorporating statute of the relevant corporation or other similar legislation), including proceedings for the appointment of a trustee, interim receiver, receiver, receiver and manager, administrative receiver, custodian, liquidator, provisional liquidator, administrator, sequestrator or other like official with respect to the relevant corporation or all or any material part of its property or assets;
- (b) makes an assignment for the benefit of creditors;
- (c) is unable or admits in writing its inability to pay its debts as they become due or otherwise acknowledges its insolvency or commits any other act of bankruptcy or is taken to be insolvent under any applicable legislation;
- (d) voluntarily suspends the conduct of its business or operations;
- (e) or acquiesces to, or takes any action in furtherance of, any of the foregoing.

- (8) ***Involuntary Proceedings.*** If any third party in respect of the Borrower or the Contractor:
- (a) makes any application under the *Companies' Creditors Arrangement Act* (Canada) or similar legislation;
 - (b) files a proposal or notice of intention to file a proposal under the *Bankruptcy and Insolvency Act* (Canada) or similar legislation;
 - (c) institutes a winding-up proceeding under the *Winding-up and Restructuring Act* (Canada), any relevant incorporating statute or any similar legislation;
 - (d) presents a petition in bankruptcy under the *Bankruptcy and Insolvency Act* (Canada) or any similar legislation;
 - (e) files, institutes or commences any other petition, proceeding or case under any other bankruptcy, insolvency, debt restructuring, reorganization, incorporation, readjustment of debt, dissolution, liquidation, winding-up or similar law now or hereafter in effect, seeking bankruptcy, liquidation, reorganization, dissolution, winding-up, composition or readjustment of debt of any of them, the appointment of a trustee, interim receiver, receiver, receiver and manager, administrative receiver, custodian, liquidator, provisional liquidator, administrator, sequestrator or other like official for any of them, or any material part of any of their respective assets or any similar relief; or
 - (f) takes possession of, forecloses, seizes, retains, sells or otherwise disposes of, or otherwise proceeds to enforce security over, all or a substantial part of the assets of the Borrower or the Contractor or gives notice of its intention to do any of the foregoing,

and if the application, filing, proceeding, petition or case is not contested by *bona fide* action on the part of the applicable party and is not dismissed, stayed or withdrawn within thirty (30) days of commencement thereof.

(9) ***Failure to Maintain Existence.*** (a) The Borrower or the Contractor dissolves, liquidates, winds up or otherwise ceases to maintain its existence, (b) the Borrower sells, transfers or disposes of any of its property, assets or undertaking, other than as expressly permitted herein, or (c) the Contractor sells, transfers or disposes of any of its interest in the Borrower, the Project or the Material Project Documents, other than as expressly permitted in the Material Project Documents.

(10) ***Judgment.*** A judgment in excess of \$200,000 is levied or enforced against the Borrower or a judgment in excess of \$5,000,000 is levied or enforced against the Contractor, unless the judgment is being actively and diligently appealed and is satisfied, vacated, discharged or execution thereof stayed pending appeal or a settlement of the judgment has been negotiated on terms acceptable to the Administrative Agent within thirty (30) days of the rendering of the judgment, or if any stay is lifted or a default occurs in any settlement.

(11) ***Remedial Plan.*** The Borrower fails to provide or comply with any Remedial Plan required under this Agreement.

(12) **Execution.** Any writ, distress, execution, attachment, seizure, garnishment, sequestration, extent or any similar process is issued, levied or enforced against the Borrower, the Contractor or any of their properties or assets and such action is not stayed, withdrawn or satisfied five (5) Business Days of the date such process is issued, levied or enforced (such five (5) Business Days to be available only if such process is being diligently contested in good faith and such process does not disrupt performance of the Works or the completion of the Project).

(13) **Environmental Claims.** (a) The Borrower has become liable for Environmental Claims in excess of \$100,000 or (b) the Contractor has become liable for Environmental Claims and such liability could reasonably be expected to have a Material Adverse Effect, unless, in either case, such Environmental Claims are being actively and diligently contested and appealed or a settlement of such Environmental Claims has been negotiated on terms acceptable to the Administrative Agent.

(14) **Invalidity and Contest – Loan Documents.** This Agreement or any of the other Loan Documents, or any material provision hereof or thereof, shall at any time after execution and delivery hereof or thereof, for any reason, (a) cease to be a legal, valid and binding obligation of the Borrower or the Contractor, as the case may be, or cease to be enforceable against the Borrower or the Contractor, as the case may be, in accordance with its terms, (b) be declared to be null and void by a court, or the legality, validity, binding nature or enforceability of this Agreement or any other Loan Document, or any provision hereof or thereof, shall be contested by the Borrower, SMH or the Contractor, or the Borrower, SMH or the Contractor shall deny that it has any further liabilities or obligations hereunder or thereunder.

(15) **Termination, Invalidity or Contest – Material Project Documents.** Any of the Material Project Documents, or any material provision thereof, shall at any time after execution and delivery hereof or thereof, for any reason, (a) terminate, (b) cease to be a legal, valid and binding obligation of the parties thereto, (c) be declared to be null and void by a court, or the legality, validity, binding nature or enforceability of such Material Project Documents, or any provision thereof, shall be contested by the Borrower, SMH or the Contractor, or the Borrower, SMH or the Contractor shall deny that it has any further liabilities or obligations thereunder.

(16) **Failure to Discharge Liens.** Either the Borrower or the Contractor fails within fifteen (15) days of becoming aware of the same, to discharge any Lien on its interest in the Works or any Material Project Document which is not a Permitted Lien unless there is a Permitted Contest and adequate security has been posted.

(17) **Voluntary Liens.** Either the Borrower or the Contractor voluntarily grants, creates or incurs any Lien on its interest in the Works, any Material Project Document or any other Collateral other than Permitted Liens.

(18) **Change in Control - Borrower.** The Contractor ceases to own, beneficially and legally, all of the issued and outstanding shares of the Borrower.

(19) **Change in Control - Contractor.** If there is a Change in Control of the Contractor, without the prior written consent of the Lenders.

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(20) **Material Adverse Effect.** At any time there occurs any event or circumstance which could reasonably be expected to have a Material Adverse Effect, as determined by the Required Lenders, acting reasonably.

(21) **Destruction or Total Loss.** All or substantially all of the Project, the Works or both are destroyed or are damaged resulting in a total loss of the Works, unless such destruction or damage is covered under an insurance policy in respect of which insurance proceeds are applied in accordance with the Insurance Trust Agreement and the Project Agreement, including, where appropriate, the reinstatement, restoration or replacement of the Facility or any other assets, materials or goods necessary or desirable for the carrying out of the Works or other project operations.

(22) **Suspension or Abandonment of the Works.** The Works, or any material part thereof, are suspended, abandoned, cancelled or terminated other than in accordance with the terms of the Material Project Documents.

(23) **Insurance.** The Borrower shall fail to maintain, or cause to be maintained, the Insurance required under Sections 9.1(20) and 9.1(22) of this Agreement.

(24) **Contractor Bonds.** The Borrower shall fail to maintain, or cause to be maintained, the Contractor Bonds or fail to cause the issuance of a replacement Contractor Bond not less than 30 days prior to the expiry of any expiring Contractor Bond.

(25) **Failure to Meet Scheduled Tower Interim Completion Date or Substantial Completion Date.** Tower Interim Completion or Substantial Completion is not achieved by the then-scheduled Tower Interim Completion Date or Substantial Completion Date, as the case may be, unless Liquidated Damages are being paid by the Contractor to the Borrower pursuant to the Contractor Support Agreement and the Lenders' Consultant has delivered confirmation, in form and substance satisfactory to the Administrative Agent and the Lenders, that Substantial Completion shall be completed prior to the Lender Longstop Date, provided that there shall be no Event of Default under this Section 10.1(25) if an event that delays the completion of the Works has occurred and SMH has granted an extension to the then-scheduled Tower Interim Completion Date or Substantial Completion Date or the Longstop Date for a period of time not less than the duration the relevant delay and SMH or the Contractor has agreed to pay compensation for any increased Cost of the Financing (as defined in the Project Agreement) on a basis whereby such increased Cost of the Financing is payable on a monthly basis to pay current interest under the Credit Facility.

(26) **Failure to achieve Substantial Completion by the Lender Longstop Date.** Substantial Completion is not achieved by the Lender Longstop Date.

(27) **Consents.** Any Consent required to enable the Borrower to conduct its business or to perform its obligations under any Loan Document is not obtained or is withdrawn or ceases to be in full force and effect and that required Consent cannot be acquired or reinstated within thirty (30) days of the date on which the Borrower knew or ought to have known the Consent was required or withdrawn.

(28) **Failure to Obtain or Maintain Consents.** The Borrower or the Contractor shall fail to obtain, renew, maintain or comply with any Consent required by it to be obtained, renewed,

maintained or complied with in connection with the Works or the entering into of the Material Project Documents.

(29) **Insufficient Funding.** If at any time the Administrative Agent receives a Lenders' Consultant's Certificate which discloses a Cost to Complete Deficiency, and the Borrower or the Contractor has not, within ten (10) Business Days of the Borrower or the Contractor becoming aware of the same (or such longer period of time determined by the Administrative Agent, acting reasonably) (a) deposited cash to the Agent's Funding Account for credit to the Agent's Funding Account Balance, or pledged marketable securities to the Administrative Agent, in the aggregate equal to such Cost to Complete Deficiency, (b) provided a plan to remediate such Cost to Complete Deficiency which is satisfactory to the Administrative Agent, acting reasonably, in consultation with the Lenders' Consultant (which plan may, without limitation, include the contribution of additional equity by the Contractor or the lending of monies by the Contractor to the Borrower by way of Permitted Debt contemplated by item (c) of the definition thereof), or (c) provided Acceptable Credit Support in an amount equal or in excess of such Cost to Complete Deficiency.

(30) **Expropriation.** If all or a material part of the property of the Borrower is compulsorily acquired by any Government Authority or the Borrower sells or divests itself of all or a material part of its property because it is required to do so by a binding order from a Government Authority, and such compulsory acquisition, sale or divestiture has a Material Adverse Effect.

(31) **Security.** Any of the Security Documents, once executed and delivered, shall in any material respect fail to provide the Administrative Agent and the Lenders the Liens, security interest, rights, titles, interest, remedies, powers or privileges intended to be created thereby or shall cease to be in full force and effect.

(32) **SMH Notice of Default.** The service by SMH of a Default Notice (as defined in the Lenders' Direct Agreement) as provided for in section 7(b)(i) of the Lenders' Direct Agreement.

10.2 Rights upon Default

Upon the occurrence of a Default, the Administrative Agent may, and shall upon the instructions of the Required Lenders, on notice to the Borrower, declare that the ability of the Borrower to make any further borrowing under the Credit Facility shall be suspended pending the remedying of the Default.

10.3 Rights upon Event of Default

(1) Upon the occurrence of an Event of Default pursuant to Sections 10.1(7) or 10.1(8), the Administrative Agent shall without notice to the Borrower, and upon the occurrence of any other Event of Default and for so long as the other Event of Default shall continue, upon notice to the Borrower, the Administrative Agent may, and shall upon the instructions of the Required Lenders, do any or all of the following:

- (a) declare that the Total Commitment has expired and that the Lenders' obligations to make Loans have terminated;

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- (b) declare the entire principal amount of all Loans outstanding, all unpaid accrued interest and all fees and other amounts required to be paid by the Borrower hereunder (including Break Costs and any Swap Breakage Costs) to be immediately due and payable without the necessity of presentment for payment, notice of non-payment and of protest (all of which are hereby expressly waived) and proceed to exercise any and all rights and remedies hereunder and under any other Loan Document or otherwise permitted by law;
- (c) transfer any balances in the Borrower Proceeds Account to the Agent's Funding Account;
- (d) apply any Agent's Funding Account Balance in satisfaction of any amount outstanding hereunder or under any of the other Loan Documents;
- (e) exercise any rights the Borrower may have under or in connection with the Contractor Bonds and any documents delivered in connection with the Contractor Bonds in each case in accordance with their terms, to the extent that the Borrower would be entitled to exercise such rights under the Contractor Bonds;
- (f) exercise any or all of the rights and powers and pursue any and all of the remedies available to the Administrative Agent or the Lenders hereunder and (subject to the terms thereof) under the other Loan Documents and the Material Project Documents, including, without limitation, the Direct Agreements, and shall have any and all rights and remedies available under Applicable Law.

From and after the issuance of any declaration referred to in this Section 10.3, no Lender shall be required to honour any cheque or other instrument presented to it by the Borrower regardless of the date of issue or presentation. Immediately upon receipt of a declaration under Section 10.3(1)(b), the Borrower shall pay to the Administrative Agent on behalf of the Lenders all amounts outstanding hereunder or under any of the other Loan Documents, including any Break Costs and Swap Breakage Costs.

10.4 Waiver of Default

No express or implied waiver by the Administrative Agent and the Lenders or any of them of any Default or Event of Default shall in any way be or be construed to be a waiver of any future or subsequent Default or Event of Default. To the extent permitted by Applicable Law, the Borrower hereby waives any rights now or thereafter conferred by statute or otherwise which may limit or modify any of the Administrative Agent's or the Lenders' rights or remedies under any Loan Document. The Borrower acknowledges and agrees that the exercise by the Administrative Agent or any Lender of any rights or remedies under any Loan Document without having declared an acceleration shall not in any way alter, affect or prejudice the right of the Administrative Agent and the Lenders to make a declaration pursuant to Section 10.3 at any time and, without limiting the foregoing, shall not be construed as or deemed to constitute a waiver of any rights under Section 10.3.

10.5 Potential Delay or Force Majeure Termination Event

If the Borrower shall be entitled to terminate the Project Agreement pursuant to Section 28.2(b) of the Project Agreement, the Administrative Agent shall have the right to require the Borrower to exercise or fail to exercise its rights or waiver of rights, as the case may be, pursuant to Section 28.2(b) of the Project Agreement (including the right to terminate the Project Agreement).

SECTION 11 – REMEDIES

11.1 Remedies Cumulative

For greater certainty, the rights and remedies of the Administrative Agent and the Lenders under this Agreement, the other Loan Documents and the Material Project Documents are cumulative and are in addition to and not in substitution for any rights or remedies provided by law or by equity.

11.2 Exercise of Remedies

Any single or partial exercise by the Administrative Agent or any Lender of any right or remedy upon the occurrence of a Default or Event of Default shall not be deemed to be a waiver of, or to alter, affect or prejudice any other right or remedy to which the Administrative Agent or the Lender may be lawfully entitled as a result of the Default or Event of Default, and any waiver by the Administrative Agent or any Lender of the strict observance of, performance of or compliance with any term, covenant, condition or agreement herein contained, and any indulgence granted thereby, either expressly or by conduct, shall be effective only in the specific instance and for the purpose for which it is given and shall be deemed not to be a waiver of any subsequent Default or Event of Default. No failure to exercise, and no delay in exercising, on the part of the Administrative Agent or any Lender, any right, remedy, power or privilege hereunder shall operate as a waiver thereof.

11.3 Remedies Not Limited

The Administrative Agent on behalf of itself and the Lenders may, to the extent permitted by Applicable Law, bring suit at law, in equity or otherwise, for any available relief or purpose including: (a) the specific performance of any covenant or agreement contained in this Agreement or in any other Loan Document; (b) an injunction against a violation of any of the terms of this Agreement or any other Loan Document; (c) in aid of the exercise of any power granted by this Agreement or any other Loan Document or by law; or (d) the recovery of any judgment for any and all amounts due in respect of the Obligations.

11.4 Sharing of Proceeds Among the Lenders

The Lenders agree among themselves that, except as otherwise contemplated by the provisions of this Agreement, all sums received by the Lenders for application against amounts owing by the Borrower under this Agreement (whether received by voluntary payment, by the exercise of any right of set-off, or by counterclaim, cross-action or as proceeds of realization of any security), after payment to the Administrative Agent of its fees and disbursements, shall be shared by each Lender as nearly as possible in accordance with each Lender's Applicable Percentage.

11.5 Set-Off, etc.

Upon the occurrence of an Event of Default, the Administrative Agent, each Lender and each of their respective branches and offices are hereby authorized by the Borrower from time to time, without notice to: (a) set off and apply any and all amounts owing by the Administrative Agent or any Lender or any of its branches or offices to the Borrower (whether payable in Canadian Dollars or any other currency – and any amounts so owing in any other currency may be converted into one or more currencies in which the Obligations are denominated at such rate or rates as the party may be able to obtain, acting reasonably – whether matured or unmatured, and in the case of deposits, whether general or special, time or demand and however evidenced) against and on account of the Obligations (whether or not any declaration under Section 10.3 has been made and whether or not those Obligations are unmatured or contingent); (b) hold any amounts owing by the Administrative Agent or any Lender as collateral to secure payment of the Obligations owing to it to the extent that those amounts may be required to satisfy any contingent or unmatured Obligations owing to it; and (c) return as unpaid for insufficient funds any and all cheques and other items drawn against any deposits so held as the Administrative Agent or any Lender in its sole discretion may elect.

11.6 Administrative Agent or Lender May Perform Covenants

If the Borrower fails to perform any of its obligations under any covenant contained in this Agreement or any other Loan Document, the Administrative Agent or any Lender may (but has no obligation to), upon notice to the Borrower after the expiry of any cure period applicable to the remediation of such failure to perform by the Borrower, perform any covenant capable of being performed by it and, if the covenant requires the payment or expenditure of money, it may make a Loan to fund that requirement, which Loan shall be repaid by the Borrower on demand. That Loan shall bear interest at a rate calculated and paid in accordance with Section 4.

11.7 Decision to Enforce Security Documents

Upon the Security Documents becoming enforceable in accordance with their terms, the Administrative Agent shall promptly so notify each of the Lenders. Any Lender may thereafter provide the Administrative Agent with a written request to enforce the Security Documents. Forthwith after the receipt of such a request, the Administrative Agent shall seek the instruction of the Required Lenders as to whether the Security Documents should be enforced and the manner in which the Security Documents should be enforced. In seeking such instructions, the Administrative Agent shall submit a specific proposal to the Lenders. The Administrative Agent shall promptly notify the Lenders of all instructions and approvals of the Required Lenders.

SECTION 12 – THE ADMINISTRATIVE AGENT AND THE LENDERS

12.1 CBA Schedule

See Section 7 of the CBA Schedule.

12.2 Action by Administrative Agent

Without limiting the generality of Section 7.9 of the CBA Schedule, the Administrative Agent shall have the right, subject to the provisions of this Agreement, and without restricting the generality of this Agreement, to take such actions as the Administrative Agent deems necessary or refrain from taking those actions, or to give agreements, consents, approvals, or instructions to the Borrower on behalf of the Lenders in respect of all matters referred to in or contemplated by this Agreement. Each Lender agrees that any action taken by the Administrative Agent or the Required Lenders (or, where required by the express terms of this Agreement, a greater proportion of the Lenders) in accordance with the provisions of this Agreement or of the other Loan Documents, and the exercise by the Administrative Agent or the Required Lenders (or, where so required, such greater proportion) of the powers set forth herein or therein, together with such other powers as are reasonably incidental thereto, shall be authorized and binding upon all of the Lenders. Without limiting the generality of the foregoing, the Administrative Agent shall have the sole and exclusive right and authority to (a) act as the disbursing and collecting agent for the Lenders with respect to all payments and collections arising in connection herewith and with the Security Documents; (b) execute and deliver each Loan Document and accept delivery of each such agreement delivered by the Borrower; (c) act as collateral agent for the Lenders for purposes of the perfection of all security interests and Liens created by such agreements and all other purposes stated therein; (d) manage, supervise and otherwise deal with the Collateral; (e) take such action as is necessary or desirable to maintain the perfection and priority of the security interests and Liens created or purported to be created by the Security Documents; and (f) except as may be otherwise specifically restricted by the terms hereof or of any other Loan Document, exercise all remedies given to the Administrative Agent and the Lenders with respect to the Collateral under the Loan Documents relating thereto, Applicable Law or otherwise.

12.3 Arrangements for Repayment

All payments made by or on behalf of the Borrower and received by the Administrative Agent, whether before or after the exercise of any rights arising under Section 10.3, shall be paid to each Lender in accordance with its entitlement under this Agreement. Payment by the Administrative Agent shall be made promptly following receipt and, in any event, the Administrative Agent shall use its reasonable efforts to pay to each Lender at the applicable Lender's Branch of Account the applicable amount on the same Business Day as the amount is received by the Administrative Agent.

12.4 Lenders Bound by Decision to Exercise Remedies

Each Lender agrees to be bound by a decision of the Required Lenders to exercise the rights and remedies provided in this Agreement. Each Lender shall, subject to Applicable Law, do all acts and things as may be necessary or reasonable to enable the Administrative Agent to act pursuant to any such decision.

12.5 Deemed Repayment and Funding

- (1) *Assumption re Payments.* See Section 6(b) of the CBA Schedule.
- (2) *Assumption re Advances.* See Section 6(a) of the CBA Schedule.

12.6 Responsibility of Administrative Agent

The Administrative Agent assumes no responsibility for the financial condition of the Borrower or the repayment of any of the Loans or other amounts outstanding under this Agreement or any of the other Loan Documents. The Administrative Agent shall not have any duty to the Lenders to investigate whether a Default or an Event of Default has occurred. The Administrative Agent shall, as regards the Lenders, be entitled to assume that no Default or Event of Default has occurred and is continuing unless the Administrative Agent has actual knowledge or has been notified by the Borrower of such fact or has been notified by a Lender that such Lender considers that a Default or Event of Default has occurred and is continuing, such notification to specify in detail the nature thereof.

12.7 Administrative Agent Co-operation with Lenders' Consultant

The Administrative Agent shall co-operate with the Lenders' Consultant and the Borrower in connection with the certifications set forth in the Funding Request and the Lenders' Consultant's Certificate and shall furnish to the Borrower and the Lenders' Consultant the information regarding the Accounts, Borrowing Costs, Break Costs, Swap Breakage Costs and Increased Financing Costs which is necessary to complete the calculations relating to such certifications.

12.8 Acknowledgement of Lenders

- (1) *Independent Appraisal of Borrower.* See Section 7.8 of the CBA Schedule.
- (2) *No Fiduciary Obligations.* See Section 7.3(1)(a) of the CBA Schedule.

12.9 Successor Administrative Agent

See Section 7.7 of the CBA Schedule.

12.10 Replacement of Administrative Agent

See Section 7.7 of the CBA Schedule.

12.11 Notices between the Lenders and the Administrative Agent

All notices by a Lender to the Administrative Agent shall be to the Administrative Agent at the address or telecopier number set out on the execution pages hereof and all notices by the Administrative Agent to any Lender shall be through such Lender's Branch of Account. All communication between the Borrower and any Lender in connection with this Agreement and the other Loan Documents shall be directed through the Administrative Agent.

12.12 Reliance by Administrative Agent

See Section 7.4 of the CBA Schedule.

12.13 Reimbursement of Administrative Agent's Expenses and Indemnity

In addition to the provisions of Sections 7.5 and 9(c) of the CBA Schedule, the expenses incurred by the Administrative Agent may, for greater certainty, include reasonable due diligence expenses, consultant's fees and expenses, and travel expenses.

12.14 Borrower's Right to Rely on Administrative Agent

Unless otherwise required hereunder, during the term of this Agreement, the Borrower shall be entitled to deal exclusively with the Administrative Agent and to rely on discussions with and instructions from the Administrative Agent in order to fulfill its obligations hereunder.

12.15 Administrative Agent's Duty to Deliver Documents

The Administrative Agent shall promptly deliver to each of the Lenders, at their respective Branches of Account, all documents, papers, materials and other information as are furnished by the Borrower to the Administrative Agent on behalf of the Lenders under this Agreement as follows:

- (a) **Notices Generally.** Except in the case of notices and other communications expressly permitted to be given by telephone (and except as provided in Section 12.15(c)), all notices and other communications provided for herein shall be in writing and shall be delivered by hand or overnight courier service, mailed by certified or registered mail or sent by telecopier to the addresses or telecopier numbers of the respective Branch of Account of each Lender;
- (b) **Delivery.** Notices sent by hand or overnight courier service, or mailed by certified or registered mail, shall be deemed to have been given when received; notices sent by telecopier shall be deemed to have been given when sent (except that, if not given during normal business hours for the recipient, shall be deemed to have been given at the opening of business on the next business day for the recipient). Notices delivered through electronic communications to the extent provided in Section 12.15(c), shall be effective as provided in Section 12.15(c); and
- (c) **Electronic Communications.** Notices and other communications to the Lenders may be delivered or furnished by electronic communication (including e-mail and internet or intranet websites) pursuant to procedures approved by the Administrative Agent, provided that the foregoing shall not apply to notices to any Lender if such Lender has notified the Administrative Agent that it is incapable of receiving or is unwilling to accept notices by electronic communication.

The Administrative Agent shall have no other obligation to provide any Lender with any credit or other information whatsoever with respect to the Borrower and shall be under no obligation to inquire as to the performance by the Borrower of its obligations under this Agreement or any other Loan Document.

12.16 No Partnership

The obligations of each Lender under this Agreement are several. The failure of any Lender to carry out its obligations hereunder shall not relieve the other Lenders of any of their respective obligations hereunder. No Lender shall be responsible for the obligations of any other Lender hereunder. Nothing contained in this Agreement and no action taken pursuant to it shall be deemed to constitute the Lenders a partnership, association, joint venture or other similar entity.

12.17 Adjustments Among Lenders

- (1) *Adjustment After Exercise of Rights.* See Section 5 of the CBA Schedule.
- (2) *General Application.* See Section 5 of the CBA Schedule.
- (3) *Borrower Agreement.* See Section 5 of the CBA Schedule.

12.18 Administrative Agent May Deal With Collateral

Each of the Lenders hereby directs, in accordance with the terms hereof, the Administrative Agent to release any Lien held by the Administrative Agent for the benefit of the Lenders against:

- (a) all of the Collateral, upon termination of the Commitments and payment and satisfaction in full of all Loans and Obligations that the Administrative Agent has been notified in writing are then due and payable; and
- (b) any part of the Collateral sold or disposed of by the Borrower if such sale or disposition is permitted by this Agreement (or permitted pursuant to a waiver or consent of a transaction otherwise prohibited by this Agreement if such waiver or consent is consented to by the Required Lenders in accordance with the terms of this Agreement).

Each of the Lenders hereby directs the Administrative Agent to execute and deliver or file such termination and partial release statements and do such other things as are necessary to release Liens to be released pursuant to this Section 12.18 promptly upon the effectiveness of any such release.

12.19 Administrative Agent May Debit Accounts

The Borrower authorizes and directs the Administrative Agent, in the Administrative Agent's discretion, to debit automatically, by mechanical, electronic or manual means, any bank account of the Borrower maintained with Bank of Montreal (for so long as Bank of Montreal is the Administrative Agent) for all amounts payable by the Borrower under this Agreement or any other Loan Document, including the repayment of principal and the payment of interest, fees and all charges for the keeping of that bank account. The Administrative Agent shall notify the Borrower as to the particulars of those debits in the normal course.

12.20 Anti-Money Laundering

The Borrower hereby represents to the Administrative Agent that the Credit Facility is for its own use and is not intended to be used by or for the benefit of any third party.

The Administrative Agent shall retain the right not to act and shall not be liable for refusing to act if, due to a lack of information or for any other reason whatsoever, the Administrative Agent, in its sole judgment, determines that such act might cause it to be in non-compliance with any applicable anti-money laundering or anti-terrorist legislation, regulation or guideline. Further, should the Administrative Agent, in its sole judgment, determine at any time that its acting under this Agreement has resulted in its being in non-compliance with any applicable anti-money laundering or anti-terrorist legislation, regulation or guideline, then it shall have the right to resign on 30 days' written notice to the Borrower; provided that: (i) the Administrative Agent's written notice shall describe the circumstances of such non-compliance; and (ii) if such circumstances are rectified to the Administrative Agent's satisfaction within such 30 day period, then such resignation shall not be effective.

12.21 Compliance with FATCA

(1) **Application of FATCA.** The Borrower shall ensure that, unless otherwise agreed by all Lenders, the Borrower does not become a US Tax Obligor.

(2) **Lender Compliance with FATCA.** If a payment made to a Lender under any Loan Document would be subject to United States federal withholding Tax imposed by FATCA if such Lender were to fail to comply with the applicable reporting requirements of FATCA (including those contained in Section 1471(b) or 1472(b) of the Internal Revenue Code, as applicable), such Lender shall deliver to the Borrower and the Administrative Agent at the time or times prescribed by law and at such time or times reasonably requested by the Borrower or the Administrative Agent such documentation prescribed by applicable law (including as prescribed by Section 1471(b)(3)(C)(i) of the Internal Revenue Code) and such additional documentation reasonably requested by the Borrower or the Administrative Agent as may be necessary for the Borrower and the Administrative Agent to comply with their obligations under FATCA and to determine that such Lender has complied with such Lender's obligations under FATCA or to determine the amount to deduct and withhold from such payment. Solely for purposes of this Section 12.21, "FATCA" shall include any amendments made to FATCA after the date of this Agreement.

SECTION 13 – ASSIGNS AND PARTICIPANTS

13.1 Assignment and Participation

(1) **Benefit and Burden of this Agreement.** This Agreement shall enure to the benefit of and be binding on the parties hereto, their respective successors and any permitted assignees or transferees of some or all of the parties' rights or obligations hereunder.

(2) **Borrower.** The Borrower shall not assign, delegate or transfer all or any part of its rights or obligations hereunder without the prior written consent of the Lenders.

(3) ***Assignment and Participation.***

- (a) Subject to the terms of the Lenders' Direct Agreement, a Lender may, at any time, assign, transfer or otherwise dispose of all or a proportionate part of any of its interest in the Credit Facility and the Loan Documents, provided that, prior to the occurrence of an Event of Default, each of the Lenders agrees that it will not assign, transfer or otherwise dispose of its interest under any Loan Document where such assignment, transfer or disposal would, at the time of such transfer or assignment, result in any increased cost to the Borrower or impose any tax on the Borrower or any payments to be made by the Borrower under the Loan Documents. For greater certainty, after the occurrence and during the continuance of an Event of Default, a Lender may assign, transfer or otherwise dispose of all or a proportionate part of any of its interest in the Credit Facility and the Loan Documents without restriction.
- (b) Each Lender acknowledges and agrees that, to the extent that it assigns its interest in the Credit Facility and the Loan Documents to a person that is not resident in Canada, such assignment shall be made on the basis that such assignee shall not, at any time other than during the continuance of an Event of Default, be entitled to a withholding tax gross up or any other indemnification from the Borrower in respect of any withholding taxes or other increased costs that may be applicable to payments by the Borrower to such assignee.

(4) ***Deliveries.*** The Borrower and the Administrative Agent may continue to deal solely and directly with the assignor Lender in connection with any interest so assigned until:

- (a) notice of such assignment, together with payment instructions, addresses and related information with respect to the assignee, shall have been given to the Borrower and the Administrative Agent by such Lender and its assignee; and
- (b) such assignee shall have delivered to the Borrower and the Administrative Agent an assignment agreement in form acceptable to the Administrative Agent, together with a processing and recordation fee of \$3,500 payable to the Administrative Agent.

When the Administrative Agent has received the items listed in the preceding paragraph, the assignee shall be a party hereto and, to the extent that rights and obligations hereunder have been so assigned to it, shall have the rights and obligations of a Lender hereunder, and the assignor shall, to the extent that rights and obligations hereunder have been assigned by it, relinquish its rights and be released from its obligations hereunder. The commitment to make available the Credit Facility hereunder allocated to an assignee shall reduce such commitment of the assignor.

(5) ***Participations By Lender.*** Any Lender may at any time sell to one or more financial institutions or other persons (each of such financial institutions or other persons being herein called a "Participant") participating interests in all or a portion of its rights and obligations under this Agreement and the other Loan Documents (including all or a portion of the amounts owing to it); provided, however, that:

- (a) no participation contemplated in this Section 13.1(5) shall relieve such Lender from its obligations hereunder or under any other Loan Document;

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- (b) such Lender shall remain solely responsible for the performance of its obligations under the Loan Documents;
 - (c) the Borrower and the Administrative Agent shall continue to deal solely and directly with such Lender in connection with such Lender's rights and obligations under this Agreement and each of the other Loan Documents;
 - (d) no Participant, unless such Participant is an Affiliate of a Lender, or is itself a Lender, shall be entitled to have any right to vote or grant or withhold consents hereunder or under any other Loan Document; and
 - (e) no such transfer of a participating interest shall, directly or indirectly, result in any increased cost or liability to the Borrower unless the Borrower shall agree in writing.
- (6) ***Borrower Cooperation.*** See Section 10(b) of the CBA Schedule.
- (7) ***Disclosure.*** Each Lender may disclose to any prospective assignee or prospective Participant such information concerning the Borrower or any Major Project Party as it considers appropriate, acting reasonably, provided that the prospective assignee or prospective Participant shall sign a confidentiality and non-disclosure agreement in form acceptable to the Borrower and the Administrative Agent.

SECTION 14 – MISCELLANEOUS

14.1 Amendments, Waivers, etc.

- (1) ***Binding Effect.*** Except as otherwise provided in this Section 14.1, no amendment, waiver, discharge or termination of any provision of this Agreement or any other Loan Document and no waiver of any breach of any provision of this Agreement or any other Loan Document and no consent to any departure by a party from any provision of this Agreement shall be binding:
- (a) upon the Borrower unless it is evidenced by an instrument in writing signed by the Borrower; nor
 - (b) upon the Administrative Agent and the Lenders unless it is approved in writing by the Administrative Agent and all the Lenders or the Required Lenders, as applicable.

Notwithstanding the foregoing, any waiver or consent may be validly effected by execution by the Administrative Agent and all the Lenders or the Required Lenders, as applicable, of an instrument in writing without requiring the execution of that instrument by the Borrower. The Administrative Agent shall forward a copy of the written instrument to the Borrower as soon as practicable following the execution thereof. The waiver or consent will be effective only in the specific instance, for the specific purpose and for the specific length of time for which it is given.

- (2) ***Errors.*** The Administrative Agent may correct any typographical error or other error of a clerical nature in this Agreement and the other Loan Documents and substitute the corrected text in the counterparts of this Agreement and the other Loan Documents if the corrections do not modify in any manner the meaning or the interpretation of this Agreement or any other Loan Document and if

the Administrative Agent gives the Borrower not less than five (5) Business Days prior notice of any correction and the Borrower does not object in writing to such correction within a period of five (5) Business Days after receipt of such notice.

(3) **Approval of All Lenders.** Where any amendment, waiver, discharge or termination relates to the following matters, the amendment, waiver, discharge or termination requires the approval of all Lenders:

- (a) a change in the rate or amount of any principal, interest or fees or any other amount payable by the Borrower or any alteration in the currency or mode of calculation or computation thereof;
- (b) any waiver of the conditions set out in Section 8.1 of this Agreement;
- (c) any extension or reduction of the time for any payments required to be made by the Borrower;
- (d) any change in the Maturity Date;
- (e) the types of Loans available;
- (f) an increase in the Total Commitment or in any Lender's Commitment;
- (g) an extension or reduction of the notice period required in connection with any Loan;
- (h) the definition of Required Lenders;
- (i) the nature and scope of the Security Documents;
- (j) an assignment or transfer by the Borrower of any of its rights and obligations under this Agreement; or
- (k) any provision of this Section 14.1, or of Sections 3.2, 11.4 and 11.5 of this Agreement, or of Sections 3.4 and 4 of the CBA Schedule.

Any other amendment, waiver, discharge or termination requires the approval of only the Required Lenders, which approval, if obtained, shall be binding upon all the Lenders.

(4) **Approvals re Interest Rate Swap Documents.** Any change (a) to any of the financial terms or conditions of an Interest Rate Swap Document, including (without limitation) any amendment to the provisions relating to the calculation and/or payment of swap margin, the hedge profile or interest or other amounts payable under such Interest Rate Swap Document and (b) to the Security Documents or the other Loan Documents that would cause the Hedge Providers to no longer be *pari passu* to the Lenders (in their capacity as lenders of the Credit Facility) in receipt of payments or security interests shall require the approval of the applicable Hedge Providers to which such Interest Rate Swap Document relates, and such Hedge Providers shall provide notice of any such change to the Administrative Agent and the Administrative Agent shall provide such notice to every other Lender that is not a Hedge Provider.

(5) **Request for Approval.** If the approval of a Lender is required under this Section 14.1, the Administrative Agent shall advise the Lender in writing of the issue to be decided and, if the Administrative Agent determines in its sole discretion that it is appropriate to do so, request the Lender's approval of a course of action proposed by the Administrative Agent. In requesting a Lender's approval, the Administrative Agent may establish, in its discretion acting reasonably, a deadline by which the Lender shall respond to the Administrative Agent's request. If the Lender fails to respond by that deadline, that Lender's failure to respond shall be conclusive evidence of the disapproval by the Lender of the course of action proposed by the Administrative Agent. The Administrative Agent may, in its sole discretion and acting reasonably, extend the deadline set by the Administrative Agent by which the Lender shall respond to the Administrative Agent's request.

(6) **Amendment re Rights of Administrative Agent.** Any amendment or waiver of any provision of any Loan Document which relates to the rights or obligations of the Administrative Agent shall require the written agreement of the Administrative Agent thereto.

14.2 No Deemed Subordination

Notwithstanding anything to the contrary contained herein (including any provision for, reference to, or acknowledgement of, any Lien or Permitted Lien), nothing herein and no approval by the Administrative Agent or Lenders of any Lien or Permitted Lien (whether such approval is oral or in writing) shall be construed as or deemed to constitute a subordination by the Administrative Agent or the Lenders of any security interest or other right, interest or Lien in or to the Collateral or any part thereof in favour of any Lien or Permitted Lien or any holder of any Lien or Permitted Lien.

14.3 Further Assurances

The Borrower shall from time to time promptly, upon the request of the Administrative Agent, take such action, and execute and deliver such further documents as may be reasonably necessary or appropriate to give effect to the provisions and intent of this Agreement.

14.4 Judgment Currency

If for the purpose of obtaining judgment in any court it is necessary to convert any amount owing or payable to the Administrative Agent or the Lenders under this Agreement from the currency in which it is due (the "**Agreed Currency**") into a particular currency (the "**Judgment Currency**"), the rate of exchange applied in that conversion shall be that at which the Administrative Agent, in accordance with its normal procedures, could purchase the Agreed Currency with the Judgment Currency at or about noon on the Business Day immediately preceding the date on which judgment is given. The obligation of the Borrower in respect of any amount owing or payable under this Agreement to the Administrative Agent or Lenders in the Agreed Currency shall, notwithstanding any judgment and payment in the Judgment Currency, be satisfied only to the extent that the Administrative Agent, in accordance with its normal procedures, could purchase the Agreed Currency with the amount of the Judgment Currency so paid at or about noon on the next Business Day following that payment; and if the amount of the Agreed Currency which the Administrative Agent could so purchase is less than the amount originally due in the Agreed Currency, the Borrower shall, as a separate obligation and notwithstanding the judgment or payment, indemnify the Administrative Agent and the Lenders against any loss.

14.5 Notice

(1) **Notices Generally.** Subject to Section 12.15 and except in the case of notices and other communications expressly permitted to be given by telephone (and except as provided in Section 14.5(2), all notices and other communications provided herein shall be in writing and shall be delivered by hand or overnight courier service, mailed by certified or registered mail or sent by telecopier to the addresses or telecopier numbers set out on the execution pages hereof.

Notices sent by hand or overnight courier service, or mailed by certified or registered mail, shall be deemed to have been given when received; notices sent by telecopier shall be deemed to have been given when sent (except that, if not given on a Business Day between 9:00 a.m. and 5:00 p.m., shall be deemed to have been given at 9:00 a.m. on the next Business Day for the recipient). Notices delivered through electronic communications to the extent provided in Section 14.5(2) shall be effective as provided in Section 14.5(2).

(2) **Electronic Communications.** The Administrative Agent or the Borrower may, in its discretion, agree to accept notices and other communications to it hereunder by electronic communications pursuant to procedures approved by it, provided that approval of such procedures may be limited to particular notices or communications.

Unless the Administrative Agent otherwise prescribes, (a) notices and other communications sent to an e-mail address shall be deemed received upon the sender's receipt of an acknowledgement from the intended recipient (such as by the "**return receipt requested**" function, as available, return e-mail or other written acknowledgement), provided that if such notice or other communication is not sent during the normal business hours of the recipient, such notice or communication shall be deemed to have been sent at the opening of business on the next Business Day for the recipient, and (b) notices or communications posted to an internet or intranet website shall be deemed received upon the deemed receipt by the intended recipient at its e-mail address as described in the foregoing clause (a) of notification that such notice or communication is available and identifying the website address therefore.

(3) **Change of Address.** Any party hereto may change its address or telecopier number for notices and other communications hereunder by notice to the other parties hereto.

14.6 Reimbursement of Expenses

See Section 9(a) of the CBA Schedule.

14.7 Submission to Jurisdiction

See Section 11(b) of the CBA Schedule

14.8 Counterparts

See Section 13(a) and 13(b) of the CBA Schedule.

14.9 Confidentiality

See Section 14 of the CBA Schedule.

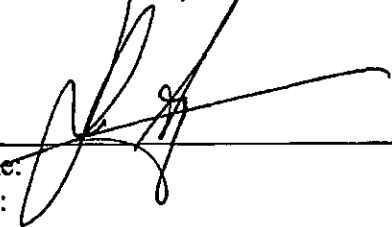
[SIGNATURE PAGES AND SCHEDULES FOLLOW]

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

407 Basaltic Road
Concord, Ontario
L4K 4W8

Attention: John Aquino, President
Facsimile No.: (416) 667 – 8462

2442931 ONTARIO INC., as Borrower

By: 
Name: _____
Title: _____

By: _____
Name: _____
Title: _____

In the case of all matters relating to Funding, rollovers, conversions and repayments, to:

BANK OF MONTREAL,
as Administrative Agent

Bank of Montreal
Agent Bank Services
234 Simcoe Street, 3rd Floor
Toronto, Ontario
M5T 1T4

By: 

Name:

Title:

James Di Giacomo
Managing Director
Corporate Finance Underwriting
and Syndications

By: _____

Name:

Title:

Attention: Manager, Agent Bank Services
Facsimile No.: (416) 598-6218

In the case of all reports to be provided pursuant to Section 9.3, to:

Bank of Montreal
100 King Street West
1 First Canadian Place, 4th Floor
Toronto, Ontario
M5X 1A1

Attention: Agency Deal Specialist
Facsimile No.: (416) 359-7796

In the case of all other communications to be provided to the Agent, to:


Bank of Montreal
Corporate Finance Division
100 King Street West
1 First Canadian Place, 11th Floor
Toronto, Ontario
M5X 1A1


Attention: Director
Facsimile: (416) 360-7168

Bank of Montreal
Corporate Finance Division
100 King Street West
1 First Canadian Place, 11th Floor
Toronto, Ontario
M5X 1A1

Attention: Director
Facsimile No: (416) 360-7168

BANK OF MONTREAL, as Lender

By: 
Name: Shane Downey
Title: Managing Director

By: 
Name: Andrew Falone
Title: Associate

The Toronto-Dominion Bank
Commercial National Accounts
100 Wellington Street West, 26th Floor
Toronto, Ontario M5K 1A2

Attention: Michael Duhaime
Facsimile No.: 416-982-6076

THE TORONTO-DOMINION BANK, as Lender

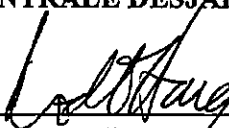
By: Michael J. Duhaime **Michael Duhaime**
Name: **Director**
Title: **National Accounts**

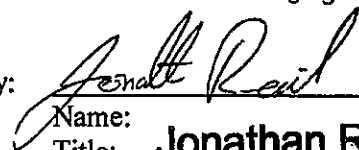
By: Natalie Guida
Name: **Natalie Guida**
Title: **Manager Commercial Credit
National Accounts**

Suite 1000
25 York Street
Toronto, ON
M5J 2V5

Attention: Rod O'Hara
Facsimile No.: 416-861-9992

CAISSE CENTRALE DESJARDINS, as Lender

By: 
Name: **Rod O'Hara**
Title: **Managing Director**

By: 
Name: **Jonathan Raiken**
Title: **Director**

130 King Street West
8th Floor
Toronto, Ontario
M5X 1J9

Attention: Zami Salaria
Facsimile No.: 416-864-7819

NATIONAL BANK OF CANADA, as Lender

By: 

Name: **Zami Salaria**
Title: Director

By: 

Name: **Russell A. Garrard**
Title: Associate Vice President

Schedule A – CBA Model Loan Provisions

The attached model credit agreement provisions, which have been revised under the direction of the Canadian Bankers' Association Secondary Loan Market Specialist Group from provisions prepared by The Loan Syndications and Trading Association, Inc. form part of this Agreement, except for the footnotes to the model credit provisions and subject to the following variations:

1. All references in this Schedule A to LIBO Rate Loans, Letters of Credit, the Issuing Bank, and Montreal, Quebec are deemed deleted.
2. The definition of Change in Law in Section 1 of this Schedule A shall be amending by adding the following proviso:

; provided that (i) all requests, rules, guidelines and directives promulgated by the Bank for International Settlements, the Basel Committee on Banking Supervision (or any successor or similar authority) or any regulatory authorities pursuant to Basel III, and (ii) the Dodd-Frank Wall Street Reform and Consumer Protection Act and all requests, rules, guidelines or directives thereunder or issued in connection therewith, will be deemed to be a Change in Law, regardless of the date enacted, adopted or issued.

3. Section 10(b) of this Schedule A is amended by renumbering Section 10(b)(vi) as Section 10(b)(vii) and inserting the following new provision as Section 10(b)(vi) after Section 10(b)(v):

(vi) except (i) if an Event of Default has occurred and is continuing and the Lenders have exercised their right to accelerate the Loans under the Loan Documents or (ii) any of the Loans have not been repaid by the Borrower on the Maturity Date, any assignment by a Lender of all or a portion of its Commitment and Loans must not, at the time of such assignment, increase any cost or impose any tax on the Borrower or any payments to be made by the Borrower under the Loan Documents;

4. Section 9(a) of this Schedule A is amended by deleting (ii) and (iii) thereof and replacing them with the following:

“and (ii) all out of pocket expenses incurred by the Administrative Agent or any Lender, including the reasonable fees, charges and disbursements of counsel, in connection with any amendments, modifications or waivers relating to the terms of the Loan Documents or Material Project Documents, or the enforcement or protection of its rights in connection with this Agreement and the other Loan Documents, including its rights under this Section, in connection with the Loans, including all such out-of-pocket expenses incurred during any workout, restructuring or negotiations in respect of such Loans.”

5. To the extent that there is any conflict between any provision in either the Project Agreement or this Credit Agreement and those set forth in this Schedule A, the relevant provisions of the Project Agreement or this Credit Agreement, as applicable, will prevail.

Schedule 1.1(30) – Lenders’ Branches of Account

Lender	Address of Branch of Account
Bank of Montreal	11th Floor, 1 First Canadian Place Toronto, Ontario M5X 1A1
The Toronto-Dominion Bank	100 Wellington Street West, 26th Floor Toronto, ON M5K 1A2
Caisse centrale Desjardins	Office 300 1170 Peel Street Montreal, Quebec H3B 0A9
National Bank of Canada	130 King St West, Suite 3200 Toronto, ON M5X 1J9

Schedule 1.1(42) – Commitments

Lender	Commitment	Applicable Percentage
Bank of Montreal	\$65,735,204	28.5%
The Toronto-Dominion Bank	\$68,678,572	29.8%
Caisse centrale Desjardins	\$58,867,347	25.5%
National Bank of Canada	\$37,282,653	16.2%
Total Commitment	\$230,563,776	100%

Schedule 1.1(45) – Form of Compliance Certificate

2442931 ONTARIO INC.

TO: BANK OF MONTREAL, in its capacity as Administrative Agent (the “Administrative Agent”)

AND TO: Each of the financial institutions and other entities from time to time parties to the Credit Agreement (as defined below) (the “Lenders”)

Reference is made to the Credit Agreement made as of January 27, 2015 (the “**Credit Agreement**”), between 2442931 Ontario Inc. (the “**Borrower**”), the Administrative Agent and the Lenders. Capitalized terms used herein but not otherwise defined shall bear the respective meanings given to them in the Credit Agreement.

I, *[insert name]*, being the *[insert office]* of the Borrower and an authorized signatory of the Borrower, and being duly authorized by the Borrower to deliver this certificate, hereby make the following certifications and confirmations for and on behalf of the Borrower and without incurring personal liability and that the same may be relied upon by you without further inquiry:

- (a) the information contained in the financial statements delivered to you on the date hereof is prepared and presented in accordance with GAAP and in a manner consistent with the past practices of the Borrower and such financial statements are true and correct in all material respects and present fairly the results of operations and changes in the financial position of the Borrower;
- (b) the Borrower is in material compliance with its covenants set forth in Section 9 of the Credit Agreement;
- (c) each of the representations and warranties of the Borrower set forth in Section 2 of the Credit Agreement is true and correct in all respects by reference to the facts and circumstances existing on the date hereof **[other than as set forth in a schedule to this certificate]**;
- (d) no Default or Event of Default has occurred and is continuing as of the date hereof **[other than as set forth in a schedule to this certificate]**; and
- (e) no changes have been made to the most recent Financial Model delivered to the Administrative Agent.

DATED: _____,

Name:
Title:

Schedule 1.1(83) – Financial Model

- See attached -

[SMH Jan 27 2015 FC Final Version.xlsm]

Schedule 1.1(132) – Material Subcontracts

Urban Mechanical Contracting Ltd.	Mechanical
OZZ Electric	Electrical

Schedule 2.1(25) – Corporate Organization Chart

Major Project Party	Parent Company
2442931 Ontario Inc.	Bondfield Construction Company Limited owns 100% of the issued and outstanding shares.

Schedule 3.2(1) – Draw Schedule

Date	Maximum Draw
27-Jan-15	\$22,700,683
28-Feb-15	\$140,256
31-Mar-15	\$2,980,917
30-Apr-15	\$3,712,683
31-May-15	\$4,426,015
30-Jun-15	\$4,594,335
31-Jul-15	\$4,629,639
31-Aug-15	\$6,150,914
30-Sep-15	\$6,687,968
31-Oct-15	\$7,263,651
30-Nov-15	\$7,770,755
31-Dec-15	\$8,225,273
31-Jan-16	\$8,634,655
29-Feb-16	\$8,900,683
31-Mar-16	\$9,149,454
30-Apr-16	\$9,143,397
31-May-16	\$9,203,067
30-Jun-16	\$9,101,110
31-Jul-16	\$9,355,480
31-Aug-16	\$9,170,040
30-Sep-16	\$9,075,568
31-Oct-16	\$8,862,071
30-Nov-16	\$8,560,892
31-Dec-16	\$8,208,350
31-Jan-17	\$7,810,111
28-Feb-17	\$7,427,872
31-Mar-17	\$6,052,390
30-Apr-17	\$5,457,291
31-May-17	\$4,753,519
30-Jun-17	\$3,986,642
31-Jul-17	\$3,215,847
31-Aug-17	\$2,403,430
30-Sep-17	\$1,562,015
31-Oct-17	\$1,246,804
30-Nov-17	\$0
31-Dec-17	\$645,783
31-Jan-18	\$807,291
28-Feb-18	\$616,239
31-Mar-18	\$976,393
30-Apr-18	\$1,443,979

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31-May-18	\$1,464,993
30-Jun-18	\$1,991,286
31-Jul-18	\$2,411,304
31-Aug-18	\$2,758,360
30-Sep-18	\$3,022,258
31-Oct-18	\$3,207,736
30-Nov-18	\$3,290,773
31-Dec-18	\$3,288,275
31-Jan-19	\$3,206,125
28-Feb-19	\$2,975,670
31-Mar-19	\$2,710,524
30-Apr-19	\$2,346,901
31-May-19	\$1,418,751
30-Jun-19	\$1,093,473
31-Jul-19	\$772,493
31-Aug-19	\$308,979
30-Sep-19	\$238,171
31-Oct-19	\$0
30-Nov-19	\$0
31-Dec-19	\$0

Schedule 3.5(1) – Form of Funding Request

[Date]

Bank of Montreal, as Administrative Agent
 [**]

Attention: [**]

Fax: [**]

Dear Sirs/Mesdames:

Reference is made to that certain Credit Agreement made as of January 27, 2015 (as amended, restated, supplemented or otherwise modified from time to time, the “**Credit Agreement**”), between 2442931 Ontario Inc. (the “**Borrower**”), the Lenders from time to time party thereto (the “**Lenders**”) and The Toronto-Dominion Bank, as administrative agent (the “**Administrative Agent**”). Capitalized terms used and not defined herein have the meanings given to them in the Credit Agreement.

Borrower hereby gives irrevocable notice, pursuant to Section 3.5(1) of the Credit Agreement, of the following Requested Funding:

- (a) Proposed Funding Date: _____
- (b) Total amount of the Requested Funding: C\$ _____
- (c) Allocation of the Requested Funding:
 - (i) Borrower Proceeds Account at:
 [insert wire transfer instructions]: C\$ _____
 - (ii) [payee name, if directed payment] on
 account of Fees/Transaction Expenses: C\$ _____

The Borrower is familiar with and has examined the provisions of the Credit Agreement and has made reasonable investigations of the records of the Borrower and based on the foregoing and as of the date of this Funding Request, hereby certifies, to the Administrative Agent and each of the Lenders, that:

- (a) attached is (i) the Contractor’s progress draw application relating to the Construction Costs in respect of the Requested Funding, (ii) the Contractor’s invoice for other transaction costs not inconsistent with the Financial Model[, and a **statutory declaration executed by the Contractor with respect to [●]**], and (c) a WSIB clearance certificate;

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- (b) attached is a title search of the Project Lands which confirms that there exist upon the Project Lands no Liens other than Permitted Liens;
- (c) the portion of the Works completed as of the date hereof has been completed in accordance with the Construction Contract, the Planning and Design Documents and the Construction Budget;
- (d) no Default or Event of Default has occurred and is continuing;
- (e) each Material Project Document is in full force and effect, no default by the Borrower or, to the Borrower's Knowledge, by the Contractor has occurred and is continuing under any Material Project Document which has a Material Adverse Effect, none of the Material Project Documents have been terminated (whether for convenience, for cause or otherwise) and no notice of termination has been given under any of the Material Project Documents;
- (f) all conditions to the making of Loans on each Funding Date set forth in Section 8.2 have been satisfied or will be satisfied on the proposed Funding Date set forth in paragraph (a) above;
- (g) each of the representations and warranties contained in Section 2.1 of the Credit Agreement and in the Security Documents is true and accurate in all respects as of the date hereof (other than any portion of such representations and warranties that was given in respect of a particular date or period, in which case such representation and warranty shall continue to be given as at such date or for such period);
- (h) the proceeds of the Requested Funding will be used in accordance with the Credit Agreement and the Funding Request;
- (i) all Construction Costs to which this Funding Request applies are accurate and there are no material variances between such Construction Costs and the Construction Budget;
- (j) the amount requested in respect of Construction Costs hereunder does not exceed 90% of the total certified cost of all Works to which this Funding Request relates;
- (k) except those Construction Costs in respect of subcontracted Works that have been completed by the applicable Subcontractor, all applicable lien periods have expired in respect of such subcontracted Works as certified by the Lenders' Consultant, in which case, the amount requested in respect of Construction Costs includes 100% of the total certified cost of the applicable subcontracted Works;
- (l) the total amount of Construction Costs estimated to be incurred from the date of this Funding Request up to the scheduled Substantial Completion Date are consistent with the Construction Budget; and

[either

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(m) **the Borrower has sufficient funds available to it pursuant to the Credit Facility, in the Borrower Proceeds Account and in its Agent's Funding Account Balance to complete the Works in accordance with the Construction Budget and to pay all Borrowing Costs.**

Or

(n) **there is a Cost to Complete Deficiency in the amount of \$[●] in respect of the proposed Funding Date set forth in paragraph (a) above. Attached is a detailed plan to remediate such Cost to Complete Deficiency.]**

IN WITNESS WHEREOF, Borrower has caused this Funding Request to be executed and delivered by its duly authorized officer(s) as of the date first set forth above.

2442931 ONTARIO INC.

By: _____

Name:

Title:

Schedule 5.4 -- Notice of Repayment

[Date]

Bank of Montreal, as Administrative Agent

[**]

Attention: [**]

Fax: [**]

Dear Sirs/Mesdames:

We refer to Section 5.4 of the Credit Agreement made as of January 27, 2015, between 2442931 Ontario Inc., as Borrower, Bank of Montreal, as Administrative Agent, and the Lenders party thereto, as amended, restated, supplemented and otherwise modified from time to time (the "Credit Agreement"). Capitalized terms used and not defined herein have the meanings given to them in the Credit Agreement.

We hereby give you irrevocable notice that we shall repay certain of the Loans under the Credit Facility as follows (repeat for each Loan to be repaid):

1. Date of repayment _____/_____/_____ (not less than three (3) Business Days from the date of this notice).
2. Aggregate amount of repayment of \$_____ (minimum aggregate amount of Cdn\$500,000 or the outstanding balance if less, and shall be made in Cdn\$100,000 multiples, as the case may be).

Yours truly,

2442931 ONTARIO INC.

By: _____

Name:

Title:

Schedule 5.5 – Notice of Cancellation

[Date]

Bank of Montreal, as Administrative Agent

[**]

Attention: [**]

Fax: [**]

Dear Sirs/Mesdames:

We refer to Section 5.5 of the Credit Agreement made as of January 27, 2015, between 2442931 Ontario Inc., as Borrower, Bank of Montreal, as Administrative Agent, and the Lenders party thereto, as amended, restated, supplemented and otherwise modified from time to time (the "Credit Agreement"). Capitalized terms used and not defined herein have the meanings given to them in the Credit Agreement.

We hereby give you notice of cancellation and reduction in the amount of Cdn\$ _____ [minimum of Cdn\$500,000 and in multiples of Cdn\$100,000] of the Total Commitment effective as at _____ [insert date, which shall be no earlier than 1 Business Day after the date on which this Notice of Cancellation is received by the Administrative Agent].

Following such cancellation, the Total Commitment shall be Cdn\$ _____.

Yours truly,

2442931 ONTARIO INC.

By: _____

Name:

Title:

Schedule 8.2(6)(b) – Form of Statutory Declaration

(Attach form CCDC-9A)

Schedule 8.2(6)(c) – Form of Lenders’ Consultant Certificate

Lenders’ Consultant’s Certificate

TO: Bank of Montreal, as administrative agent for and on behalf of the Lenders (the “Administrative Agent”)

AND TO: 2442931 Ontario Inc. (the “Borrower”)

RE: Requested Funding in the amount of \$[Insert Amount]

Reference is made to the Credit Agreement made as of January 27, 2015 as amended, restated, supplemented or otherwise modified from time to time, the “**Credit Agreement**”, between the Borrower, each of the financial institutions and other entities from time to time parties hereto (the “**Lenders**”) and the Administrative Agent.

Reference is made to the guaranteed price contract made as of January 27, 2015 (the “**Construction Contract**”), between the Borrower and Bondfield Construction Company Limited (the “**Contractor**”) for the carrying out of the Works. All terms used with initial capital letters but not otherwise defined herein shall have the meanings ascribed thereto in the Credit Agreement.

1. We are the Lenders’ Consultant and in such capacity have reviewed the following, each as constituted as of the date hereof:

- (a) a Funding Request dated *[Insert Date]* for the Requested Funding;
- (b) the most recent Works Report prepared by the Borrower in accordance with Section 13.6 of the Project Agreement and the most recent Monthly Report prepared by the Independent Certifier as defined in and in accordance with the Independent Certifier Agreement;
- (c) **[with respect to the calculation of any Forecasted Delay, any plan proposed by the Contractor to remediate such Forecasted Delay.]**
- (d) **[with respect to any Cost to Complete Deficiency, any plan proposed by the Contractor to remediate such Cost to Complete Deficiency.]**

2. We have made, or caused to be made, such examinations or investigations as are, in our belief, necessary to enable us to make the statements or give the opinions contained or expressed in this Lenders’ Consultant’s Certificate, in accordance with our responsibilities in such regard pursuant to the provisions of the Construction Contract. We have periodically visited the Project Lands and last visited the Works on *[Insert Date]*.

3. Based upon the foregoing, we certify and confirm that:

- (a) the Works are proceeding within the Construction Budget and the incurred Construction Costs to date are \$*[Insert Amount]*;

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- (b) as of the date hereof, all Consents required in connection with the performance of the Works done to date, have been obtained;
- (c) the Requested Funding has been made in the amount of *[\$Insert Amount]*, which is equal to the sum of (i) ●% of the certified Construction Costs in respect of the Works for this Funding Period and (ii) Fees and Transaction Expenses not inconsistent with the Financial Model;
- (d) the construction Works are not abandoned;
- (e) all Loans made to the Borrower to date have been spent on incurred Construction Costs (less the Legislative Holdback), Borrowing Costs and Transaction Expenses, save for Construction Costs being held by the Contractor as projected Construction Costs which will be applied to incurred Construction Costs;
- (f) true and complete copies of such bills, receipts and invoices necessary to substantiate the incurrence and, if applicable, payment of the incurred Construction Costs for which the Requested Funding is requested have been reviewed by us and we are satisfied with the same;
- (g) the sum of Fundings made on account of Construction Costs in respect of prior Funding Periods plus the Requested Funding on account of Construction Costs for this Funding Period does not exceed ●% of the total Construction Costs incurred and certified to date;
- (h) Tower Interim Completion will be achieved by the Scheduled Tower Interim Completion Date **[or, there is a delay in achieving Tower Interim Completion by the Scheduled Tower Interim Completion Date of [●] days];**
- (i) there is no Forecasted Delay **[or, there is a Forecasted Delay of [●] days];**
- (j) Substantial Completion will be achieved by the Lender Longstop Date;
- (k) there is no anticipated delay in achieving Substantial Completion by the Scheduled Substantial Completion Date **[or there is an anticipated delay in achieving Substantial Completion by the Scheduled Substantial Completion Date of [●] days by reason of ● and any resulting increased Cost of the Financing has been and is being paid by the Contractor to the Borrower];** and
- (l) there is no Cost to Complete Deficiency **[or (A) there is a Cost to Complete Deficiency in the amount of \$[●], and (B) the Cost to Complete Deficiency Remedial Plan is satisfactory or (C) the Cost to Complete Deficiency Remedial Plan is not satisfactory].**

This Lenders' Consultant's Certificate is being delivered to the Administrative Agent pursuant to Section 8.2(6)(c) of the Credit Agreement and may be relied upon by the addressees hereof and their respective successors and assigns.

DATED this • day of • 20•.

•

By:

Name:

Title:

Schedule 9.1(19) – Financial Model Updates

1. Unless otherwise provided under this Agreement, each reference to the Financial Model shall mean the current Financial Model until another Financial Model becomes the current one in accordance with this Schedule 9.1(19).
2. Each new Financial Model shall be in the same form as the initial Financial Model.
3. The Administrative Agent acknowledges that the Borrower may from time to time need to amend the Financial Model (for example, in order to reflect any Variations or Variation Directives under the Project Agreement).
4. A draft Financial Model delivered by the Borrower to the Administrative Agent shall become the current Financial Model automatically upon approval by the Administrative Agent and the Lenders (upon advice from the Lenders' Consultant) and SMH. If the Administrative Agent and the Lenders do not approve a draft Financial Model, the Borrower and the Administrative Agent (together with the Lenders' Consultant) shall diligently work to resolve such disputed aspect of the draft Financial Model.
5. The Financial Model shall be kept by the Borrower, and each of the Administrative Agent and the Borrower shall maintain its own copy of the Financial Model for day-to-day purposes.
6. The Administrative Agent shall promptly deliver a copy of each Financial Model received by the Administrative Agent pursuant to this Agreement to each of the Lenders.

Schedule 9.1(22) – Additional Insurance

None.

THIS IS EXHIBIT "B" TO
THE AFFIDAVIT OF EDEN ORBACH
SWORN BEFORE ME THIS 17th
DAY OF DECEMBER, 2018.

Aneesa Tamm

A Commissioner etc.

DESIGN AND CONSTRUCTION CONTRACT

THIS DESIGN AND CONSTRUCTION CONTRACT is made as of the 27th day of January, 2015

BETWEEN:

2442931 ONTARIO INC., a corporation incorporated under the laws of the Province of Ontario

("Project Co")

- and -

BONDFIELD CONSTRUCTION COMPANY LIMITED, a corporation formed under the laws of the Province of Ontario
("Construction Contractor")

WHEREAS:

- A. Pursuant to a Project Agreement dated as of the 27th day of January, 2015 between Project Co and SMH (such agreement, together with all amendments, supplements and modifications thereto and restatements or replacements thereof, being hereinafter called the "**Project Agreement**"), Project Co has agreed to perform the Design and Construction Work.
- B. Project Co and Construction Contractor have entered into a contractor support agreement dated as of the date hereof (the "**Construction Contractor Support Agreement**")
- C. Pursuant to the Project Agreement, Project Co has agreed to enter into this Design and Construction Contract with Construction Contractor, pursuant to which Construction Contractor has agreed to perform the Design and Construction Work.

NOW THEREFORE in consideration of the mutual covenants and agreements of the Parties hereinafter contained and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties covenant and agree as follows:

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions and Interpretation

- (a) Unless otherwise defined herein, all capitalized terms in this Design and Construction Contract shall have the meanings ascribed to them in Schedule 1 – Definitions and Interpretation, of this Design and Construction Contract.
- (b) This Design and Construction Contract is comprised of this executed agreement and the following documents, all of which are hereby incorporated by reference into and form part of this Design and Construction Contract:

Schedule No.	Description
Appendix A	- General Conditions of the Design and Construction Contract
Schedule 1	- Definitions and Interpretation
Schedule 2	- INTENTIONALLY DELETED
Schedule 3	- Design and Construction Work Scheduling Requirements
Schedule 4	- INTENTIONALLY DELETED
Schedule 5	- Construction Contractor's Direct Agreement
Schedule 6	- Independent Certifier Agreement
Schedule 7	- Subcontractor's Direct Agreement
Schedule 8	- Construction Contractor Parties
Schedule 9	- Key Individuals
Schedule 10	- Review Procedure
Schedule 11	- Design Quality Plan and Construction Quality Plan
Schedule 12	- INTENTIONALLY DELETED
Schedule 13	- Construction Contractor Proposal Extracts
Schedule 14	- Outline Commissioning Program
Schedule 15	- Output Specifications
Schedule 16	- Title Encumbrances
Schedule 17	- Design and Construction Work Report Requirements
Schedule 18	- Communications Protocol
Schedule 19	- INTENTIONALLY DELETED
Schedule 20	- Procurement Monitoring and Implementation Plan
Schedule 21	- INTENTIONALLY DELETED
Schedule 22	- Variation Procedure
Schedule 23	- Compensation on Termination
Schedule 24	- INTENTIONALLY DELETED
Schedule 25	- Insurance and Performance Security Requirements
Schedule 26	- Record Provisions
Schedule 27	- Dispute Resolution Procedure
Schedule 28	- INTENTIONALLY DELETED
Schedule 29	- INTENTIONALLY DELETED
Schedule 30	- Insurance Trust Agreement
Schedule 31	- INTENTIONALLY DELETED
Schedule 32	- INTENTIONALLY DELETED
Schedule 33	- INTENTIONALLY DELETED

2. CONSTRUCTION WORK AND OTHER OBLIGATIONS

2.1 Design and Construction Work

- (a) Subject to Article 1 and the provisions of the Design and Construction Contract, Construction Contractor shall perform all of the Design and Construction Work in compliance with this Design and Construction Contract and in such a manner so as not to cause Project Co to be in breach of its obligations to SMH pursuant to the Project Agreement in respect of the Design and Construction Work.

- (b) For greater certainty, Construction Contractor shall not be obligated by this Design and Construction Contract for any covenant, agreement, undertaking or obligation of Project Co related to the Financing or the Cost of the Financing, including any obligations of Project Co under Section 8.4(a) of the Project Agreement, each of which are hereby expressly excluded from the scope of this Design and Construction Contract, provided that Construction Contractor's obligations in respect of Liquidated Damages as set forth in the Construction Contractor Support Agreement shall not be construed as any such covenant, agreement, undertaking or obligation of Project Co related to the Financing or the Cost of the Financing.
- (c) At the request of Project Co, the Construction Contractor, within such time as required by Project Co, shall provide Project Co with copies of any reports, plans, notices, or other documents or communications which the Construction Contractor is required by the Design and Construction Contract to provide to SMH, SMH Representative, Independent Certifier, Lender's Consultant or any other third party.

2.2 Other Obligations

Subject to Article 1 and the provisions of this Design and Construction Contract (including, without limitation, Section 2.1(b) above), Construction Contractor shall perform all of the obligations of the Construction Contractor set out in this Design and Construction Contract in compliance with this Design and Construction Contract.

2.3 Energy Matters

- (a) Construction Contractor acknowledges Schedule 33 of the Project Agreement – Energy Matters (“**Schedule 33 of the PA**”).
- (b) Construction Contractor hereby assumes the responsibilities and liabilities of Project Co in respect of Schedule 33 of the PA, subject to a Variation under the Design and Construction Contract to the extent a Variation is implemented under the Project Agreement. For clarity, the Construction Contractor acknowledges and agrees that the Construction Contractor is bound by the outcome of any findings or decisions, which relate to energy matters under Schedule 33 of the PA, to the extent and in the manner that Project Co is bound under the Project Agreement.
- (c) Project Co shall pay Construction Contractor all amounts which Project Co receives from SMH in respect of Schedule 33 of the PA, within two (2) Business Days of receipt of such payments from SMH.
- (d) Construction Contractor shall pay Project Co all amounts owing from Project Co to SMH in respect of Schedule 33 of the PA, at least two (2) Business Days before such payments are due to SMH under the terms of Schedule 33 of the PA.

3. GUARANTEED PRICE AND ADJUSTMENTS

3.1 Guaranteed Price and Adjustments

- (a) The Guaranteed Price hereunder, excluding HST, shall be the Guaranteed Price under the Project Agreement less the Cost of the Financing as set out in Schedule 24 – Financial Model to the Project Agreement.
- (b) The Guaranteed Price hereunder will not be subject to adjustment despite changes in the Design and Construction Work, unless such changes in the Design and Construction Work constitute a Variation Confirmation. The parties further agree that the Guaranteed Price hereunder will only be adjusted where the Design and Construction Contract specifically and expressly refers to an adjustment to the Guaranteed Price hereunder, and no claim for an adjustment to the Guaranteed Price hereunder on any legal or equitable basis outside of the specific and express right to an adjustment of the Guaranteed Price hereunder set out in the Design and Construction Contract will be allowed. In order to be effective, any permitted adjustment to the Guaranteed Price hereunder must be provided for in a Variation Confirmation under Schedule 22 – Variation Procedure of the Design and Construction Contract.

3.2 Cash Allowance

- (a) On or before the date of the Design and Construction Contract, Construction Contractor, on behalf of Project Co, shall open the Cash Allowance Account. Construction Contractor shall deposit the portion of the applicable Cash Allowance Amount in respect of each applicable Cash Allowance Item into the Cash Allowance Account prior to the scheduled commencement of the portion of the Design and Construction Work relating to such portion of the Cash Allowance Item as set out in the Design and Construction Work Schedule (the “**Cash Allowance Monthly Deposit Amount**”). The Cash Allowance Monthly Deposit Amount shall be equal to the estimated value of the portion of the Design and Construction Work relating to the applicable Cash Allowance Item to be completed in each applicable month. In the event that, at any time and from time to time, it is determined that the actual value of such Design and Construction Work is greater or less than the Cash Allowance Monthly Deposit Amount deposited for such month, Construction Contractor shall adjust the Cash Allowance Monthly Deposit Amount for the following month downwards or upwards, as the case may be, in order to reconcile the Cash Allowance Monthly Deposit Amount for the previous month (each is a “**Cash Allowance Monthly Deposit Amount Reconciliation**”). For clarity, the intent is that Construction Contractor shall ensure that it has sufficient funds in the Cash Allowance Account to pay the relevant vendors and Construction Contractor Parties from the Cash Allowance Account in respect of the applicable month pursuant to and in accordance with Section 3.2(g) and that the amount of such funds need not exceed the estimated value of the portion of the Design and Construction Work relating to the applicable Cash Allowance Item to be completed in each applicable month.

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- (b) Subject to Section **Error! Reference source not found.**, in the event that at any time and from time to time the actual cost of the Design and Construction Work for a particular Cash Allowance Item (or any portion thereof) exceeds the total Cash Allowance Amount for such Cash Allowance Item, Construction Contractor shall fund the difference between such actual cost of the Design and Construction Work and such Cash Allowance Amount (a "**Cash Allowance Amount Shortfall**") from the then remaining Cash Allowance Amount of any other Cash Allowance Item, such remaining Cash Allowance Amount, for clarity, being an amount equal to the amount of funds in respect of such Cash Allowance Amount that, at that time, has not yet been deposited by Construction Contractor into the Cash Allowance Account (a "**Remaining Cash Allowance Amount**"). Upon Construction Contractor funding the Cash Allowance Amount Shortfall there shall be a corresponding reduction in the Remaining Cash Allowance Amount for such other Cash Allowance Item.
- (c) The Parties and SMH agree that Construction Contractor, on behalf of Project Co, shall manage the Cash Allowance Account and the cash flow process applicable thereto in accordance with the following:
- (i) The Cash Allowance Account shall be in the name of Project Co but Construction Contractor will hold and manage all monies in the Cash Allowance Account in trust for, for the benefit of and as directed by SMH;
 - (ii) interest earned on the Cash Allowance Account will accrue in the Cash Allowance Account and will be for the benefit of SMH;
 - (iii) Construction Contractor shall provide a reconciliation of the Cash Allowance Account to SMH on a monthly basis;
 - (iv) in the event that
 - (A) Construction Contractor must deposit a Cash Allowance Monthly Deposit Amount into the Cash Allowance Account pursuant to Section 3.2(a);
 - (B) a Cash Allowance Amount Shortfall exists; and
 - (C) the Cash Allowance Amount Shortfall exceeds the aggregate of all of the Remaining Cash Allowance Amounts, then

SMH shall, pursuant to Section 3.2(c)(iv) of the Project Agreement, at its sole cost and expense, deposit into the Cash Allowance Account (I) the initial Cash Allowance Amount Shortfall up to the aggregate amount of all vendor and Construction Contractor Party invoices that have been approved by SMH pursuant to Section 3.2(f) of the Project Agreement in respect of the particular Cash Allowance Item to which the Cash Allowance Amount Shortfall relates and that are due for payment that month and (II) all future Cash Allowance Monthly Deposit Amounts

- required to complete the Design and Construction Work for all of the remaining Cash Allowance Items. Pursuant to the Project Agreement, SMH shall deposit such funds into the Cash Allowance Account on a date that is no later than 2 Business Days before the date that Construction Contractor is required to make each of the applicable payments under each of the invoices approved by SMH pursuant to Section 3.2(f) of the Project Agreement related to such Design and Construction Work;
- (v) notwithstanding Section 3.2(a), on the Substantial Completion Date, Construction Contractor, on behalf of Project Co, shall deposit the aggregate of all Remaining Cash Allowance Amounts (if any) into the Cash Allowance Account (including, for clarity, each and every Cash Allowance Amount in respect of any Design and Construction Work for any Cash Allowance Items that are to be completed following the Substantial Completion Date). Following the Substantial Completion Date and on the later of (A) the Substantial Completion Payment Date and (B) the date that the Independent Certifier certifies that all of the Design and Construction Work related to the Cash Allowance Items have been completed, if a positive balance in the Cash Allowance Account exists on such date, such balance will be the property of SMH and will be paid by Construction Contractor, on behalf of Project Co, to SMH or as SMH directs. If the Termination Date occurs prior to the date described above in terms of items (A) and (B) and if a positive balance in the Cash Allowance Account exists on the Termination Date, such balance will be the property of SMH and will be paid by Construction Contractor, on behalf of Project Co, to SMH or as SMH directs; and
 - (vi) the Parties agree to mutually review with each other, and with SMH, the operation of the Cash Allowance Account on a regular basis and make any appropriate modifications to ensure its efficient operation.
- (d) Construction Contractor, on behalf of Project Co, shall provide monthly reports to the SMH Representative that include the following information:
- (i) itemized and aggregate amounts committed to date for each Cash Allowance Item separately and all Cash Allowance Items in the aggregate;
 - (ii) itemized and aggregate amounts spent to date for each Cash Allowance Item separately and all Cash Allowance Items in the aggregate;
 - (iii) the projected cost of each remaining Cash Allowance Item, the projected effect of such costs on each Cash Allowance Amount separately and on the aggregate of all of the Cash Allowance Amounts (including any and all anticipated Cash Allowance Amount Shortfalls); and
 - (iv) details and supporting information in respect of any Cash Allowance Monthly Deposit Amount Reconciliations.

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- (e) In addition to the monthly reports described in Section 3.2(d), Construction Contractor shall, on behalf of Project Co, on a monthly basis, provide to the SMH Representative a request for payment approval (each, a “**Request for Payment Approval**”) that includes the following information:
- (i) details of all vendor or Construction Contractor Party invoices that are due for payment that month, including relevant supporting documentation in connection with any Cash Allowance Items or portions thereof;
 - (ii) evidence that the commitment by Construction Contractor to purchase any applicable Cash Allowance Items or portions thereof have been approved by SMH; and
 - (iii) any discounts, rebates, refunds, chargebacks, credits, price adjustments and other allowances available to Construction Contractor in connection with any Cash Allowance Item or portion thereof.
- (f) Construction Contractor acknowledges that pursuant to Section 3.2(f) of the Project Agreement, SMH shall, within 10 Business Days of receipt of a Request for Payment Approval, advise Project Co, in writing, whether or not payment of the invoices set out in such Request for Payment Approval is approved. Pursuant to the Project Agreement, SMH shall only be permitted to withhold its approval if (i) SMH determines that the Request for Payment Approval does not contain the information that SMH requires, acting reasonably, to discharge its obligations under this Section **Error! Reference source not found.** and (ii) upon the request of SMH, the Independent Certifier confirms to SMH that any of the Design and Construction Work claimed by Construction Contractor to be in relation to a Cash Allowance Item are not, in fact, in relation to a Cash Allowance Item. If SMH withholds its approval pursuant to Section 3.2(f) of the Project Agreement, and subsequently receives the information that SMH requires, acting reasonably, to discharge its obligations under Section **Error! Reference source not found.** of the Project Agreement, it shall, within 10 Business Days of its receipt of such information, provide to Project Co, in writing, SMH’s approval of the invoices set out in the aforementioned Request for Payment Approval.
- (g) Pursuant to Section 3.2(g) of the Project Agreement, if SMH approves the payment of the invoices set out in a Request for Payment Approval, Construction Contractor shall make payment to the relevant vendors or each Construction Contractor Party from the Cash Allowance Account.
- (h) Construction Contractor acknowledges and agrees that:
- (i) neither it, nor any Construction Contractor Party, shall be entitled to any mark-ups for profit, overhead or other costs associated with the Cash Allowance Items;
 - (ii) all discounts, rebates, refunds, chargebacks, credits, price adjustments and other allowances available to Construction Contractor in connection with

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the Cash Allowance Items shall be attributed solely to and shall benefit the pricing of the Cash Allowance Items;

- (iii) all costs and expenses related to the administration of the Cash Allowance Account, including, without limitation, the preparation of Requests for Payment Approval and any required reporting, shall be borne by Construction Contractor and shall not be charged to the Cash Allowance Account; and
- (iv) subject to SMH's responsibilities under Section 3.2(c)(iv) of the Project Agreement, all of the Cash Allowance Amounts (including all portions thereof) shall be deposited and the Cash Allowance Account will be managed in accordance with the Design and Construction Work Schedule and any costs, expenses or delays related to funding or managing the Cash Allowance Account are the responsibility of Construction Contractor.
- (i) Notwithstanding anything to the contrary in the Design and Construction Contract and the Project Agreement, the approval by SMH of the commitment by Construction Contractor, on behalf of Project Co, to purchase any Discretionary SMH Cash Allowance Item with any portion of the Discretionary SMH Cash Allowance Amount shall be in SMH's sole discretion and shall only be in respect of any obligation of SMH under the Project Agreement, including but not limited to, any matter which is the responsibility of SMH pursuant to Section 18 of the Project Agreement and, for greater certainty, excluding any matter which is in respect of any obligation of Construction Contractor under this Design and Construction Contract.

4. PAYMENTS AND HOLDBACKS

4.1 Payments to the Construction Contractor

All payments required to be made by Project Co to Construction Contractor hereunder, including:

- (a) Base Progress Payments;
- (b) payments in respect of a Variation Confirmation or Variation Directive, but only to the extent that:
 - (i) a corresponding Variation Confirmation or Variation Directive, each as defined in the Project Agreement, is issued and required to be implemented under the Project Agreement; and
 - (ii) the work under such Variation Confirmation or Variation Directive is financed by the Lenders, subject to the agreement of the Lenders in their sole discretion or, is instead, funded by SMH;

(c) subject to, and in accordance with, Section 4.6 of Appendix A – General Conditions to the Design and Construction Contract, the Completion Holdback and the Tower Interim Completion Holdback; and

(d) any Legislative Holdbacks with respect thereto,

shall be paid by Project Co to Construction Contractor, together with applicable HST in accordance with this Article 4 and Article 4 of Appendix A – General Conditions of the Design and Construction Contract.

4.2 HST

All payments to be made by Project Co to Construction Contractor shall also include applicable HST.

4.3 No Other Entitlement

Construction Contractor shall not be entitled to any payments or compensation under or in connection with this Design and Construction Contract, except for payments made under Section 4.1 of the body of the Design and Construction Contract.

4.4 Applications for Payment

(a) Applications for payment on account may be made monthly as the Design and Construction Work progresses.

(b) Project Co and Construction Contractor agree that for the purpose of calculating payment hereunder and for the amount of any Legislative Holdback under the Design and Construction Contract such determination shall be based only upon the Cost of the Design and Construction Work.

(c) Application for payment by Construction Contractor shall be dated the last day of the agreed monthly payment period and the amount claimed shall be based on the value, proportionate to the Cost of the Design and Construction Work, of the Design and Construction Work performed forming part of the Cost of the Design and Construction Work including Products delivered to the Site at that date (the "**Base Progress Payments**").

(d) Construction Contractor may also submit on a monthly basis a separate application for payment dated the last day of the agreed monthly payment period that states the value of the Design and Construction Work performed with respect to Variation Confirmations or Variation Directives, but only to the extent that:

(i) a corresponding Variation Confirmation or Variation Directive, each as defined in the Project Agreement, is issued and required to be implemented under the Project Agreement; and

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- (ii) the work under such Variation Confirmation or Variation Directive is financed by the Lenders (subject to the agreement of the Lenders in their sole discretion) or, is instead, funded by SMH.
- (e) Applications for payment in respect of Section 4.4(c) of the body of the Design and Construction Contract and, to the extent funded by the Lenders, subject to the agreement of the Lenders in their sole discretion, in respect of Section 4.4(d) of the body of the Design and Construction Contract, shall be submitted by Construction Contractor, on behalf of Project Co to the Lenders' Consultant. The Lenders' Consultant shall be responsible for verifying the application for payment to the Lenders. Applications for payment, to the extent funded by SMH, in respect of Section 4.4(d) of the body of the Design and Construction Contract shall be submitted by Construction Contractor, on behalf of Project Co, to SMH.
- (f) Construction Contractor shall submit to the Lenders' Consultant, at least fourteen (14) days before the first application for payment, a schedule of values for the parts of the Design and Construction Work so as to facilitate a valuation of applications for payment. The schedule of values shall be made out in such form, broken down in such detail and supported by such evidence as Project Co and the Lenders' Consultant may reasonably direct and when accepted by the Lenders' Consultant and Project Co, shall be used as the basis for applications for payment, unless it is found to be in error.
- (g) Claims in applications for payment for Base Progress Payments for Products delivered to the Site but not yet incorporated into the Design and Construction Work shall be supported by such evidence as the Lenders' Consultant may reasonably require to establish the value and delivery of the Products.
- (h) Construction Contractor shall submit to Project Co and the Lenders' Consultant a statement based on the schedule of values, a Workplace Safety & Insurance Board Certificate of Clearance, and an updated cash flow with each application for payment in respect of Section 4.4(c) of the body of the Design and Construction Contract.
- (i) With the second and all subsequent applications for payment, except the final payment and release of holdback applications, Construction Contractor shall submit a Statutory Declaration on CCDC Form 9A.
- (j) Construction Contractor, at the request of Project Co, shall provide the documents referred to in Sections 4.4(g), (h), and (i) of the body of the Design and Construction Contract, along with such other documents as are reasonably required by Project Co, in respect of the applications submitted in accordance with Section 4.4(d) of the body of the Design and Construction Contract.

4.5 Progress Payments

- (a) The Lenders' Consultant will issue to Project Co, Lenders and the Construction Contractor, no later than ten (10) Business Days after the receipt of an application

for payment from Construction Contractor submitted in accordance with Section 4.4(c) of the body of the Design and Construction Contract, a certificate of the progress of the Design and Construction Work in relation to the schedule of values, a copy of which shall be provided to such other entities as identified by Project Co.

Project Co shall not be responsible for any delay in issuing a certificate for payment in respect of or for payment of Base Progress Payments on account of the activities of the Lenders' Consultant and/or the Lenders.

- (b) Payment to Construction Contractor on account of Base Progress Payments shall be made no later than ten (10) Business Days after the date of a certificate for payment issued by the Lenders' Consultant.
- (c) Payment to Construction Contractor on account of the Design and Construction Work performed with regards to a Variation Confirmation or Variation Directive (to the extent a Variation Confirmation or Variation Directive, each as defined in the Project Agreement, is issued and required to be implemented under the Project Agreement) shall be made two (2) Business Days after Project Co's receipt of the funds in respect of such work from SMH or the Lenders, as the case may be.
- (d) Applications for progress payments will continue to be provided to the Lenders' Consultant so long as any amount that has been held back by Project Co pursuant to the Design and Construction Contract for the Design and Construction Work completed prior to the Substantial Completion Date remains unpaid. Notwithstanding anything herein contained, during the pendency of a construction lien registered against the Site, Project Co shall not be required to make any payment to Construction Contractor in excess of the applicable amount released to Project Co under the Lending Agreements.
- (e) Notwithstanding the time periods provided regarding the approval and certification of payment by the Lenders' Consultant in Section 4.5(a) of the body of the Design and Construction Contract and for payment in Section 4.5(b) of the body of the Design and Construction Contract, respectively, the total period of time between receipt of the application for payment by Construction Contractor and payment by Project Co shall be no more than twenty (20) Business Days, except with respect to any amount held back from such payment by Project Co in accordance with the Design and Construction Contract and, subject to Project Co's receipt of funds in respect of the work described in Section 4.5(c) of the body of the Design and Construction Contract.

4.6 Construction Liens

- (a) Notwithstanding anything else in this Article 4, in the event a claim for a construction lien is registered against the Site arising from the performance of the Design and Construction Work, and unless Construction Contractor makes alternative arrangements to bond or otherwise secure the amount of the lien claim

and costs associated therewith satisfactory to Project Co, acting reasonably, or Project Co receives any written notice of lien arising from the performance of the Design and Construction Work, Project Co shall be entitled to withhold such portion of any payment otherwise due to Construction Contractor in an amount Project Co reasonably determines would be required to satisfy the applicable lien claimant and any costs and expenses incurred by Project Co in connection therewith, including such amount on account of costs of the lien claimant such that Project Co may, upon payment of the amount of the lien claim together with such costs into court, obtain an order vacating such lien pursuant to the *Construction Lien Act* (Ontario), until such time as such claim has been dealt with as provided below.

- (b) In the event that a written notice of a construction lien arising from the performance of the Design and Construction Work is received by Project Co, and unless Construction Contractor makes alternative arrangements to bond or otherwise secure the amount of the lien claim and costs associated therewith satisfactory to Project Co acting reasonably, Construction Contractor shall, within ten (10) Business Days, at its sole expense, arrange for the withdrawal or other disposal of the written notice of a lien pursuant to the *Construction Lien Act* (Ontario).
- (c) If a construction lien arising from the performance of the Design and Construction Work is registered against the Site, and unless Construction Contractor makes alternative arrangements to bond or otherwise secure the amount of the lien claim and costs associated therewith satisfactory to Project Co, acting reasonably, Construction Contractor shall, within ten (10) Business Days, at its sole expense, vacate or discharge the lien from title to the Site. If the lien is merely vacated, Construction Contractor shall, if requested, undertake Project Co's defence of any subsequent action commenced in respect of the lien at Construction Contractor's expense.
- (d) If Construction Contractor fails or refuses to vacate or discharge a construction lien or written notice of lien arising from the performance of the Design and Construction Work within the time prescribed above, and unless Construction Contractor makes alternative arrangements to bond or otherwise secure the amount of the lien claim and costs associated therewith satisfactory to Project Co, acting reasonably, Project Co shall, at its option, be entitled to take all steps necessary to vacate and/or discharge the lien, and all costs incurred by Project Co in doing so (including legal fees on a full indemnity basis and any payment which may ultimately be made out of or pursuant to security posted to vacate the lien) shall be for the account of Construction Contractor, and Project Co may deduct such amounts from the amounts otherwise due or owing to Construction Contractor.
- (e) Without limiting any of the foregoing, Construction Contractor shall satisfy all judgments and pay all costs resulting from any construction liens arising from the performance of the Design and Construction Work or any actions brought in

connection with any such liens, or in connection with any other claim or lawsuit brought against Project Co by any person that provided services or materials to the Site which constituted part of the Design and Construction Work.

- (f) The provisions of Sections 4.6(a) through 4.6(e) inclusive, of the body of the Design and Construction Contract, do not apply to construction liens (i) filed by Construction Contractor which are claimed as a result of any default of Project Co to make payments to Construction Contractor in accordance with the terms of the Design and Construction Contract or (ii) filed by any SMH Party, including for greater certainty SMH's own forces or SMH's other contractors, which are claimed as a result of work in relation to the Project.

4.7 Payment of Holdback Upon Substantial Completion

- (a) After the issuance by the Independent Certifier of the Substantial Completion Certificate under Section 24.4 of Appendix A - General Conditions of the Design and Construction Contract, Construction Contractor shall:
 - (i) submit an application for payment of the Legislative Holdback under the Project Agreement;
 - (ii) submit a written request for release of holdback including a declaration that no written notices of lien arising from the performance of the Design and Construction Work have been received by it;
 - (iii) submit a Statutory Declaration CCDC 9A; and
 - (iv) submit an original Workplace Safety & Insurance Board Certificate of Clearance.
- (b) After the later of (i) the receipt of the documents set out in Section 4.7(a) of the body of the Design and Construction Contract, and (ii) the expiration of a period of forty-five (45) days from the date of publication of the certificate of substantial performance of the Works pursuant to the *Construction Lien Act* (Ontario), the Independent Certifier shall issue a certificate for payment of the Legislative Holdback under the Project Agreement.
- (c) Prior to the date of the release of the holdback, Construction Contractor shall have removed from the Site all supplies, waste materials, rubbish and temporary facilities and all personnel except as required to achieve Final Completion or to correct any remaining Minor Deficiencies.
- (d) Subject to the provisions of Section 4.6 of the body of the Design and Construction Contract and the removal of claims for lien preserved or perfected pursuant to the *Construction Lien Act* (Ontario) arising from the performance of the Design and Construction Work, the Legislative Holdback under the Project Agreement authorized by the certificate for payment of the holdback amount is due and payable on the later of: (i) the second Business Day following the receipt

of the certificate for payment of the holdback amount pursuant to Section 4.7(b) of the body of the Design and Construction Contract; or (ii) two (2) Business Days after payment of the applicable Legislative Holdback by SMH pursuant to Section 4.5 of the Project Agreement. For clarity, Project Co shall pay the Construction Contractor the entire amount of the Legislative Holdback under the Project Agreement.

4.8 Completion

- (a) Construction Contractor shall provide As-Built Drawings and specifications, spare parts and shop drawings within thirty (30) days after the Substantial Completion Date.
- (b) Pursuant to Section 24.9 of Appendix A – General Conditions of the Design and Construction Contract, Construction Contractor shall complete all Minor Deficiencies and assign and provide all of the Project deliverables that remain outstanding no later than forty five (45) days from the issuance of the Minor Deficiencies List or such other period as the Independent Certifier may specify in the Minor Deficiencies List.

4.9 Lump Sum Payment

- (a) On the date that is 2 Business Days following the date upon which the Independent Certifier provides SMH and Project Co with written confirmation that the installation and commissioning of all Not-In-Contract Equipment has been completed in accordance with Section 21 of the Project Agreement, Project Co shall pay to Construction Contractor the Not-In-Contract Equipment Fee.
- (b) On the date that is 2 Business Days following the date upon which the Independent Certifier provides SMH and Project Co with written confirmation that the final Transition (including, for greater certainty, the transfer, installation and commissioning of all Existing Equipment) has been completed in accordance with Section 24.14 of the Project Agreement, Project Co shall pay to Construction Contractor the Transition Services Fee.

4.10 Withholding of Payment

If because of climatic or other conditions reasonably beyond the control of Construction Contractor, there are items of work that cannot be performed, payment in full for that portion of the Design and Construction Work which has been performed, as certified by the Independent Certifier, shall not be withheld or delayed by Project Co on account thereof, but Project Co may withhold, until the remaining portion of the Design and Construction Work is finished, only such amount that the Independent Certifier determines is sufficient and reasonable to cover the cost of performing such remaining Design and Construction Work.

4.11 Non-Conforming Works

No payment by Project Co under the Design and Construction Contract nor partial or entire use or occupancy of the Design and Construction Work by Project Co or SMH shall constitute an acceptance of any portion of the Design and Construction Work or Products which are not in accordance with the requirements of the Design and Construction Contract, including the drawings and specifications.

5. CHANGES

The Design and Construction Work, the Guaranteed Price hereunder, the Scheduled Substantial Completion Date and the Scheduled Tower Interim Completion Date, as such terms are applied and interpreted for the purposes of this Design and Construction Contract, are subject to change, adjustment or variation only in accordance with the provisions of the Project Agreement and the Design and Construction Contract, as applicable. For greater certainty, Construction Contractor shall not be entitled to any adjustment or variation to the Design and Construction Work, the Guaranteed Price hereunder, the Scheduled Substantial Completion Date or the Scheduled Tower Interim Completion Date except if and to the extent allowed to Project Co pursuant to the provisions of the Project Agreement and of the Design and Construction Contract, as applicable.

6. INDEPENDENT CERTIFIER

The Construction Contractor acknowledges the appointment and role of the Independent Certifier pursuant to the Project Agreement and agrees to be bound by the decisions, directions and instructions of the Independent Certifier pursuant to those provisions of the Project Agreement and the Design and Construction Contract incorporated herein, as such decisions, directions and instructions apply to the performance of the Design and Construction Work by Construction Contractor.

7. CROSS DEFAULT

A Project Co Construction Event of Default (as defined in the Project Agreement) shall constitute a default by Construction Contractor under the Design and Construction Contract, provided that, for greater certainty, if the Construction Contractor has received a copy of the notice of default provided to Project Co in accordance with Article 10 of the body of the Design and Construction Contract, subject to Section 34.4 of Appendix A – General Conditions of the Design and Construction Contract, Construction Contractor shall not be entitled to any notice of or time period to remedy such Project Co Construction Event of Default.

8. LIMITS ON LIABILITY

8.1 Indirect Losses

- (a) Subject to Section 8.1(b) of the body of the Design and Construction Contract and without prejudice to the Parties' rights in respect of payments provided for herein, the indemnities under the Design and Construction Contract shall not apply and there shall be no right to claim damages for breach of the Design and

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Construction Contract, 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 profits, loss of use, loss of production, loss of business or loss of business opportunity; or
- (iii) is a claim for consequential loss or for indirect loss of any nature suffered or allegedly suffered by either Party,

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

- (b) With respect to the indemnity in Sections 44.1(a)(i), 44.1(a)(ii) and 44.1(a)(iii) of Appendix A – General Conditions of the Design and Construction Contract only, the exceptions in Sections 8.1(a)(ii) and (iii) of the body of the Design and Construction Contract shall not apply as a result of, or in relation to, SMH's loss of use of the Facility and/or the Existing Facilities or a portion thereof, which for the purposes of Sections 44.1(a)(i), 44.1(a)(ii) and 44.1(a)(iii) of Appendix A – General Conditions of the Design and Construction Contract, shall be Direct Losses.

8.2 No Liability in Tort

- (a) Subject to the indemnities provided for herein and in the Project Agreement, SMH, SMH Parties, Project Co, and Project Co Parties shall not be liable in tort to Construction Contractor or any Construction Contractor Party, and neither Construction Contractor nor any Construction Contractor Party shall be liable in tort to Project Co or any Project Co Party in respect of any negligent act or omission of any such person relating to or in connection with the Design and Construction Contract and no such person shall bring such a claim.

8.3 Sole Remedy

- (a) Nothing in the Design and Construction Contract shall prevent or restrict the right of Project Co to seek injunctive relief or a decree of specific performance or other discretionary remedies of a court of competent jurisdiction.
- (b) Notwithstanding any other provision of the Design and Construction Contract, and except to the extent recovered under any of the insurances required pursuant to Schedule 25 – Insurance and Performance Security Requirements of the Design and Construction Contract, neither Party shall be entitled to recover compensation or make a claim under the Design and Construction Contract, or any other agreement in relation to the Project, in respect of any loss that it has incurred (or any failure of the other Party) to the extent that the Party has already been compensated in respect of that loss or failure pursuant to the Design and Construction Contract, or otherwise.

8.4 Maximum Liability

- (a) Subject to Section 8.4(b) of the body of the Design and Construction Contract, the maximum aggregate liability of each Party in respect of all claims under Section 44 of Appendix A – General Conditions of the Design and Construction Contract shall not exceed \$50,000,000. This limit shall be index linked and shall be exclusive of any insurance or performance security proceeds received or which will be received pursuant to performance security or policies maintained in accordance with Schedule 25 – Insurance and Performance Security Requirements of the Design and Construction Contract. This limit shall not apply in cases of wilful misconduct or deliberate acts of wrongdoing.
- (b) Construction Contractor's maximum aggregate liability in respect of all claims under Sections 44.1(a)(i), 44.1(a)(ii) and 44.1(a)(iii) of Appendix A – General Conditions of the Design and Construction Contract shall not exceed \$10,000,000. This limit shall be index linked and shall be exclusive of any insurance or performance security proceeds received or which will be received pursuant to performance security or policies maintained in accordance with Schedule 25 – Insurance and Performance Security Requirements. This limit shall not apply in cases of wilful misconduct or deliberate acts of wrongdoing.
- (c) Nothing in this Section 8.4 of the body of the Design and Construction Contract shall restrict, limit, prejudice or in any other way impair the rights and/or remedies of the Parties under any other provision of the Design and Construction Contract.

9. BONDS

- (a) Construction Contractor shall obtain and deliver to Project Co the Bonds on or before the Financial Close Target Date and shall provide satisfactory evidence with respect thereto to Project Co on or before the Financial Close Target Date. Each Bond shall be properly executed by a Surety or by an agent or an attorney in fact for the Surety, in which latter case, Construction Contractor is required to submit with such Bond a power of attorney to the signatory agent or the attorney in fact executed by the Surety in a form satisfactory to Project Co to evidence the authority of the agent or attorney in fact.
- (b) Such Bonds shall be issued by a duly licensed surety company authorized to transact a business of suretyship in the Province of Ontario and shall be maintained in good standing until the fulfilment of the Design and Construction Contract.

10. GENERAL

10.1 Notices to Parties

All notices, requests, demands, instructions, certificates, consents and other communications (each being a "Notice") required or permitted under this Design and

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Construction Contract shall be in writing (whether or not "written notice" or "notice in writing" is specifically required by the applicable provision of this Design and Construction Contract) and served by sending the same by registered mail, facsimile or by hand, as follows:

If to Construction Contractor:	407 Basaltic Road Concord, Ontario L4K 4W8
	Fax No.: 416-667-8462
	Attn.: John Aquino
If to Project Co:	407 Basaltic Road Concord, Ontario L4K 4W8
	Fax No.: 416-667-8462
	Attn.: John Aquino

10.2 Notice to Independent Certifier and Lenders' Consultant

In addition to the notice requirements set out in Section 10.1 of the body of the Design and Construction Contract, where any Notice is to be provided or submitted to the Independent Certifier or the Lenders' Consultant, it shall be provided or submitted by sending the same by registered mail, facsimile or by hand, as follows:

If to Independent Certifier:	Altus Group Limited 33 Yonge Street, Suite 500 Toronto, ON M5E 1G4
	Fax No: (416) 667-8462
	Attn.: Monica Sechiari, Manager IC Services
Lenders' Consultant	Pelican Woodcliff 100 York Blvd., Suite 608 Richmond Hill, ON L4B 1J8
	Fax No.: 905 889 9950
	Attn.: Ronald R. Mandowsky

10.3 Facsimile

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 comply with this Section 10.3 of the body of the Design and Construction Contract.

10.4 Change of Address

Either Party to this Design and Construction Contract may, from time to time, change any of its contact information set forth in Section 10.1 or 10.2 of the body of the Design and Construction Contract 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.

10.5 Deemed Receipt of Notices

- (a) Subject to Sections 10.5(b), 10.5(c) and 10.5(d) of the body of the Design and Construction Contract:
 - (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 Section 10.
- (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 4:00:00 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.

10.6 Amendments

- (a) This Design and Construction Contract may not be varied, amended or supplemented 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 or other modification, as the case may be, to this Design and Construction Contract.

10.7 Waiver

- (a) No waiver made or given by a Party under or in connection with this Design and Construction Contract 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 Independent Certifier 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.

10.8 Relationship Between the Parties

- (a) The Parties are independent contractors. This Design and Construction Contract is not intended to and does not create or establish between the Parties, or between SMH or Project Co and any Construction Contractor Party, any relationship as partners, joint venturers, employer and employee, master and servant, or (except as provided in this Design and Construction Contract), of principal and agent, and does not create or establish any relationship whatsoever between Project Co or SMH, and any representative or employee of Construction Contractor or the Construction Contractor Parties.
- (b) The Parties further agree that:
 - (i) except as expressly provided in this Design and Construction Contract, 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 Design and Construction Contract, 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 Design and Construction Contract; and
 - (iv) any person which a Party may engage as an agent, employee, subcontractor or otherwise, to perform such Party's obligations under this Design and Construction Contract, 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.

10.9 General Duty to Mitigate

- (a) Project Co and Construction Contractor 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 Design and Construction Contract.

10.10 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 Construction Contractor shall, for all purposes of this Design and Construction Contract, 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, officers, senior management and the Construction Contractor Representative and the Project Co Representative, respectively. For clarity, except as expressly set out to the contrary, a reference in the Design and Construction Contract to the "knowledge of" Project Co or Construction Contractor, shall be construed in a manner consistent with the foregoing sentence.

10.11 Entire Agreement

- (a) Except where provided otherwise in this Design and Construction Contract, this Design and Construction Contract 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 Design and Construction Contract, including the Request for Proposals and the Proposal Submission.

10.12 No Reliance

- (a) Each of the Parties acknowledges that:
 - (i) it has not entered into this Design and Construction Contract 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 Design and Construction Contract or not, except those expressly made, given or repeated in this Design and Construction Contract 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 Design and Construction Contract; and

- (ii) this Section 10.12 shall not apply to any statement, representation or warranty made fraudulently, or to any provision of this Design and Construction Contract which was induced by fraud, for which the remedies available shall be all those available under Applicable Law.

10.13 Severability

- (a) Each provision of this Design and Construction Contract shall be valid and enforceable to the fullest extent permitted by law. If any provision of this Design and Construction Contract 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 Design and Construction Contract. If any such provision of this Design and Construction Contract 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 Design and Construction Contract as near as possible to its original intent and effect.

10.14 Enurement

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

10.15 Governing Law and Jurisdiction

- (a) This Design and Construction Contract, and each of the documents contemplated by or delivered under or in connection with this Design and Construction Contract, 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 27 – 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.

10.16 Cumulative Remedies

- (a) Except as otherwise set forth in this Design and Construction Contract, the rights, powers and remedies of each Party set forth in this Design and Construction Contract 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 Design and Construction Contract at law or in equity.

10.17 Further Assurance

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

10.18 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 Design and Construction Contract.

10.19 Language of Agreement

- (a) Each of the parties acknowledges having requested and being satisfied that this Design and Construction Contract 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, operation 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 Design and Construction Contract shall be in English.

10.20 Proof of Authority

- (a) Project Co and Construction Contractor each reserve the right to require any person executing the Design and Construction Contract on behalf of the other Party to provide proof, in a form acceptable to Project Co or Construction Contractor, as applicable, that they have the requisite authority to execute this Design and Construction Contract on behalf of and to bind Project Co or Construction Contractor, as applicable.

10.21 Counterparts

- (a) This Design and Construction Contract 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 Design and Construction Contract which was so faxed.

10.22 Third Party Beneficiaries

- (a) The provisions of Section 8.2 of the body of the Design and Construction Contract and Sections 5.1(b), 7.1, 7.2(a), 7.3(a), 9.1(c), 11.12(a), 39.6, 39.7, 39.9, 40, and 44.1 of Appendix A – General Conditions of the Design and Construction

Contract and each other provision of the Design and Construction Contract which is to the benefit of a third party are:

- (i) intended for the benefit of each entity and, if set out in the relevant Section, each entity's directors, officers, employees, board appointees, agents and representatives, and shall be enforceable by each of such persons and his or her heirs, executors, administrators and other legal representatives (collectively, the "Third Party Beneficiaries"); and
 - (ii) are in addition to, and not in substitution for, any other rights that the Third Party Beneficiaries may have by contract or otherwise.
- (b) Project Co shall hold the rights and benefits in this Design and Construction Contract which are to the benefit of a Project Co Party in trust for and on behalf of the Third Party Beneficiaries and Project Co hereby accepts such trust and agrees to hold the benefit and enforce performance of such covenants on behalf of the Third Party Beneficiaries.

10.23 Time is of the Essence

- (a) Time is of the essence in this Design and Construction Contract.

11. CONTRACT CANCELLATION FEE

Construction Contractor acknowledges and agrees that there will be no cost associated with the cancellation of this Design and Construction Contract for the purposes of the calculation of the applicable amounts under the provisions of Schedule 23 – Compensation on Termination, of the Design and Construction Contract, other than cancellation charges and other costs associated with the termination of any commitments relating to the Design and Construction Work under this Design and Construction Contract that Construction Contractor makes, enters into or incurs in respect of any such work and that are otherwise payable pursuant to the provisions of Schedule 23 – Compensation on Termination, of the Design and Construction Contract.

12. NOT USED

13. LIQUIDATED DAMAGES

The Parties acknowledge that Liquidated Damages (as defined in the Construction Contractor Support Agreement) may be due under the Construction Contractor Support Agreement. If such Liquidated Damages are not timely paid by Construction Contractor in accordance with the requirements of the Construction Contractor Support Agreement, such failure to pay shall be a Construction Contractor Event of Default under this Design and Construction Contract.

14. PROJECT AGREEMENT

- (a) If (i) Project Co has the right to exercise any discretion, grant or refuse to grant an approval, accept or refuse to accept a request or submission, make any determination or confirm its satisfaction under this Design and Construction Contract in respect of any matter in respect of which SMH has a corresponding right to exercise any discretion, grant or refuse to grant an approval, accept or refuse to accept a request or submission, make any determination or confirm its satisfaction pursuant to the terms of the Project Agreement in respect of the same or substantially the same or similar matter, (ii) SMH has exercised its rights in a particular manner, and (iii) Project Co exercises its discretion, grants or refuses to grant an approval, accepts or refuses to accept a request or submission or makes the relevant determination in a manner that is consistent with the discretion exercised, approval granted or refused, request or submission accepted or refused or determination made or level of satisfaction confirmed by SMH under the Project Agreement, then the Construction Contractor will be bound by, conform with and observe such exercise of discretion, grant or refusal of approval, acceptance or refusal of a request or submission, or determination.
- (b) Notwithstanding any other provision in the Design and Construction Contract, the Construction Contractor acknowledges and agrees as follows:
- (i) the Construction Contractor is bound by the rulings and decisions of the Independent Certifier and the outcome of any dispute resolution proceedings between Project Co and SMH, in respect of the Project Agreement, to the extent and in the manner that Project Co is bound; and
 - (ii) the Construction Contractor is not entitled to greater rights, entitlements or relief (including any indemnification, compensation, damages or other payment of any kind or any extension of time) against Project Co under the Design and Construction Contract than Project Co actually obtains from SMH in respect of the Project Agreement. Without limiting the generality of the foregoing:
 - (A) the liability of Project Co under Section 44.2(a) of Appendix A – General Conditions of the Design and Construction Contract is not greater than the liability of SMH to Project Co under Section 44.2(a) of the Project Agreement, as the case may be;
 - (B) the Construction Contractor shall not be entitled to an extension in the time to complete the Design and Construction Work (including the Scheduled Substantial Completion Date), except if, when and to the extent allowed to Project Co pursuant to the Project Agreement;
 - (C) the Construction Contractor shall not be entitled to an increase in the Guaranteed Price or additional compensation except if and to

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the extent allowed and paid to Project Co pursuant to the provisions of the Project Agreement; and

- (D) the Construction Contractor shall not be entitled to any compensation payable to Project Co under the Project Agreement, specifically in respect of (i) the Debt Service Amount (as defined in the Project Agreement) or any other obligation of Project Co under the Lending Agreements, and (ii) any specific loss, cost or expense incurred by Project Co to which the relevant compensation expressly relates and which is not included any amount claimed by the Construction Contractor.
- (ii) All rights and claims of the Construction Contractor are limited to the rights and claims Project Co can enforce against SMH in respect of the Project Agreement. Every other claim against Project Co to the extent it exceeds the recovery from SMH is hereby waived and released.

15. ENFORCEMENT OF PARALLEL ISSUES

- (a) Project Co will use commercially reasonable efforts to preserve, protect and pursue under the Project Agreement such rights, remedies and relief as may relate to the Design and Construction Work or Construction Contractor's rights or obligations hereunder, including any claim for relief pursuant to Section 14 hereof (a "Parallel Issue") in order to secure a favourable resolution of the Parallel Issue, provided that:
 - (i) Project Co has received written notice from Construction Contractor of the Parallel Issue;
 - (ii) Construction Contractor shall not be entitled to recover from Project Co any Direct Losses or claims arising out of or in connection with Project Co pursuing resolution of a Parallel Issue on Construction Contractor's behalf, except to the extent that Project Co recovers such Direct Losses or claims from SMH under the Project Agreement; and
 - (iii) Construction Contractor shall indemnify Project Co in respect of any Direct Losses arising out of or in connection with Project Co pursuing resolution of a Parallel Issue on Construction Contractor's behalf, including reimbursing Project Co for any deduction from, reduction of or exercise of set-off, compensation or similar right against any amount payable by SMH associated therewith.
- (b) Project Co shall, at the reasonable request of Construction Contractor, pursue the rights, remedies and relief under the Project Agreement described in Section 15(a) of the body of the Design and Construction Contract on behalf of Construction Contractor in accordance with the reasonable direction of Construction Contractor at Construction Contractor's cost and expense, or, alternatively, Project Co may consent to Construction Contractor pursuing such rights, remedies and relief in

the name of Project Co at Construction Contractor's cost and expense, in either case to the extent that the relevant rights, remedies or relief relate to the Design and Construction Work or Construction Contractor's rights and obligations hereunder. For greater certainty, Project Co shall not be obligated to act in accordance with Construction Contractor's instructions or allow Construction Contractor to pursue claims in Project Co's name to the extent that the relevant rights, relief and remedies relate to rights or obligations of Project Co or any Project Co Party in respect of Project related matters other than the Design and Construction Work or Construction Contractor's rights hereunder.

- (c) Project Co shall not enter into any compromise or settlement of a Parallel Issue with SMH which affects in any material respect the Design and Construction Work or the Construction Contractor's rights, obligations, remedies or relief hereunder without first obtaining the prior written consent of Construction Contractor, such consent not to be unreasonably withheld or delayed.
- (d) Where Project Co pursues a Parallel Issue in accordance with this Section 15, Construction Contractor shall be kept informed of Project Co's progress under this Section 15 and shall be given the opportunity to comment on all submissions (written or oral) which are to be put forward by Project Co in accordance with this Section 15.
- (e) If Project Co does not, after having been given written notice in accordance with Section 15(a) of the body of the Design and Construction Contract, take steps to pursue such Parallel Issue within fourteen (14) Business Days or prior to that date being five (5) Business Days prior to the expiry or other extinguishment of Project Co's right to pursue such Parallel Issue, Construction Contractor may, in the name of and on behalf of Project Co, pursue such Parallel Issue itself subject to this Section 15, at its sole cost and expense, and Project Co will (at the sole cost and expense of Construction Contractor) use reasonable efforts to provide assistance, including providing documents, data and information, as Construction Contractor may reasonably request in connection with the pursuit of such Parallel Issue by Construction Contractor.
- (f) Construction Contractor shall at its own cost and within the time frame contemplated by any relevant dispute resolution procedure or reasonably set by Project Co use commercially reasonable efforts to provide assistance, including providing documents, data and information, as Project Co may reasonably request in connection with any dispute or negotiations arising under this Design and Construction Contract.
- (g) Any claims in respect of a Parallel Issue and any recoveries obtained by Project Co or Construction Contractor in respect of any Parallel Issue under the Project Agreement shall be subject to the provisions of this Section 15 in respect of relief under Section 14 hereof.

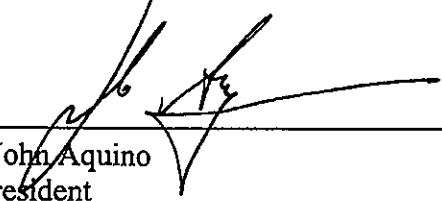
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- (h) If SMH asserts a claim against Project Co which relates to the obligations of the Construction Contractor hereunder, Project Co will, at Construction Contractor's cost, defend the claim in accordance with the reasonable instructions of Construction Contractor and Construction Contractor will provide assistance to Project Co in defending that claim. Project Co may, on terms of mutually agreed between the Parties permit Construction Contractor to challenge or defend SMH claim directly. As required by Project Co, Construction Contractor will work cooperatively with Project Co in a defense of a SMH claim.

[SIGNATURE PAGES IMMEDIATELY TO FOLLOW]

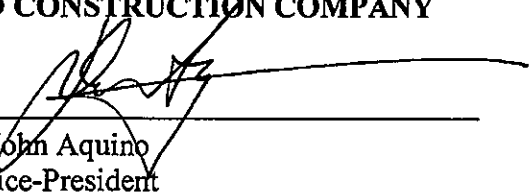
IN WITNESS WHEREOF the Parties have executed this Design and Construction Contract as of the date first above written.

2442931 ONTARIO INC.

Per: 
Name: John Aquino
Title: President

Per: _____
Name:
Title:

BONDFIELD CONSTRUCTION COMPANY LIMITED

Per: 
Name: John Aquino
Title: Vice-President

Per: _____
Name:
Title:

I/We have authority to bind the corporation

APPENDIX A
GENERAL CONDITIONS OF THE DESIGN AND
CONSTRUCTION CONTRACT

THE ST. MICHAEL'S HOSPITAL
REDEVELOPMENT PROJECT

CONFIDENTIAL

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APPENDIX "A"**GENERAL CONDITIONS TO THE DESIGN AND CONSTRUCTION CONTRACT****1. DEFINITIONS AND INTERPRETATION****1.1 Definitions and Interpretation**

- (a) The Design and Construction Contract shall be interpreted in accordance with Schedule 1 – Definitions and Interpretation.
- (b) The documents comprising the Design and Construction Contract are complementary and what is called for by any one of them shall be interpreted as if called for by all, except in the event of ambiguities, conflicts or inconsistencies, in which case Section 1.2 shall apply.
- (c) Except for those parts of Construction Contractor's proposal which are incorporated by reference into the Design and Construction Contract by the Construction Contractor Proposal Extracts, on Financial Close the Request for Proposals and Construction Contractor's proposal shall be superseded entirely by the Design and Construction Contract and rendered null and void, and shall not be relied upon or used by Construction Contractor, Project Co or anyone else (including anyone pursuant to Schedule 27 – Dispute Resolution Procedure or any arbitral body or any court) in any way to interpret or qualify the scope of the Design and Construction Work, any obligations or liabilities of Construction Contractor, or anything else contained in the Design and Construction Contract.
- (d) Unless it is specifically provided that a consent, approval or satisfaction is in the sole discretion of Project Co, no consent, approval or satisfaction of Project Co or the SMH Representative shall be unreasonably withheld or delayed.
- (e) Unless it is specifically provided that a consent, approval or satisfaction is in the sole discretion of Construction Contractor, no consent, approval or satisfaction of Construction Contractor or the Construction Contractor Representative shall be unreasonably withheld or delayed.
- (f) The organization of the Output Specifications into divisions, sections and parts shall not control Construction Contractor in dividing the Design and Construction Work among the Construction Contractor Parties or in establishing the extent of the Design and Construction Work to be performed by a trade.

1.2 Conflict of Terms

- (a) In the event of ambiguities, conflicts or inconsistencies between or among any of the provisions of the Design and Construction Contract, the provisions shall govern in the following order of precedence with each taking precedence over those listed subsequently:
- (i) the provisions of amendments in writing to the Design and Construction Contract signed by the Parties and Variation Confirmations shall govern and take precedence only over those specific provisions of the Design and Construction Contract expressly amended thereby;
 - (ii) any provision establishing a higher standard of safety, reliability, durability, performance or service shall take precedence over a provision establishing a lower standard of safety, reliability, durability, performance or service;
 - (iii) the body of the Design and Construction Contract;
 - (iv) Appendix A – General Conditions of the Design and Construction Contract;
 - (v) Schedule 1 – Definitions and Interpretation;
 - (vi) Schedule 27 – Dispute Resolution Procedure;
 - (vii) Part 4 of Schedule 15 – Output Specifications;
 - (viii) Schedule 15 – Output Specifications (excluding Part 4);
 - (ix) Schedule 25 – Insurance and Performance Security Requirements;
 - (x) Schedule 22 – Variation Procedure;
 - (xi) Schedule 10 – Review Procedure;
 - (xii) Schedule 14 – Outline Commissioning Program;
 - (xiii) Schedule 11 – Design Quality Plan and Construction Quality Plan;
 - (xiv) Schedule 23 – Compensation on Termination;
 - (xv) Schedule 26 – Record Provisions;
 - (xvi) the other Schedules in the order in which they are listed in Section 1.1(b) of the body of the Design and Construction Contract; and
 - (xvii) Schedule 13 – Construction Contractor Proposal Extracts
- (b) Subject to Section 1.2(a), if the ambiguity, conflict or inconsistency is between a provision of general application and a provision that applies only to a specific part of the

Design and Construction Work, the provision that applies to the specific part of the Design and Construction Work shall govern for that specific part of the Design and Construction Work.

- (c) If any ambiguity, conflict or inconsistency is not readily resolved by the foregoing provisions of this Section 1.2, then Construction Contractor or Project Co, upon discovery of same, shall immediately give notice to the SMH Representative. The SMH Representative shall, within 10 Business Days after such notice, make a determination of which provision governs and give notice of such determination, in writing, to Project Co.
- (d) Project Co and Construction Contractor shall comply with the determination of the SMH Representative pursuant to this Section 1.2 unless Project Co or Construction Contractor disputes the decision of the SMH Representative in which event such Dispute may be referred for resolution in accordance with Schedule 27 – Dispute Resolution Procedure.

1.3 Not Used.

1.4 Legal Requirements

- (a) Whenever standards of Applicable Law differ, the most stringent standards shall govern.

2. NOT USED

3. NOT USED

4. PAYMENT

4.1 General

- (a) Subject to the provisions of the Design and Construction Contract (including, for clarity Section 3.1(b) of the body of the Design and Construction Contract) and in accordance with and subject to Applicable Law respecting holdbacks, Project Co shall make the payments set out in this Article 4 and as also provided for in Article 4 of the body of the Design and Construction Contract.
- (b) For the purpose of the Design and Construction Contract, payments made by electronic transfer shall be deemed to have been made on the day and at the time the electronic transfer is initiated, as confirmed by the initiating bank by a confirmation setting out the transfer number and the other details of the transfer.

4.2 Not Used.

4.3 Not Used.

4.4 Not Used.

4.5 Payment of Legislative Holdback

- (a) Without derogating from Project Co's obligation to pay Construction Contractor, and Construction Contractor's right to receive, the Legislative Holdback in accordance with the Design and Construction Contract, the Construction Contractor acknowledges that payment of the Legislative Holdback by SMH to Project Co under the Project Agreement is subject to a direction which has been given by Project Co. Notwithstanding such acknowledgement and subject to Section 4.9 of this Appendix A – General Conditions of the Design and Construction Contract and Article 4 of the body of the Design and Construction Contract, Project Co covenants and agrees with Construction Contractor to pay to Construction Contractor the Legislative Holdback on the date provided for in Section 4.7(d) of the body of the Design and Construction Contract. Construction Contractor acknowledges and agrees that payment by Project Co of the Legislative Holdback in accordance with this Section 4.5 constitutes payment by Project Co to Construction Contractor in satisfaction of Project Co's obligation to pay the Legislative Holdback to Construction Contractor under the Design and Construction Contract and in satisfaction of any trust obligation of Project Co with respect to such payments under Section 7 of the CLA pursuant to Section 10 of the CLA.
- (b) After the issuance of the Substantial Completion Certificate under Section 24.4 of this Appendix A – General Conditions of the Design and Construction Contract, Construction Contractor shall:
- (i) submit an application for payment of the Legislative Holdback amount;
 - (ii) submit a written request for release of the Legislative Holdback, including a declaration that no written notice of lien arising in relation to the performance of the Design and Construction Work has been received by it that has not been withdrawn by the lien claimant;
 - (iii) submit a Statutory Declaration CCDC Form 9A (2001); and
 - (iv) submit an original WSIB Certificate of Clearance
- (c) After the later of (i) the receipt of the documents set out in Section 4.5(b), and (ii) the expiration of a period of 45 days from the date of publication of the certificate of substantial performance pursuant to the CLA, the Independent Certifier shall issue a certificate for payment of the Legislative Holdback.
- (d) Prior to the date of the release of the holdback, Construction Contractor shall have removed from the Site, the Facility and the Existing Facilities all supplies, waste materials, rubbish and temporary facilities and all personnel except as required to achieve Final Completion or to correct any remaining Minor Deficiencies.
- (e) Subject to the provisions of Section 17.3 of this Appendix A – General Conditions of the Design and Construction Contract and the removal of claims for lien preserved or perfected pursuant to the CLA arising in relation to the performance of the Design and Construction Work, the Legislative Holdback amount authorized by the certificate for payment of the Legislative Holdback amount is due and payable on the date provided for in Section 4.7(d) of the body of the Design and Construction Contract.

4.6 Completion Holdback and Tower Interim Completion Holdback

- (a) The Tower Interim Completion Holdback may be reduced from time to time as a result of such actions by Construction Contractor, as confirmed by the Independent Certifier, in accordance with the terms and conditions of the Design and Construction Contract. To the extent the Tower Interim Completion Holdback is reduced from time to time, Project Co, pursuant to the Project Agreement, directs SMH to pay the amount of any Tower Interim Completion Holdback reduction, together with applicable HST, to the Lenders' Agent or as the Lenders' Agent may direct, as security for the Financing. Pursuant to the Project Agreement, SMH agrees to pay the Tower Interim Completion Holdback reductions as directed by Project Co and shall not accept any redirection without the consent of the Lenders' Agent. Construction Contractor acknowledges and agrees that payment by SMH of the Tower Interim Completion Holdback reductions in accordance with Section 4.6(a) of the Project Agreement as Project Co may direct constitutes payment by SMH to Project Co in satisfaction of SMH's obligation to pay the Tower Interim Completion Holdback reductions to Project Co under the Project Agreement and in satisfaction of any trust obligation of SMH with respect to such payments under Section 7 of the CLA pursuant to Section 10 of the CLA. Notwithstanding the acknowledgement in this Section 4.6(a) by the Construction Contractor or any other term in the Design and Construction Contract, Project Co shall remain liable to pay Construction Contractor for the completion of the Phase Minor Deficiencies and Tower Interim Completion Minor Deficiencies. Project Co shall pay Construction Contractor as the Tower Interim Completion Holdback is reduced pursuant to Section 4.6(a) and Section 23B.10 of the Project Agreement and Project Co shall pay Construction Contractor within two (2) Business Days of the applicable reductions of the Tower Interim Completion Holdback under Section 4.6 and Section 23B.10 of the Project Agreement. As the Phase Minor Deficiencies and Tower Interim Completion Minor Deficiencies are completed, and the Tower Interim Completion Holdback is reduced, Construction Contractor shall be paid by Project Co for the entire amount of Tower Interim Completion Holdback reduction under the Project Agreement.
- (b) The Completion Holdback may be reduced from time to time as a result of such actions by Construction Contractor, as confirmed by the Independent Certifier, in accordance with the terms and conditions of the Design and Construction Contract. To the extent the Completion Holdback is reduced from time to time, Project Co, pursuant to the Project Agreement, directs SMH to pay the amount of any Completion Holdback reduction, together with applicable HST, to the Lenders' Agent or as the Lenders' Agent may direct, as security for the Financing. Pursuant to the Project Agreement, SMH agrees to pay the Completion Holdback reductions as directed by Project Co and shall not accept any redirection without the consent of the Lenders' Agent. Construction Contractor acknowledges and agrees that payment by SMH of the Completion Holdback reductions in accordance with Section 4.6(b) of the Project Agreement as Project Co may direct constitutes payment by SMH to Project Co in satisfaction of SMH's obligation to pay the Completion Holdback reductions to Project Co under the Project Agreement and in satisfaction of any trust obligation of SMH with respect to such payments under Section 7 of the CLA pursuant to Section 10 of the CLA. Notwithstanding the acknowledgement in this Section 4.6(b) by the Construction Contractor or any other term in the Design and

Construction Contract, Project Co shall remain liable to pay Construction Contractor for the completion of the Phase Minor Deficiencies and Minor Deficiencies. Project Co shall pay Construction Contractor as the Completion Holdback is reduced pursuant to Section 4.6(b) and Section 24.10 of the Project Agreement and Project Co shall pay Construction Contractor within two (2) Business Days of the applicable reductions of the Completion Holdback under Section 4.6 and Section 24.10 of the Project Agreement. As Phase Minor Deficiencies and Minor Deficiencies are completed, and the Completion Holdback is reduced, Construction Contractor shall be paid by Project Co for the entire amount of Completion Holdback reduction under the Project Agreement.

4.7 Not Used.

4.8 Not Used.

4.9 Compensation on Termination

- (a) If the Design and Construction Contract is terminated pursuant to Sections 34.3(a), 35.2(a)(ii), 36.1, 36.2 or 36.3 of this Appendix A – General Conditions of the Design and Construction Contract, then:
- (i) Schedule 23 - Compensation on Termination shall apply and Project Co shall pay Construction Contractor any applicable compensation on termination; and
 - (ii) The provisions of Article 4 of the body of the Design and Construction Contract and Article 4 of Appendix A – General Conditions of the Design and Construction Contract relating to Project Co's payment obligations shall no longer apply.
- (b) Pursuant to the Project Agreement, Project Co directed SMH to make any Compensation Payment to the Lenders' Agent, or as the Lenders' Agent may direct, as security for the Financing. Pursuant to the Project Agreement, SMH shall pay the Compensation Payment as directed by the Lenders' Agent and shall not accept any redirection without the consent of Lenders' Agent. SMH will pay the Compensation Payment in accordance with the provisions of Schedule 23 – Compensation on Termination of the Project Agreement. The Construction Contractor acknowledges and agrees that payment by SMH of the Compensation Payment to the Lenders' Agent in accordance with Section 4.9 of the Project Agreement constitutes payment by Project Co to the Construction Contractor in satisfaction of Project Co's obligation to pay the Compensation Payment to Construction Contractor under the Design and Construction Contract and in satisfaction of any trust obligation of Project Co with respect to such payments under Section 7 of the CLA pursuant to Section 10 of the CLA, provided that any amounts in excess of the Senior Debt Amount (as defined in the Project Agreement) and the Senior Debt Makewhole (as defined in the Project Agreement), shall be paid to the Construction Contractor.

4.10 Payment Due under Insurance Policies

- (a) Construction Contractor acknowledges that in the event of loss or damage occurring where payment becomes due under the property and boiler insurance policies, payments shall be made in accordance with the provisions of the Insurance Trust Agreement.

4.11 Not Used.

4.12 Set-Off

- (a) The Parties agree that their rights of set-off at law or in equity are limited as follows:
- (i) Project Co may set off against any amounts otherwise due to Construction Contractor pursuant to the terms of the Design and Construction Contract, any amounts (including, without limitation, any amounts payable in accordance with Article 44 of this Appendix A – General Conditions to the Design and Construction Contract) which are due to Project Co by Construction Contractor pursuant to the terms of the Design and Construction Contract; and
 - (ii) Construction Contractor may not set off against any amounts otherwise due to Project Co pursuant to the terms of the Design and Construction Contract and may not set off any amounts payable by Construction Contractor to Project Co in respect of Liquidated Damages pursuant to the terms of the Construction Contractor Support Agreement.

4.13 Effect of Payment

- (a) Subject to Section 38.2 of this Appendix A – General Conditions of the Design and Construction Contract, no payment hereunder shall be construed as an acceptance or approval of incomplete, defective or improper performance by Construction Contractor of any of its obligations under the Design and Construction Contract, nor shall it operate to relieve Construction Contractor from the performance of any of its obligations under the Design and Construction Contract which have not been performed.

4.14 No Other Entitlement

- (a) Construction Contractor shall not be entitled to any payments, compensation, rights, remedies, benefits or entitlements under or in connection with the Design and Construction Contract, except as specifically and expressly set out in the Design and Construction Contract.

4.15 Taxes

- (a) All amounts specified in the Design and Construction Contract, including, for clarity, any compensation payable on termination, are expressed exclusive of any Taxes payable pursuant to Applicable Law by Project Co. For clarity, Project Co shall not be required to pay any interest and/or penalties that are imposed on or assessed against Construction Contractor or any Construction Contractor Party for non-compliance with Applicable Law. If Construction Contractor is required by Applicable Law to collect any such Taxes

from Project Co, Project Co shall pay such Tax to Construction Contractor simultaneously with the amount to which such applicable Tax relates or applies.

- (b) Project Co shall pay, or cause to be paid, when due and payable, all property taxes or payments in lieu of property taxes that are assessed in respect of ownership or use of the Site, the Facility or the Existing Facilities.
- (c) Project Co shall pay all applicable HST properly payable in accordance with the *Excise Tax Act* (Canada) by Project Co upon and in connection with payments by Project Co to Construction Contractor under the Design and Construction Contract.

4.16 Changes in Scope of Taxation

- (a) If, as a result of a Change in Law, the application of Taxes under Part IX of the *Excise Tax Act* (Canada) or any provincial sales tax legislation changes with respect to the provision of any goods or services by Construction Contractor in connection with the performance of the Design and Construction Work, Project Co and Construction Contractor agree to co-operate to determine how such change affects their respective obligations under this Design and Construction Contract.

4.17 Information and Assistance Provided by Construction Contractor

- (a) Construction Contractor shall, at Project Co's request and cost, assist Project Co and SMH in applying for and obtaining all remissions and credits of Taxes to which Project Co or SMH, as applicable, is entitled, provided that to the extent that Construction Contractor is assisting Project Co or SMH as a result of a request or requirement on the part of SMH under the Project Agreement, Construction Contractor shall, in accordance with Section 14 of the body of the Design and Construction Contract, be compensated for its costs only to the extent that SMH compensates Project Co.
- (b) Construction Contractor acknowledges that pursuant to Section 4.17(b) of the Project Agreement, SMH may apply for a global or general exemption, waiver, remission or refund of some or all Taxes which may otherwise be applicable in relation to the Project Agreement. Construction Contractor shall, at Project Co's cost (subject to Section 14 of the body of the Design and Construction Contract), assist SMH in making any applications for such global or general exemption, waiver, remission or refund and shall provide SMH with such documentation as SMH may reasonably require to support such application and, in any event, shall provide such consent as SMH may require. Any exemption, waiver, remission, refund or other recovery of Taxes obtained by SMH through such application shall accrue to the sole benefit of SMH.
- (c) Construction Contractor will provide Project Co or, at Project Co's request, SMH, with any information reasonably requested by Project Co or SMH from time to time in relation to any Taxes, (as defined herein and in the Project Agreement, as the case may be), chargeable in accordance with the Design and Construction Contract or the Project Agreement and payable by Project Co to Construction Contractor or SMH to Project Co from time to time.

4.18 Residency – *Income Tax Act* (Canada)

- (a) Construction Contractor shall not undertake any action or transaction that, if undertaken, would cause or result in Construction Contractor becoming a Non-Resident without Project Co's prior written consent, which consent may be withheld in Project Co's sole discretion.

4.19 Taxes – General

- (a) Construction Contractor shall not, without the prior written consent of Project Co (which consent may be withheld in its sole discretion), undertake any action or transaction that, if undertaken, would cause Project Co or SMH to have (or result in Project Co or SMH having) any obligation to deduct, withhold or remit any Taxes (as defined herein and in the Project Agreement, as the case may be), that are required by Applicable Law to be deducted, withheld or remitted from any amounts paid or credited to Construction Contractor or any Construction Contractor Party under the Design and Construction Contract or under any other Ancillary Document.

4.20 Taxes – Indemnity

- (a) If (i) Construction Contractor becomes a Non-Resident, or (ii) Project Co or SMH is or becomes required by Applicable Law to deduct or withhold any amount in respect of Taxes (as defined herein and in the Project Agreement, as the case may be) on or in respect of any amounts paid or credited to Construction Contractor or a Construction Contractor Party by Project Co or SMH under the Design and Construction Contract, the Project Agreement, or under any of the Project Documents, then Project Co shall be entitled to make any applicable deductions or withholdings required by Applicable Law from any amount paid or credited or to be paid or credited to Construction Contractor or a Construction Contractor Party on or after the date on which (A) Construction Contractor or the Construction Contractor Party becomes a Non-Resident and at all times while it remains a Non-Resident; or (B) Project Co or SMH is required by Applicable Law to deduct or withhold amounts in respect of any such amounts, in each case, in respect of all Taxes that are required by Applicable Law to be deducted or withheld from amounts paid or credited to a Non-Resident or otherwise as required by Applicable Law; and all amounts paid or credited by Project Co under the Design and Construction Contract or under any other Ancillary Document to Construction Contractor or a Construction Contractor Party shall be paid or credited net of such deductions or withholdings.
- (b) If (i) Construction Contractor becomes a Non-Resident, or (ii) Project Co or SMH is or becomes required by Applicable Law to deduct or withhold any amount in respect of Taxes (as defined herein and in the Project Agreement, as the case may be) on or in respect of any amounts paid or credited to Construction Contractor or a Construction Contractor Party by Project Co or SMH under the Design and Construction Contract, the Project Agreement, or under any of the Project Documents, Construction Contractor shall, in each case, indemnify and hold harmless Project Co for (A) the full amount of all Taxes (as defined herein and in the Project Agreement, as the case may be) ("**Indemnifiable Taxes**") that arise, are imposed on or are required to be paid by Project

Co or SMH in respect of any amounts paid or credited by Project Co or SMH to Construction Contractor or any Construction Contractor Party under the Design and Construction Contract, the Project Agreement or under any other Ancillary Document as a result of either of the foregoing items less any amount withheld or deducted by Project Co or SMH in respect of such Taxes, and (B) any liability payable or incurred in connection with Indemnifiable Taxes (including penalties, interest and reasonable expenses associated with Tax compliance, reporting and contesting such liability for Indemnifiable Taxes, including reasonable professional expenses payable or incurred in connection therewith) arising from or with respect to Indemnifiable Taxes, whether or not they were correctly or legally asserted (“**Associated Liabilities**”). Payment under this indemnification shall be made within 30 days from the date Project Co makes written demand for it. A certificate containing reasonable detail as to the amount of Indemnifiable Taxes and Associated Liabilities submitted to Construction Contractor by Project Co shall be conclusive evidence, absent manifest error, of the amount due from Construction Contractor to Project Co. Project Co shall be entitled to exercise its rights of set-off under Section 4.12 against any amounts owing under this indemnification.

5. SCOPE OF AGREEMENT

5.1 Scope of Agreement

- (a) Construction Contractor shall undertake the Project and perform the Design and Construction Work in accordance with and subject to the provisions of the Design and Construction Contract.
- (b) Construction Contractor shall exercise its rights and perform its obligations at its own cost and risk without recourse to Project Co or SMH, except as otherwise provided in the Design and Construction Contract. Construction Contractor shall not have recourse to any Government Entity with respect to the subject matter of the Design and Construction Contract.

6. NOT USED

7. BACKGROUND INFORMATION

7.1 No Liability

- (a) Except as expressly provided in Sections 7.4, 18.2 and 18.3 of this Appendix A – General Conditions of the Design and Construction Contract, none of Project Co, SMH, any Project Co Party, any SMH Party or any Government Entity shall be liable to Construction Contractor or any Construction Contractor Party for, and Construction Contractor or any Construction Contractor Party shall not seek to recover from Project Co, SMH, Project Co Party, any SMH Party or any Government Entity, any damages, losses, costs, liabilities or expenses which may arise (whether in contract, tort or otherwise) from the adoption, use or application of the Background Information by, or on behalf of, Construction Contractor or any Construction Contractor Party.

7.2 No Warranty

- (a) Except as expressly provided in Sections 7.4, 18.2 and 18.3 of this Appendix A – General Conditions of the Design and Construction Contract:
- (i) none of Project Co, SMH or any Government Entity gives any warranty or undertaking of whatever nature in respect of the Background Information and, specifically (but without limitation), none of Project Co, any Project Co Party, SMH, any SMH Party or any Government Entity warrants that the Background Information represents all of the information in its possession or power (either during the conduct of the procurement process for the Project or at the time of execution and delivery of the Design and Construction Contract) relevant or material to or in connection with the Project or the obligations of Construction Contractor under the Design and Construction Contract or under any of the Project Documents; and
 - (ii) none of Project Co, SMH or any Government Entity shall be liable to Construction Contractor or any Construction Contractor Party in respect of any failure, whether before, on or after the execution and delivery of the Design and Construction Contract:
 - (A) to disclose or make available to Construction Contractor or any Construction Contractor Party any information, documents or data;
 - (B) to review or update the Background Information; or
 - (C) to inform Construction Contractor or any Construction Contractor Party of any inaccuracy, error, omission, defect or inadequacy in the Background Information.

7.3 No Claims

- (a) Construction Contractor acknowledges and confirms that:
- (i) it has conducted its own analysis and review of the Background Information and has, before the execution and delivery of the Design and Construction Contract, satisfied itself as to the accuracy, completeness and fitness for purpose of any such Background Information upon which it places reliance; and
 - (ii) except as expressly provided in Sections 7.4, 18.2 and 18.3 of this Appendix A – General Conditions of the Design and Construction Contract, it shall not be entitled to and shall not, and shall ensure that no Construction Contractor Party shall, make any claim against Project Co, any Project Co Party, SMH, any SMH Party or any Government Entity (whether in contract, tort or otherwise), including, without limitation, any claim in damages, for extensions of time or for additional payments under the Design and Construction Contract on the grounds:
 - (A) of any misunderstanding or misapprehension in respect of the Background Information; or

(B) that the Background Information was incorrect or insufficient,

nor shall Construction Contractor be relieved from any of its obligations under the Design and Construction Contract on any such ground.

7.4 Technical Reports

- (a) Project Co agrees that, if at the date of the Design and Construction Contract, except as disclosed in any Background Information or as otherwise disclosed by SMH, any SMH Party, Project Co, any Project Co Party, or known by Construction Contractor or any Construction Contractor Party, any of the information in the Technical Reports is, to the actual knowledge of SMH, incorrect or there is relevant information in the possession or control of SMH that would make any of the information in the Technical Reports incorrect, then, to the extent that such incorrect information materially adversely interferes with Construction Contractor's ability to perform the Design and Construction Work or materially adversely affects Construction Contractor's cost of performing the Design and Construction Work, such incorrect information shall, subject to and in accordance with Schedule 22 – Variation Procedure, result in a Variation.
- (b) For the purposes of Section 7.4(a), "to the actual knowledge of SMH" means to the actual knowledge of the Executive Vice President and Chief Administrative Officer or the Vice President and Chief Planning Officer.

8. PROJECT DOCUMENTS

8.1 Project Documents

- (a) Construction Contractor shall perform its obligations under, and observe all of the provisions of, each of the Project Documents to which it is a party, and shall ensure that each Construction Contractor Party shall perform its obligations under, and observe all of the provisions of, each of the Project Documents to which such Construction Contractor Party is a party, so as to ensure that other parties to such Project Documents shall not be entitled to terminate same. In the event that Construction Contractor receives a notice of default under any of the Project Documents, it shall promptly, and, in any event, no later than 2 Business Days after receipt thereof, deliver a copy of such notice of default to Project Co.

8.2 Ancillary Documents

- (a) Construction Contractor shall not:
 - (i) terminate or agree to the termination of all or part of any Ancillary Document, except pursuant to Sections 47.3 and 48.2 of this Appendix A – General Conditions of the Design and Construction Contract or otherwise to prevent or cure a Construction Contractor Event of Default (provided that commercially reasonable alternative measures would not prevent or cure such Construction Contractor Event of Default);

- (ii) make or agree to any amendment, restatement or other modification or waive or exercise any of its rights under any Ancillary Document that materially adversely affects (i) Construction Contractor's ability to perform its obligations under the Design and Construction Contract, or (ii) Project Co's ability to perform its obligations under the Project Agreement or that has the effect of increasing any liability of Project Co or SMH, 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 Ancillary Document, if any such breach (or waiver or lapse) would materially adversely affect (i) Construction Contractor's ability to perform its obligations under the Design and Construction Contract, or (ii) Project Co's ability to perform its obligations under the Project Agreement or that have the effect of increasing any liability of Project Co or SMH, 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 Ancillary Document, except in the circumstances referenced in Section 8.2(a)(i),

without the prior written consent of Project Co (or SMH, as applicable), not to be unreasonably withheld or delayed, provided that, where consent is requested pursuant to Section 8.2(a)(i) or 8.2(a)(iv), such consent shall not be withheld, and shall be provided within a reasonable time, where the relevant matter referred to in Section 8.2(a)(i) or 8.2(a)(iv) will not materially adversely affect (i) Construction Contractor's ability to perform its obligations under the Design and Construction Contract, or (ii) Project Co's ability to perform its obligations under the Project Agreement or have the effect of increasing any liability of Project Co or SMH, whether actual or potential. In the event of termination or agreement to the termination of all or part of any Ancillary Document as described in Section 8.2(a)(i), or the entering into of any agreement replacing all or part of any Ancillary Document as described in Section 8.2(a)(iv), Construction Contractor shall, to the extent applicable, comply with all provisions herein relating to changes in Subcontractors, including Section 47.3.

- (b) Upon the written request of SMH or the SMH Representative, Construction Contractor will deliver or cause to be delivered to SMH or the SMH Representative a copy of any notices delivered or received by Construction Contractor under any of the Ancillary Documents.

9. PROJECT CO RESPONSIBILITIES

9.1 General

- (a) Project Co shall, at its own cost and risk:
 - (i) perform all of its obligations under, and observe all provisions of, the Design and Construction Contract in compliance with Applicable Law;
 - (ii) Not Used;
 - (iii) comply with all Permits, Licences, Approvals and Agreements in accordance with their terms; and
 - (iv) cooperate with Construction Contractor in the fulfillment of the purposes and intent of the Design and Construction Contract, provided, however, that Project Co shall not be under any obligation to perform any of Construction Contractor's obligations under the Design and Construction Contract.
- (b) Project Co shall, and shall cause all Project Co Parties to, take reasonable steps to minimize undue interference with the provision of the Design and Construction Work by Construction Contractor or any Construction Contractor Party.
- (c) Nothing in the Design and Construction Contract shall in any way fetter the right, authority and discretion of SMH or any Government Entity in fulfilling its statutory or other functions under Applicable Law, and Construction Contractor understands and agrees that nothing in the Design and Construction Contract shall preclude SMH's board of directors from performing, discharging or exercising its duties, responsibilities, and powers under Applicable Law. Construction Contractor further agrees that it shall comply, and shall cause all relevant Construction Contractor Parties to comply, with all written directions issued by or on behalf of SMH's board of directors from time to time subject to Section 29.1(b) of this Appendix A – General Conditions of the Design and Construction Contract.

10. CONSTRUCTION CONTRACTOR RESPONSIBILITIES – GENERAL

10.1 Other Business

- (a) Not Used.

10.2 Complete and Operational Facility

- (a) Construction Contractor shall design, engineer, construct and commission the Facility so as to provide SMH with a complete and operational Facility in accordance with the Output Specifications and the Construction Contractor Proposal Extracts, all in accordance with and subject to the terms of the Design and Construction Contract.

10.3 General Responsibilities and Standards

- (a) Construction Contractor shall, at its own cost and risk, perform and complete the Design and Construction Work:
- (i) in accordance with the Design and Construction Work Schedule and, in this regard, shall commence the Design and Construction Work no later than the day following Financial Close and, subject to adjustment as provided for in the Design and Construction Contract, (A) achieve each Phase Completion by the applicable Scheduled Phase Completion Date; (B) achieve Tower Interim Completion by the Scheduled Tower Interim Completion Date; (C) achieve Substantial Completion by the Scheduled Substantial Completion Date; and (D) achieve Final Completion by the Scheduled Final Completion Date;
 - (ii) in compliance with Applicable Law;
 - (iii) so as to satisfy the Output Specifications;
 - (iv) in compliance with all Permits, Licences, Approvals and Agreements and so as to preserve the existence and continued effectiveness of any such Permits, Licences, Approvals and Agreements;
 - (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 hospital facilities 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 the Design and Construction Contract, in a manner which will not impair the ability of Project Co, SMH, any of the SMH Parties and any of the Project Co Parties or any Government Entity to comply with Applicable Law; and
 - (ix) in accordance with all other terms of the Design and Construction Contract.
- (b) Construction Contractor shall cooperate with Project Co and SMH in the fulfillment of the purposes and intent of the Design and Construction Contract, provided however that Construction Contractor shall not be under any obligation to perform any of Project Co's obligations under the Design and Construction Contract.

11. CONSTRUCTION CONTRACTOR RESPONSIBILITIES – DESIGN AND CONSTRUCTION

11.1 Development of Design

- (a) Construction Contractor shall, at its own cost, develop and complete the design of the Facility and all Design Data in accordance with the requirements of the Design and Construction Contract, including Schedule 10 – Review Procedure and this Section 11.1.
- (b) The further development of the design and the process by which it is progressed must fully comply with the requirements of the Design and Construction Contract.
- (c) The Parties agree that Appendix A to Schedule 10 – Review Procedure is an initial list of Design Data and other items that will require design review, which Design Data and other items shall include design, procurement and construction documentation (to a scale required by the SMH Design Team) for each of the following:
 - (i) 50%, 75% and 100% design development documentation, being design development drawings, reports, schedules and specifications progressed from the date of the Design and Construction Contract with extensive user group input, showing all architectural, engineering and landscape design information sufficient to allow for the development of working drawings (the “**Design Development Submittals**”);
 - (ii) 50% and 100% working drawing documentation, being construction drawings, reports, schedules and specifications progressed from the Design Development Submittals, showing all architectural, engineering and landscape design information in accordance with the requirements of the Design and Construction Contract (the “**Construction Document Submittals**”);
 - (iii) Permit, Licence, Approval and Agreement drawings (phased, if applicable); and
 - (iv) all other documentation required pursuant to Schedule 10 – Review Procedure.
- (d) Construction Contractor shall submit to the SMH Representative for review in accordance with Schedule 10 – Review Procedure all Design Data and other items listed in Section 11.1(c).
- (e) The Design Data and other items listed in Section 11.1(c) must contain, at a minimum, the following additional information:
 - (i) identification of the stage of design or construction to which the documentation relates;
 - (ii) all design or construction drawings and specifications necessary to enable the SMH Representative to make an informed decision as to whether Construction Contractor is permitted to proceed pursuant to Schedule 10 – Review Procedure;
 - (iii) for each stage of the design or construction documentation, a schedule identifying all changes to the relevant documentation that has occurred from the previous stage of design or construction documentation; and

- (iv) where changes have been submitted, an indication of how the changes meet the requirements of the Design and Construction Contract.
- (f) All design review meetings held by Construction Contractor which SMH and Project Co wish to attend shall be held in Toronto, Ontario unless Project Co and SMH otherwise agree in writing.
- (g) If Construction Contractor commences or permits the commencement of the next level of design or construction of any part or parts of the Facility prior to being entitled to proceed in accordance with Schedule 10 – Review Procedure and it is subsequently determined in accordance with Schedule 10 – Review Procedure or Schedule 27 – Dispute Resolution Procedure that the design or construction does not comply with the Design and Construction Contract, then Construction Contractor shall forthwith, at its own cost and risk, undo, remove from the Site and/or the Existing Facilities, replace and restore, as applicable, any parts of the design or construction that do not comply with the Design and Construction Contract.
- (h) Subject to Section 11.4, neither Project Co, any Project Co Party, SMH, nor any SMH Party will have any liability:
 - (i) if a document submitted by Construction Contractor and reviewed by Project Co, any Project Co Party, SMH, the SMH Representative or the SMH Design Team results in non-compliance with the Design and Construction Contract by Construction Contractor or a breach by Construction Contractor of Applicable Law; or
 - (ii) for any loss or claim arising due to some defect in any documents, drawings, specifications or certificates submitted by Construction Contractor.
- (i) Construction Contractor and Project Co will cooperate with each other and SMH in the design review process. Notwithstanding such cooperation by Project Co and SMH, such review shall not, except as provided in Section 11.4, constitute acceptance of the Design and Construction Work, and Construction Contractor shall remain solely responsible for compliance in full with all requirements of the Design and Construction Contract.
- (j) Construction Contractor shall allow the SMH Design Team, at any time, a reasonable opportunity to view any items of Design Data, which shall be made available to the SMH Representative as soon as practicable following receipt of a written request from the SMH Representative.
 - (i) Specifically, Construction Contractor will cooperate with SMH and the SMH Design Team and will cause the Construction Contractor's design and engineering consultants to:
 - (A) create as requested by SMH or the SMH Representative; and/or
 - (B) provide to and allow the SMH Design Team to make use of;

any items of Design Data and any other documents that may be required in the submission of any such items to any Governmental Authority for the purposes of obtaining any Permits, Licences, Approvals and Agreements in particular for the achievement of notice of approval conditions and site plan approvals required to be obtained by SMH in respect of the New Shuter Wing.

- (k) Construction Contractor shall establish and maintain a computerized design database which Project Co and SMH may access remotely by computer to view drawings comprised within the Design Data and to electronically store and print copies of such Design Data.

11.2 Start-Up Meeting

- (a) Within 10 Business Days of the date of the Design and Construction Contract, Construction Contractor and the Design Team shall attend a start-up meeting (the “**Start-Up Meeting**”) with Project Co and SMH to set out the design development process in greater detail.
- (b) The agenda for the Start-Up Meeting shall include the following:
 - (i) Construction Contractor’s plan to develop a successful partnership with Project Co and SMH for the purpose of supporting SMH in achieving its vision, mission and core values;
 - (ii) Construction Contractor’s plan to ensure that the Design and Construction Work are completed in accordance with the requirements set forth in the Design and Construction Contract;
 - (iii) Construction Contractor’s process to ensure optimum design quality;
 - (iv) Construction Contractor’s approach to a fully integrated interior design process that includes every element of interior finishes, furniture, fixtures, Equipment, Existing Equipment, occupant signage and wayfinding;
 - (v) a proposed schedule of Design and Construction Work Submittals which is consistent with the Design and Construction Work Schedule and which provides for a progressive and orderly flow of Design and Construction Work Submittals from Construction Contractor to the SMH Representative to allow sufficient time for review of each Design and Construction Work Submittal by the SMH Design Team, taking into account both the resources available to the SMH Design Team to conduct such review and whether delay in the review of the subject matter of the Design and Construction Work Submittal will have a material impact on Construction Contractor’s ability to progress future anticipated Design and Construction Work Submittals and the Design and Construction Work in accordance with the Design and Construction Work Schedule;
 - (vi) Construction Contractor’s approach to timing, construction, adjustment and user feedback on required mock-ups; and

- (vii) a communication process that includes an electronic data room and the use of a computerized document tracking system that has the capacity to report, on request, the status of all design and construction documentation.

11.3 Design Workshops

- (a) In order to obtain user input in the preparation of, and prior to submitting, the Design Development Submittals and the Construction Document Submittals, the Parties, with SMH, will hold user group design workshops (the “Design Workshops”) upon the following terms:
 - (i) the Construction Contractor Representative shall arrange the Design Workshops in consultation with the SMH Representative;
 - (ii) the Parties shall cooperate to develop a reasonable schedule for the Design Workshops and shall incorporate such schedule into the Design and Construction Work Schedule;
 - (iii) Construction Contractor shall circulate to the SMH Representative an agenda for each of the Design Workshops no later than 10 Business Days prior to the relevant Design Workshop;
 - (iv) the Design Workshops shall be held in person, except where otherwise agreed by the Parties, acting reasonably;
 - (v) Construction Contractor shall maintain minutes of the Design Workshops, including possible design solutions and changes in design, and, within two Business Days after each Design Workshop, Construction Contractor shall provide to the SMH Representative a copy of the minutes, together with a copy of any notes, comments, sketches, drawings, tracings, lay-outs, plans or diagrams prepared at the Design Workshop;
 - (vi) Project Co and Construction Contractor agree that the subject matter of the Design Workshops shall not be regarded as Submittals to which Schedule 10 - Review Procedure applies, and that Project Co and SMH shall not be bound by the input provided in connection with the Design Workshops;
 - (vii) Construction Contractor shall submit to SMH the Design Development Submittals or the Construction Document Submittals, as applicable, for review pursuant to Schedule 10 - Review Procedure; and
 - (viii) the Parties agree that, with respect to the Design Development Submittals and the Construction Document Submittals, the period for review shall be 15 Business Days rather than the 10 Business Days prescribed in Schedule 10 - Review Procedure.

- (b) Prior to the 50% and 75% Design Development Submittals, the Parties, with SMH, will hold Design Workshops with respect to the following matters and any other Design Workshops required by Construction Contractor, acting reasonably:
- (i) departmental layouts;
 - (ii) cross-functional issues related to:
 - (A) vertical/horizontal circulation diagrams;
 - (B) elevator configuration; and
 - (C) materials management strategy;
 - (iii) exterior elevations, including materials, finishes and colours;
 - (iv) room layouts;
 - (v) millwork/modular systems furniture;
 - (vi) Equipment, including coordination and other details;
 - (vii) information/communications strategy;
 - (viii) interior colour/material presentation;
 - (ix) mechanical and electrical systems, including plant layouts and functionality, and including integration of mechanical and electrical systems into Existing Facilities; and
 - (x) facilities management, lifecycle and energy efficiency considerations,
- (c) Prior to the 100% Design Development Submittals, the Parties, with SMH, will hold Design Workshops with respect to the following matters and any other Design Workshops required by Construction Contractor, acting reasonably:
- (i) all items listed in Section 11.3(b) and all items listed in Sections 1.0, 2.0 and 3.0 of Appendix A of Schedule 10 – Review Procedure, as required;
 - (ii) physical mock-ups for the SMH Design Team and user review – rooms to be mocked-up as per Appendix A of Schedule 10 – Review Procedure;
 - (iii) room and millwork/modular casework interior elevations;
 - (iv) door/hardware/security functionality;
 - (v) In-Contract Equipment coordination;
 - (vi) audio/visual systems and integration; and

- (vii) sustainability considerations and LEED requirements.
- (d) Prior to the 50% and 100% Construction Document Submittals, the Parties, with SMH, will hold Design Workshops with respect to the following matters and any other Design Workshops required by Construction Contractor, acting reasonably:
 - (i) millwork details;
 - (ii) ceiling details;
 - (iii) Equipment coordination details;
 - (iv) signage and wayfinding;
 - (v) detailed engineering system solutions; and
 - (vi) facilities management, lifecycle and energy efficiency considerations.
- (e) The purpose of the Design Workshops is to facilitate the incorporation of the SMH Design Team and user input, involvement and feedback into the Design Data prior to submission of such Design Data in accordance with Schedule 10 - Review Procedure.

11.4 Clinical Functionality

- (a) Project Co confirms that, as at the date of this Design and Construction Contract, it has reviewed the Site master plan and blocking and stacking diagrams and that, subject to any qualifications or comments noted thereon, such Design and Construction Work Submittals satisfy the Output Specifications in respect of Clinical Functionality, so far as can reasonably be determined given the level of detail in the Design and Construction Work Submittals.
- (b) With each of the Design Development Submittals, Construction Contractor shall submit to SMH, for its review pursuant to Schedule 10 – Review Procedure, a draft report (each a “**Clinical Functionality Report**”) to specifically identify, with reference to the Output Specifications, such matters of Clinical Functionality that Construction Contractor wishes SMH to review and consider as part of the Design Development Submittals. Each Clinical Functionality Report shall demonstrate how the Output Specifications are satisfied in respect of Clinical Functionality.
- (c) With the Construction Document Submittals, Construction Contractor shall submit to SMH, for its review pursuant to Schedule 10 – Review Procedure, a final Clinical Functionality Report, and SMH shall confirm that, subject to any qualifications or comments noted thereon, such Construction Document Submittals satisfy the Output Specifications in respect of Clinical Functionality, so far as can reasonably be determined given the level of detail in the Construction Document Submittals.
- (d) Each Clinical Functionality Report must be prepared in accordance with the technical submission requirements set out in MOHLTC’s “Capital Planning Manual” and must

address the way in which the Design Data meets the following requirements of Clinical Functionality:

- (i) MOHLTC's "OASIS" requirements of operational efficiency, accessibility, safety and security, infection prevention and control, and sustainability;
- (ii) expansion/ flexibility;
- (iii) internal adjacencies;
- (iv) internal zoning and material/staff flow;
- (v) hours of operation; and
- (vi) the Plant.

11.5 Performance of Design Obligations

- (a) In the design and engineering of the Project, Construction Contractor, its consultants and the Construction Contractor Parties shall, at a minimum, exercise the standard of care normally exercised by licensed or registered professional architectural and engineering personnel having specialized knowledge and experience in performing design activities of a similar nature, scope and complexity.
- (b) Construction Contractor shall ensure that all parts of the Design and Construction Work shall, as required by Applicable Law, be performed or reviewed by licensed or registered professional engineers and architects registered to practice in the Province of Ontario. Such architects and engineers shall certify and, if required by Applicable Law, sign and seal, all designs, drawings and technical reports confirming that they comply with all prevailing design standards and design practices for such work in the Province of Ontario, all other applicable standards, Output Specifications and codes, and as otherwise required by Applicable Law.

11.6 Design and Construction Work Submittals

- (a) Any and all items, documents and anything else required or specified by the Design and Construction Contract in respect of the Design and Construction Work to be submitted to, reviewed or otherwise processed by SMH prior to Substantial Completion, including any and all subsequent revisions, amendments and changes thereto, shall be subject to review by SMH pursuant to Schedule 10 – Review Procedure.

11.7 Documents at the Site

- (a) Construction Contractor shall keep one copy of the current digital files of the Design and Construction Contract, Project Documents, Design and Construction Work Schedule, submittals, reports, Variation Confirmations, Construction Contractor Variation Notices, Variation Directives, 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 SMH, Lenders' Consultant and the SMH Representative. Construction Contractor shall keep a daily log available to SMH, Lenders' Consultant and the SMH Representative at all times.

- (b) Construction Contractor shall, where practical, keep one copy of current standards and manufacturers' literature specified in the Project Documents at the Site in good order and available to the SMH Representative and Lenders' Consultant and their representatives for the duration of the Design and Construction Work.

11.8 General Construction Obligations

- (a) Without limiting Section 10.3:
 - (i) Construction Contractor is solely responsible for all construction means, methods and techniques used to undertake the Design and Construction Work and must provide everything (including labour, plant, equipment and materials) necessary for the construction and commissioning of the Facility, and all other performance of the Design and Construction Work.
 - (ii) Construction Contractor shall in a timely and professional manner and in accordance with the requirements of the Design and Construction Contract:
 - (A) construct the Design and Construction Work diligently, expeditiously and in a thorough and workman-like manner;
 - (B) ensure that no works other than the Design and Construction Work under the Design and Construction Contract are constructed on the Site, the Facility or the Existing Facilities by Construction Contractor, any Construction Contractor Party or any person for whom Construction Contractor is responsible at law;
 - (C) protect the Design and Construction Work from all of the elements, casualty and damage;
 - (D) in respect of plant, equipment, Products and materials incorporated in the Design and Construction Work, use plant, equipment, Products and materials that:
 - (I) are of a kind that are consistent with the Output Specifications;
 - (II) are new, of good quality and are used, handled, stored and installed in accordance with Applicable Law and Good Industry Practice, including, with respect to health and safety, so as not to be hazardous or dangerous; and
 - (III) where they differ from the Output Specifications, have been substituted with Project Co's prior written consent in accordance with Section 11.18.

- (iii) Without limiting Construction Contractor's obligations pursuant to Section 11.12, the Phasing Requirements or Construction Contractor's indemnity pursuant to Section 44.1 of this Appendix A – General Conditions of the Design and Construction Contract, Construction Contractor shall, at all times throughout the progress of the Design and Construction Work, be responsible for maintaining and securing those portions of the Site occupied by Construction Contractor from time to time for construction of the Design and Construction Work in accordance with the Phasing Requirements to prevent access onto the Site and the Facility of any persons not entitled to be there, and the licence granted to Construction Contractor pursuant to Section 16.1 of the Project Agreement shall include rights for Construction Contractor to do so.

11.9 Permits, Licences, Approvals and Agreements

- (a) Construction Contractor shall, at its own cost and risk:
 - (i) obtain, maintain, and, as applicable, renew all Construction Contractor Permits, Licences, Approvals and Agreements which may be required for the performance of the Design and Construction Work;
 - (ii) except for those obligations which are identified as SMH obligations in Appendix 1 of Schedule 1 – Definitions and Interpretation, assume all of the obligations of SMH under SMH Permits, Licences, Approvals and Agreements (and for greater certainty, the Development Approvals); and
 - (iii) comply with all Permits, Licences, Approvals and Agreements in accordance with their terms.
- (b) Where any Permits, Licences, Approvals and Agreements have requirements that may impose any conditions, liabilities or obligations on SMH or any SMH Party, Construction Contractor shall not obtain or renew such Permits, Licences, Approvals and Agreements without the prior written consent of SMH not to be unreasonably withheld or delayed, provided that neither SMH nor any SMH Party shall be responsible for obtaining or for the failure of Construction Contractor to obtain any Permit, Licence, Approval and Agreement or for the failure of Construction Contractor to renew any SMH Permit, Licence, Approval and Agreement. SMH shall comply, or shall require compliance, with any conditions, liabilities or obligations as are imposed on SMH or any SMH Party by the requirements of any Permit, Licence, Approval and Agreement obtained with SMH consent under Section 11.9(b) of the Project Agreement.
- (c) SMH is required by Section 11.9 of the Project Agreement to provide Project Co with such information and administrative assistance as Project Co may reasonably require in relation to the Permits, Licences, Approvals and Agreements. In respect of Section 11.9(a)(ii) of the Project Agreement, SMH is required to: (i) provide Project Co with relevant information and copies of notices received under the applicable SMH Permits, Licences, Approvals and Agreements and (ii) execute any documents under the

applicable SMH Permits, Licences, Approvals and Agreements which Applicable Law dictates that only SMH can execute.

11.10 Protection of Design and Construction Work and Property

- (a) Construction Contractor shall protect the Design and Construction Work and the property of SMH at the Site, including the property adjacent to the Site and the Existing Facilities, from damage which may arise as a result of Construction Contractor's operations under the Design and Construction Contract, and shall be responsible for such damage, except damage which occurs as a result of acts or omissions by SMH or any SMH Party.
- (b) Should Construction Contractor, in the performance of the Design and Construction Contract, damage the Design and Construction Work or the property of SMH at the Site, including the property adjacent to the Site and the Existing Facilities, Construction Contractor shall be responsible to Make Good such damage at Construction Contractor's expense.
- (c) Should damage occur to the Design and Construction Work or the property of SMH at the Site, including the property adjacent to the Site and the Existing Facilities, for which Construction Contractor is not responsible, as provided in Section 11.10(a), Construction Contractor shall Make Good such damage to the Design and Construction Work and, if Project Co or SMH so directs, to the property of SMH and, subject to Section 14 of the body of the Design and Construction Contract, the Guaranteed Price, each applicable Scheduled Phase Completion Date, the Scheduled Tower Interim Completion Date and the Scheduled Substantial Completion Date shall, if applicable, be adjusted in accordance with Schedule 22 – Variation Procedure.
- (d) Construction Contractor shall not undertake to repair and/or replace any damage whatsoever to adjoining property without first consulting Project Co and SMH and receiving written instructions as to the course of action to be followed.
- (e) Notwithstanding Section 11.10(d), where there is danger to life or property which arises out of or in connection with the performance of the Design and Construction Work, either Party may, but Construction Contractor shall, take such emergency action as is necessary to remove the danger.
- (f) If any Construction Contractor Party has caused damage to the work of another contractor related to the Project, Construction Contractor agrees upon due notice to settle with the other contractor by negotiation or arbitration in accordance with Section 11.13(e) of this Appendix A – General Conditions of the Design and Construction Contract and Schedule 27 – Dispute Resolution Procedure. If the other contractor makes a claim against Project Co or SMH 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 11.13(e) of this Appendix A – General Conditions of the Design and Construction Contract and Schedule 27 – Dispute Resolution Procedure.

11.11 Liability Unaffected

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

11.12 Safety

- (a) From Financial Close until Final Completion, Construction Contractor shall:
 - (i) comply with the Construction Safety Plan;
 - (ii) keep the Site, the Design and Construction 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;
 - (iii) 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;
 - (iv) comply with Applicable Law relating to health and safety, including without limitation the *Occupational Health and Safety Act* (Ontario) and all regulations thereto;
 - (v) perform all of the obligations of the "constructor", and indemnify Project Co against any and all of the liabilities of the "constructor", under the *Occupational Health and Safety Act* (Ontario) and all regulations thereto, and indemnify Project Co for all amounts which Project Co is required to provide indemnification for pursuant to Section 11.12(a)(v) of the Project Agreement; and
 - (vi) provide SMH with a certificate of good standing from WSIB or any successor thereto once every 90 days.
- (b) At any time that the Design and Construction Work are being carried out in or around the Existing Facilities Construction Contractor shall at all times:

- (i) ensure that it complies with all safety requirements set out in the Design and Construction Contract, including those set out in Section 11.12(a) above; and
- (ii) keep the Existing Facilities in a safe and orderly state, as appropriate and in accordance with Good Industry Practice, to avoid any danger to the patients, employees, visitors and other persons attending the Existing Facilities.

11.13 Additional Works

- (a) SMH has reserved the right to carry out Additional Works. Project Co may, at any time during the performance of the Design and Construction Work, assign the methods and means of construction of the Additional Works and/or the coordination and scheduling of the Additional Works and/or the safety training in respect of the Additional Works to Construction Contractor.
- (b) In connection with the Additional Works, SMH, pursuant to Section 11.13 of the Project Agreement, shall:
 - (i) cause Additional Contractors to comply with the instructions of Project Co relating to matters of health and safety on the Site, and to the extent such matters have been assigned to Project Co pursuant to Section 11.13(a) of the Project Agreement, the methods and means of construction and coordination and scheduling of the Additional Works with the Works during the performance of the Works;
 - (ii) enter into separate contracts with Additional Contractors containing terms and provisions which are consistent with the terms and provisions of the Project Agreement and which require Additional Contractors to comply with all directions of Project Co in respect of any matter regarding health and safety on the Site, and to the extent such matters have been assigned to Project Co pursuant to Section 11.13(a) of the Project Agreement, the methods and means of construction and coordination and scheduling of the Additional Works;
 - (iii) ensure that insurance coverage is provided in respect of the Additional Works as would be required by a prudent owner similarly situated and that such insurance is coordinated with the insurance coverage of Project Co as it affects the Works to provide seamless insurance coverage to Project Co and SMH (including, if appropriate, naming Project Co and SMH as additional insureds and/or loss payees) and, in any event, such insurance shall provide for commercial general 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 Additional Works.
- (c) In connection with the Additional Works, Construction Contractor shall during the performance of the Design and Construction Work:

- (i) assume overall responsibility for compliance by the Additional Contractors and Additional Works with all aspects of Applicable Law relating to health and safety at the Site prior to Substantial Completion and assume and exercise the responsibilities of the 'constructor' under the *Occupational Health and Safety Act* (Ontario) in accordance with such Act;
 - (ii) to the extent SMH has assigned to Project Co any or all of the matters referred to in Section 11.13(a) and subject to the performance by SMH of its obligations under Sections 11.13(b)(i) and 11.13(b)(ii) under the Project Agreement, Construction Contractor shall provide for the methods and means of construction (where applicable) of the Additional Works and the coordination and scheduling of the Additional Works with the Design and Construction Work to be performed under the Design and Construction Contract;
 - (iii) where all or part of the performance of the Design and Construction Work in accordance with the Design and Construction Contract is affected by or depends upon, the completion and/or proper execution of the Additional Works, promptly report to SMH in writing any readily apparent deficiencies in the Additional Works, prior to proceeding with the affected Design and Construction Work. Failure by Construction Contractor to so report shall invalidate any claims against Project Co by reason of such readily apparent deficiencies;
 - (iv) afford Additional Contractors reasonable opportunity to introduce and store their products and use their construction machinery and equipment to execute the Additional Works; and
 - (v) participate with SMH and Additional Contractors in reviewing their construction schedules when directed to do so by SMH.
- (d) If, in respect of Additional Works carried out prior to Substantial Completion at the Site:
- (i) any Additional Contractors cause any damage to the Design and Construction Work;
 - (ii) Construction Contractor incurs any additional costs or there is any delay in the Design and Construction Work Schedule as a result of any Additional Contractors not complying with the instructions of Construction Contractor regarding coordination, scheduling and/or safety and/or method and means of construction; or
 - (iii) if Construction Contractor incurs any additional costs or there is any delay in the Design and Construction Work Schedule as a result of any Additional Works,
- then, provided such delay in the Design and Construction Work Schedule or additional costs are not as a result of Construction Contractor's failure to perform any of its obligations under Section 11.13(c) or any act or omission of Construction Contractor or a Construction Contractor Party, any such delay in the Design and Construction Work Schedule or additional costs in respect of the Design and Construction Work shall,

subject to and in accordance with Article 30 of this Appendix A – General Conditions of the Design and Construction Contract, be treated as a Delay Event and, subject to and in accordance with Article 31 of this Appendix A – General Conditions of the Design and Construction Contract, be treated as a Compensation Event.

- (e) Claims, disputes, and other matters in question between Construction Contractor and Additional Contractors (except to the extent they involve claims, disputes and other matters between Project Co and SMH pursuant to the Project Agreement) shall be dealt with in substantially the same manner as contemplated in Section 8 of Schedule 27 – Dispute Resolution Procedure, provided the Additional Contractors are subject to binding reciprocal obligations in the contracts between SMH and the Additional Contractors. Construction Contractor shall be deemed to have consented to binding arbitration of any dispute with any other contractor whose contract with SMH contains a binding reciprocal agreement to arbitrate.
- (f)
 - (i) Construction Contractor shall have a period of 10 Business Days following notice of SMH's intention to carry out Additional Works, including a reasonable description of such Additional Works, to request a Variation if such Additional Works are (A) reasonably expected to void a warranty in favour of Construction Contractor from a Construction Contractor Party or equipment supplier and given in accordance with Good Industry Practice, or (B) reasonably expected to have a material adverse effect on Construction Contractor's ability to perform any of the Design and Construction Work, including a delay in the Design and Construction Work or additional costs in respect of the Design and Construction Work;
 - (ii) if Construction Contractor has requested a Variation in accordance with Section 11.13(f)(i), Project Co shall, within 10 Business Days of such request, either issue a Variation Enquiry from SMH or give notice to Construction Contractor that SMH does not agree that a Variation is required;
 - (iii) subject to 11.13(d), either Party may refer the question of whether a Variation is required pursuant to Section 11.13(e) for resolution in accordance with Schedule 27 – Dispute Resolution Procedure; and where Project Co has given notice to Construction Contractor that SMH does not agree that a Variation is required, Project Co shall, within 10 Business Days of a subsequent agreement or of a determination that a Variation is required, issue a Variation Enquiry from SMH and the relevant provisions of Schedule 22 – Variation Procedure shall apply except that:
 - (A) Project Co shall not be entitled to withdraw any such Variation Enquiry unless SMH determines not to proceed with the Additional Works or to proceed only in a manner that the Additional Works will not result in a warranty becoming void (as contemplated in Section 11.13(f)(i)) and will not result in any material adverse effect (including material additional costs) on Construction Contractor's ability to perform any of the Design

and Construction Work and Construction Contractor has agreed with such conclusion, or the Parties otherwise agree; and

- (B) the Parties shall, without prejudice to their respective obligations under the Design and Construction Contract, use commercially reasonable efforts to mitigate any adverse effects of such Additional Works, including with respect to increase in costs arising from any void warranty.
- (g) Placing, installing, applying or connecting the Additional Works performed by Additional Contractors on and to the Design and Construction Work performed by Construction Contractor will not relieve Construction Contractor from its obligations under the Design and Construction Contract with respect to the Design and Construction Work, except to the extent expressly described in any Variation Confirmation.

11.14 Defective Design and Construction Work

Prior to Substantial Completion:

- (a) Construction Contractor shall promptly Make Good any Construction Defect whether or not such Construction Defect has been incorporated into the Facility and whether or not the Construction Defect is the result of poor workmanship, use of defective Products or In-Contract Equipment or damage through carelessness or other act or omission of Construction Contractor. The correction of Construction Defects shall be at Construction Contractor's sole cost and expense. Construction Contractor shall Make Good, in a manner acceptable to the Independent Certifier, all Construction Defects, whether or not they are specifically identified by the Independent Certifier, and Construction Contractor shall prioritize the correction of any Construction Defects so as not to interfere with or derogate from the Design and Construction Work Schedule, provided that Construction Contractor shall prioritize the correction of any Construction Defects that in the sole discretion of SMH are determined to adversely affect the day to day operation of SMH.
- (b) Construction Contractor shall Make Good promptly other contractors' work destroyed or damaged by such rectifications at Construction Contractor's expense.
- (c) If in the opinion of the Independent Certifier it is not expedient for Construction Contractor to correct any Construction Defect, Project Co may deduct from the amount of the Guaranteed Price the difference in value between the Design and Construction Work as performed and that called for by the Design and Construction Contract. If Project Co and Construction Contractor do not agree on the difference in value, they shall refer the matter to the Independent Certifier for a determination and the determination will be issued as a Variation.

11.15 Warranty Obligations

- (a) Construction Contractor represents, warrants and covenants that:
 - (i) the Design and Construction Work shall conform to the requirements of the Design and Construction Contract, Good Industry Practice, Applicable Law and

- all professional engineering principles generally accepted as standards of the industry in the Province of Ontario;
- (ii) the Design and Construction Work shall be free of defects, including design defects, errors and omissions; and
 - (iii) materials and equipment shall be of good quality and in compliance with the Design and Construction Contract.
- (b) During each Warranty Period, and subject to Section 11.15(c), Construction Contractor shall promptly, at its sole cost and expense, correct and Make Good all Construction Defects arising in respect of the Design and Construction Work. For greater certainty, Construction Contractor is required to correct and Make Good Construction Defects related to any Product and any In-Contract Equipment during the applicable Warranty Period despite Construction Contractor having obtained on SMH's behalf industry-standard or other required warranties in accordance with Section 11.15(f). For all work to correct Construction Defects, the applicable Warranty Period shall be extended for a further one year from the date of the last work completed in respect of such corrective Design and Construction Work. For clarity, any extension of a Warranty Period for the purposes of a correction shall only apply to the relevant Construction Defect and not the Design and Construction Work as a whole.
- (c) In addition to the obligation to correct and Make Good Construction Defects during a Warranty Period, Construction Contractor shall at its expense correct and Make Good any Construction Defects that could not reasonably have been ascertained by a competent person in accordance with Good Industry Practice during a visual inspection of the Design and Construction Work ("**Construction Latent Defect**"), provided Project Co gives Construction Contractor written notice of the Construction Latent Defect within the time frame applicable to such Construction Latent Defect pursuant to the *Limitations Act*, 2002 (Ontario).
- (d) The warranties described in this Section 11.15 shall cover labour and material, including, the costs of removal and replacement of covering materials. The warranties shall not limit extended warranties on any Product or item of In-Contract Equipment called for elsewhere in the Output Specifications or otherwise provided by any manufacturer of such Product or item of In-Contract Equipment.
- (e) If Construction Contractor fails to correct and Make Good any Construction Defects or Construction Latent Defects in accordance with Sections 11.15(b) and 11.15(c) and in the time period specified in Section 11.16(a) or Section 11.16(b), as applicable, without prejudice to any other right or remedy Project Co or SMH may have, Project Co or SMH may correct such Construction Defects or Construction Latent Defects at Construction Contractor's sole cost and expense and Construction Contractor shall be responsible for any expenses and costs Project Co is responsible for under Section 11.15(e) of the Project Agreement.

- (f) Construction Contractor shall obtain warranties from the manufacturers of each of the Products and items of In-Contract Equipment for the duration(s) and in accordance with the applicable requirements specified in the Output Specifications in the name of and to the benefit of Construction Contractor and SMH. Where, in respect of a Product warranty or In-Contract Equipment warranty, the Output Specifications do not specify a specific duration and/or other requirements, Construction Contractor shall obtain industry-standard warranties from the applicable manufacturers in the name of and to the benefit of Construction Contractor and SMH and shall use commercially reasonable efforts to ensure that such Product warranties and In-Contract Equipment warranties extend for as long a period from each Phase Completion Date, the Tower Interim Completion Date and the Substantial Completion Date as can be obtained from the applicable manufacturer, but in any event all such Product warranties and In-Contract Equipment warranties shall extend no less than two years from the Substantial Completion Date. Each Product warranty and In-Contract Equipment warranty shall be issued by the applicable manufacturer and delivered to Construction Contractor no later than 30 days prior to each Phase Completion Date, with respect to each applicable Phase of the Works, the Tower Interim Completion Date, with respect to the Tower Interim Completion Works, and the Substantial Completion Date, with respect to the Remainder Design and Construction Work. Construction Contractor shall ensure that each Product warranty and In-Contract Equipment warranty, including any Product warranty or In-Contract Equipment warranty extended under this Section 11.15(f), is fully assigned to SMH, at no cost or expense to Project Co or SMH, at the end of each Warranty Period, as such Warranty Period may be extended in accordance with Section 11.15(b).
- (g) Construction Contractor shall monitor the maintenance program of SMH throughout each and every Warranty Period to satisfy itself that the Design and Construction Work is being maintained in accordance with the operating and maintenance manuals described in Sections 23A.5, 23B.5 and 24.5 of this Appendix A – General Conditions of the Design and Construction Contract and the Maintenance Instructions provided by Construction Contractor. Construction Contractor shall report on the status of such SMH maintenance program and shall report promptly to SMH any deviations from such prescribed Maintenance Instructions. If SMH agrees with such reported deviations, SMH shall, on a reasonable and prompt basis, perform the work required to correct such deviations and, provided such work is carried out in accordance with Good Industry Practice and the Maintenance Instructions, such work shall not impact the applicable warranty provided by Construction Contractor hereunder. If SMH does not agree with such reported deviations, SMH and Construction Contractor agree to cooperate in good faith to resolve such disagreement and for SMH to then perform the agreed upon work (if any), which work, for clarity, shall not impact the applicable warranty provided by Construction Contractor hereunder. If SMH and Construction Contractor cannot resolve such disagreement, either party may refer the matter for resolution in accordance with Schedule 27 – Dispute Resolution Procedure.
- (h) Subject to Section 11.13 and Section 11.15(g), Construction Contractor acknowledges that SMH may, in its sole discretion, maintain, repair and/or alter any part or parts of the Works during the applicable Warranty Period and agrees that such work shall not impact any of the warranties provided by Construction Contractor hereunder, provided that such

work is carried out in accordance with Good Industry Practice and, if applicable, the Maintenance Instructions and that such work does not materially alter the affected part or parts of the Design and Construction Work.

11.16 Prompt Repair of Warranty Work

- (a) Construction Contractor acknowledges that the timely performance of warranty work is critical to the ability of SMH to maintain effective operations of the Facility and the Existing Facilities. Construction Contractor shall use commercially reasonable efforts to respond to any requirement by SMH to correct Construction Defects and Construction Latent Defects within the time periods required by SMH (which, for certainty, may, in respect of an Emergency, require immediate correction). Construction Contractor further acknowledges that if Project Co or SMH is unable to contact Construction Contractor and/or the corrective work is not commenced within such time period as may be required by SMH (including, for clarity, immediately in the event of an Emergency), Project Co or SMH's own forces may take such emergency steps as are reasonable and appropriate to correct such Construction Defects and Construction Latent Defects, at Construction Contractor's sole cost and expense in respect of Project Co's own forces and Construction Contractor shall be responsible for any costs and expense Project Co is responsible for under Section 11.16(a) of the Project Agreement and, except in the case of damage caused by Project Co's or SMH's own forces, such emergency steps taken by Project Co's or SMH's own forces shall not invalidate any warranties in respect of such portion of the Design and Construction Work affected by such corrective actions of Project Co's or SMH's own forces.
- (b) Subject to Section 11.16(a), Construction Contractor shall promptly, and in any event not more than 15 days after receipt of written notice thereof from Project Co or SMH, Make Good any Construction Defects which may develop within the applicable Warranty Period and any Construction Latent Defects, and also Make Good any damage to other Design and Construction Work caused by the correction of such Construction Defects and Construction Latent Defects. All such corrective work shall be at Construction Contractor's sole cost and expense and shall not be treated as, or entitle Construction Contractor to request or form the basis of a claim for, a Variation, additional compensation or damages. The above-noted time period of 15 days shall be subject to the following:
- (i) If the corrective work cannot be completed in the 15 days specified, Construction Contractor shall be in compliance if Construction Contractor:
- (A) commences and is diligently proceeding with the corrective work within the specified time;
 - (B) provides SMH with a schedule acceptable to SMH for such correction;
 - (C) reports to SMH on the status and progress of the corrective work on an ongoing basis (including on a daily basis if requested by SMH); and

- (D) Makes Good the Construction Defect, Construction Latent Defects and/or damage, as the case may be, in accordance with such schedule.
- (c) If Construction Contractor fails to correct and Make Good the Construction Defects, Construction Latent Defects and/or damage, as the case may be, in the time specified in Section 11.16(a) or Section 11.16(b), as applicable, or subsequently agreed upon, without prejudice to any other right or remedy Project Co or SMH may have, Project Co or SMH may correct such work at the sole risk, cost and expense of Construction Contractor and may draw down on the Warranty Letter of Credit to fund or as reimbursement for such costs and expenses.
- (d) The performance of corrective work and Making Good of Construction Defects, Construction Latent Defects and/or damage for which Construction Contractor is responsible shall be commenced and completed as expeditiously as possible in accordance with Section 11.16(a) or Section 11.16(b), as applicable, and shall be executed at times convenient to SMH and this may require work outside normal working hours at Construction Contractor's expense. Any extraordinary measures required to complete such work, as directed by SMH to accommodate the operation of the Facility or other aspects of the Project as constructed, shall be at Construction Contractor's sole cost and expense.
- (e) The foregoing express warranties shall not deprive Project Co or SMH of any action, right or remedy otherwise available to Project Co or SMH at law or in equity for breach of any of the provisions of the Design and Construction Contract or any Ancillary Document by Construction Contractor, and the periods referred to in this Section 11.16, shall not be construed as a limitation on the time in which Project Co or SMH may pursue such other action, right or remedy.

11.16A Warranty Letter of Credit

- (a) On or before the date which is ninety (90) days prior to the Substantial Completion Date, Construction Contractor shall deliver to SMH an unconditional and irrevocable letter of credit (the "**Warranty Letter of Credit**") from any one or more of the Schedule I Canadian chartered banks or any other financial institutions approved by SMH in SMH's sole and absolute discretion, in each case, whose current long-term issuer rating is at least "A" by Standard & Poor's and "A2" by Moody's Investor Services or an equivalent rating by another party acceptable to SMH, in its sole and absolute discretion, in favour and for the direct and exclusive benefit of SMH, in a form provided by Project Co to SMH pursuant to the Project Agreement and acceptable to and approved by SMH, acting reasonably, pursuant to the Project Agreement, and in the amount equal to **ten million dollars (\$10,000,000)**.
- (b) Unless the Warranty Letter of Credit is drawn by SMH in accordance with the provisions of the Project Agreement, SMH, pursuant to the Project Agreement, shall release and deliver the Warranty Letter of Credit to Project Co on the day following the expiry of the final Warranty Period, as may be extended pursuant to Section 11.15(b) of the Project

Agreement and Project Co shall deliver the Warranty Letter of Credit to Construction Contractor within 2 Business Days of receipt from SMH.

- (c) Pursuant to the Project Agreement, SMH shall be entitled to draw on the Warranty Letter of Credit:
 - (i) in accordance with Section 11.16(c) of the Project Agreement; and/or
 - (ii) to satisfy any amounts that are due and have remained outstanding for 30 days by Project Co pursuant to the terms of the Project Agreement or by the Construction Guarantor pursuant to Schedule 12 – Performance Guarantee of Construction Guarantor.
- (d) SMH, pursuant to the Project Agreement, may make multiple calls on the Warranty Letter of Credit.
- (e) Construction Contractor shall continuously maintain, replace or renew the Warranty Letter of Credit until the Warranty Letter of Credit is released and delivered to Project Co pursuant to Section 11.16A(b) of the Project Agreement.
- (f) In the event that Construction Contractor does not renew the Warranty Letter of Credit and does not provide proof of such renewal to SMH before the date that is 20 calendar days before the Warranty Letter of Credit's expiry date, then at any time during such 20 calendar day period and upon SMH providing prior written notice to Project Co, which Project Co shall provide to Construction Contractor, SMH may draw upon the full amount of the Warranty Letter of Credit and deposit the cash proceeds thereof in a segregated bank account selected by Construction Contractor (provided that such bank account must be at a bank that meets the thresholds described in Section 11.16A(a) and if Construction Contractor does not promptly select such bank account then, pursuant to the Project Agreement, such bank account may be selected by SMH in its sole and absolute discretion) and such cash proceeds shall thereupon stand in place of the Warranty Letter of Credit until Construction Contractor delivers a replacement Warranty Letter of Credit to SMH. All interest earned on such cash proceeds shall be for the benefit of Construction Contractor. Pursuant to the Project Agreement, SMH shall be entitled to withdraw such cash proceeds in the same manner that they are permitted to draw upon the Warranty Letter of Credit under Section 11.16A(c) of the Project Agreement. Upon the delivery of a replacement Warranty Letter of Credit by Construction Contractor to SMH, all remaining cash proceeds and all accrued interest thereon from such segregated bank account shall be returned to Construction Contractor or as Construction Contractor may direct within five Business Days.
- (g) Until a date that is one year before the Scheduled Substantial Completion Date, Construction Contractor may propose to SMH a form of warranty bond in favour of SMH as a substitute for the Warranty Letter of Credit. Construction Contractor agrees that the aggregate bond amount of such warranty bond shall be no less than \$15 million and a portion of such aggregate bond amount shall contain a liquid amount of no less than \$5 million to be made available to SMH upon demand. Pursuant to the Project Agreement,

in the event that, in SMH's discretion acting reasonably, SMH approves of and accepts such form of warranty bond as a substitute for the Warranty Letter of Credit, a Variation shall be implemented in respect thereof, with a corresponding variation under this Design and Construction Contract. For clarity, pursuant to the Project Agreement, SMH shall be under no obligation whatsoever to approve of or accept any such warranty bond or to implement any such Variation.

- (h) For greater certainty, the reference in Section 4.3(b) of the Project Agreement to the withholding of the Warranty Cash Amount being the sole remedy for the failure to deliver the Warranty Letter of Credit is not applicable to the Design and Construction Contract.
- (i) For greater certainty, a failure by the Construction Contractor to deliver the Warranty Letter of Credit in accordance with Section 11.16A(a) will be a default pursuant to which a claim may be made under the Performance Bond by delivery by an Obligee (as defined in the Performance Bond) of a Performance Obligation Declaration of Default (as defined in the Performance Bond).

11.17 Minimize Disturbance and Design and Construction Work in Existing Facilities

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

Project Co and SMH in complying with said instructions during the performance of the Design and Construction Work. Any costs incurred by Construction Contractor in complying with said instructions shall be part of the Guaranteed Price.

- (c) Construction Contractor acknowledges that the Design and Construction Contract includes the Phasing Requirements and other specifications which include instructions respecting SMH's use of the Existing Facilities and infection control procedures. Construction Contractor acknowledges having read and understood the said instructions and agrees to comply with the procedures set out therein. Construction Contractor shall be responsible for any costs and expenses resulting in its failure to comply with these procedures.

11.18 Substitutions

- (a) Whenever equipment, components, materials, supplies, tools, and other items are specified or otherwise described in the Design and Construction Contract by using the name or catalogue or model number of a particular manufacturer, fabricator, vendor or distributor, or any other material name or description, the naming or identification of the item is intended to establish the type and the minimum function and quality required, and equipment, components, materials, supplies, tools, and other items of other manufacturers, fabricators, vendors or distributors shall not be substituted without the prior written consent of Project Co, in its sole discretion.

11.19 Change in Standards

- (a) Where the Design and Construction Contract requires Construction Contractor to comply with a technical standard in respect of the design and construction of the Facility, and that standard has changed between the date of the Design and Construction Contract and the date that such compliance is required, then Construction Contractor shall give notice to SMH of such change. If, after such notice, SMH requires compliance with the changed standard (rather than the standard applicable as of the date of the Design and Construction Contract), then, to the extent such change impacts the Design and Construction Work and would not have otherwise been taken into account by compliance with Good Industry Practice, such changed standard shall, subject to and in accordance with Schedule 22 - Variation Procedure, result in a Variation. If SMH does not require compliance with the changed standard, then Construction Contractor shall continue to comply with the standard applicable as of the date of the Design and Construction Contract, without a Variation therefor. This Section 11.19 shall not apply where a change in a technical standard is also a Change in Law.

11.20 Subcontractors and Suppliers

- (a) Construction Contractor shall preserve and protect the rights of the Parties under the Design and Construction Contract with respect to the works to be performed under Subcontract, and shall:

- (i) enter into Subcontracts or written agreements with Construction Contractor Parties to require them to perform their work as provided in the Design and Construction Contract;
 - (ii) incorporate the relevant terms and conditions of the Design and Construction Contract into all contracts or written agreements with Construction Contractor Parties; and
 - (iii) be as fully responsible to Project Co for acts and omissions of the Construction Contractor Parties as for acts and omissions of persons directly employed by Construction Contractor.
- (b) Attached in Part 1 of Schedule 8 – Construction Contractor Parties is a list of all Construction Contractor Parties that Construction Contractor has engaged or caused to be engaged for the performance of the Design and Construction Work as of the date of execution of the Design and Construction Contract. Construction Contractor agrees to update such list from time to time as additional Construction Contractor Parties are engaged. Any of these named Construction Contractor Parties listed by Construction Contractor may be changed by Construction Contractor upon prior notice to (but without the approval of) the SMH Representative and Project Co, provided however, that if the SMH Representative or Project Co reasonably objects to any change to a mechanical or electrical Subcontractor that is a Construction Contractor Party, then Construction Contractor shall select an alternative replacement mechanical or electrical Subcontractor to which the SMH Representative does not reasonably object.
- (c) Construction Contractor hereby agrees to enter into the Construction Contractor's Direct Agreement and, subject to Section 11.20(d), to cause each of the other Construction Contractor Parties, including Suppliers leasing any construction machinery and equipment, to enter into the Subcontractor's Direct Agreement, to evidence, among other things, that SMH shall have the right to cure any default by the Construction Contractor under the Subcontract.
- (d) With the exception of the Subcontracts specifically listed in items (a) through (k) in Part 2 of Schedule 8 – Construction Contractor Parties, none of Construction Contractor or the applicable Construction Contractor Party are obliged to enter into a Subcontractor's Direct Agreement in respect of Subcontracts having a total estimated cost of \$1,000,000 or less.
- (e) Subject to Section 11.20(d), Construction Contractor agrees to deliver to SMH the Subcontractor's Direct Agreements by the applicable due dates set out in Part 2 of Schedule 8 – Construction Contractor Parties. If, following the date that 100% Construction Document Submittals are submitted to SMH in accordance with Schedule 10 – Review Procedure, Construction Contractor is required to enter into any additional Subcontractor's Direct Agreement pursuant to this Section 11.20, Construction Contractor shall deliver such Subcontractor's Direct Agreements to SMH within 30 days of execution.

11.21 Apprenticeship Plan and Program

- (a) No later than six months after Financial Close, Construction Contractor shall provide a plan setting out Construction Contractor's Project-specific approach to maximizing apprenticeship opportunities on the Project (the "**Apprenticeship Plan**") for review and approval by SMH. 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 Construction Contractor'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) Construction Contractor shall implement the approved Apprenticeship Plan.
- (c) Construction Contractor shall provide an annual report to SMH 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 Construction Contractor's progress toward achieving the objectives set out in the Apprenticeship Plan, including an identification of an barriers that prevented Construction Contractor from achieving its objectives.
- (d) Project Co may require Construction Contractor to amend its Apprenticeship Plan if, in SMH's opinion, acting reasonably, Construction Contractor is failing to maximize apprenticeship opportunities on the Project pursuant to the then current Apprenticeship Plan.
- (e) Project Co or SMH may, in its sole discretion, release Construction Contractor's Apprenticeship Plan to the public. Construction Contractor's Apprenticeship Plan shall not be Confidential Information.

11.22 Procurement Monitoring and Implementation Plan

- (a) Construction Contractor shall implement the procurement monitoring and implementation plan (the “**Procurement Monitoring and Implementation Plan**”) attached as Schedule 20 – Procurement Monitoring and Implementation Plan to the Design and Construction Contract.
- (b) A director of Construction Contractor shall submit, annually, on each anniversary of Commercial Close, a completed and executed declaration in the form attached as Appendix 1 to Schedule 20 – Procurement Monitoring and Implementation Plan that Construction Contractor has made the proper inquiries and has determined that the requirements of the Procurement Monitoring and Implementation Plan have been complied with by Construction Contractor and its Subcontractors in the immediately previous year.

11.23 Demolition Requirements

- (a) Construction Contractor shall, and shall cause each Construction Contractor Party that is performing any part of the Design and Construction Work, at such person’s own cost and risk, at all times during any period in which the Design and Construction Work that are being performed pursuant to the Design and Construction Contract involving any Demolition, to:
 - (i) conduct all work in connection with any Demolition at all times in compliance with Section 3 of the Performance Standards Regulation;
 - (ii) ensure that all Construction Contractor Parties having responsibility for the supervision of any such Demolition are qualified as either a professional engineer, limited license holder or provisional license holder (as such terms are used in the Performance Standards Regulation) (such person is hereinafter referred to as a “**Demolition Supervisor**”);
 - (iii) observe and perform the Demolition in a manner that is consistent with the recommendations set forth in the Demolition Guidelines in all material respects; and
 - (iv) in connection with any Complex Structure Demolition to be conducted by Construction Contractor or any Construction Contractor Party, shall:
 - (A) prepare detailed specifications relating to such Complex Structure Demolition which specifications will include, without limitation, colour-coded Load-Path Diagrams (which will include a description of the Demolition Requirements set forth herein) to supplement the Site work plans and blueprints relating to the Demolition and all other technical requirements relating to the Complex Structure Demolition (the “**Demolition Specifications**”);

- (B) at all times when a Complex Structure Demolition is being performed that the Demolition Specifications, Demolition workplan and Load-Path Diagram, be present and available at the Site at which such Complex Structure Demolition is being performed; and
- (C) ensure at all times when a Complex Structure Demolition is being performed that a Demolition Supervisor will be on the Site at which such Complex Structure Demolition is being performed and actively supervising all activities in respect of the Complex Structure Demolition;

(the obligations to be performed by Construction Contractor or any Construction Contractor Party that is performing any part of the Design and Construction Work in connection with any Demolition as set forth in this Section 11.23(a) are collectively referred to as the “**Demolition Requirements**”).

- (b) Without limiting any other provision of the Design and Construction Contract, if at any time while any Demolition is being performed pursuant to the Design and Construction Contract, Construction Contractor or any Construction Contractor Party that is performing any part of any Demolition receives notice from Project Co, SMH, any SMH Party or any Governmental Authority that the Demolition is:
 - (i) not being conducted in a manner that is in compliance with the Demolition Requirements; or
 - (ii) not being conducted in a manner that is in accordance with this Project Agreement;

(such event referred to as a “**Demolition Default Event**”),

Construction Contractor, and the applicable Construction Contractor Party, shall:

- (A) be required immediately upon the occurrence of a Demolition Default Event, to notify Project Co and SMH of that a Demolition Default Event has occurred, unless SMH was the person that provided notice of the Demolition Default Event,
- (B) cease all work in respect of such Demolition, and
- (C) within 5 Business Days of receipt of a notice of a Demolition Default Event produce and deliver to the Project Co and the SMH Representative:
 - (I) a report identifying the reasons for the occurrence of the Demolition Default Event; and
 - (II) a Demolition Plan showing the steps that are to be taken to rectify the Demolition Default Event within a period of not more than 30 days from the occurrence of the Demolition Default Event, which Demolition Plan shall be subject to review and approval by SMH

and, to the extent SMH requires any amendments or revisions to be made to such Demolition Plan, Construction Contractor and the applicable Construction Contractor Party shall take all reasonable steps as may be necessary to make all such required amendments and revisions and deliver to SMH an amended and revised Demolition Plan not more than 5 Business Days from the date on which such request is made by SMH.

- (c) No Demolition shall be recommenced at the Site that was the subject of the Demolition Default Event until (i) Project Co and SMH are satisfied that Construction Contractor or the applicable Construction Contractor Party has taken all necessary steps to remediate such Demolition Default Event in accordance with Demolition Plan and (ii) Project Co and SMH has received a report, in form and substance satisfactory to SMH, prepared by a professional engineer that the Demolition Default Event has been remediated and the Site has been properly prepared for the Demolition to proceed in accordance with the Demolition Plan. Project Co and SMH shall have the right to require Construction Contractor and the applicable Construction Contractor Party, each at its sole cost and expense, to take all corrective and remedial action as SMH, acting reasonably, believes is necessary to ensure that the Site that was the subject of the Demolition Default Event is remediated and prepared so that the Demolition can proceed in accordance with the Demolition Plan. If Construction Contractor and the applicable Construction Contractor Party do not take such actions within the time period required by Project Co and SMH, Project Co and SMH shall have the right to, or to cause a third party to, take all such corrective and remedial action as may be required to put the Site in a condition that will allow the Demolition to proceed in accordance with the Demolition Plan and Construction Contractor shall be responsible for all costs and expenses incurred by Project Co pursuant to this Section or which Project Co is responsible for pursuant to Section 11.23(c) of the Project Agreement.
- (d) Provided that Construction Contractor has complied with Section 11.23(b), for greater certainty, the occurrence of a Demolition Default Event shall not be a Construction Contractor Event of Default for the purposes of Section 34.1(a)(vi) of this Appendix A – General Conditions of the Design and Construction Contract.

12. REPRESENTATIVES

12.1 SMH Representative

- (a) Construction Contractor acknowledges the provisions of Section 12.1 of the Project Agreement in relation to the SMH Representative.
- (b) Subject to the limitations set out in Section 12.1(d) of the Project Agreement, the SMH Representative shall exercise the functions and powers identified in the Project Agreement and the Design and Construction Contract, as applicable, as functions or powers to be performed by the SMH Representative and such other functions and powers of SMH under the Project Agreement or the Design and Construction Contract, as applicable, as SMH or Project Co may notify Construction Contractor from time to time.

- (c) SMH or Project Co may, from time to time by written notice to Construction Contractor, change the SMH Representative. Such change shall have effect on the later of the date of delivery of such notice and the date specified in such notice.
- (d) During any period when no SMH Representative has been appointed, or when the SMH Representative is unable, through illness, incapacity or any other reason whatsoever, to perform the SMH Representative's functions under the Project Agreement or the Design and Construction Contract, SMH shall perform or SMH or Project Co may, by written notice to Construction Contractor, promptly appoint an alternative SMH Representative to perform the functions which would otherwise be performed by the SMH Representative. Upon receipt of such written notice, Construction Contractor and the Construction Contractor Representative shall be entitled to treat any act of such alternative SMH Representative which is permitted by the Project Agreement as being authorized by SMH, and Construction Contractor and the Construction Contractor Representative shall not be required to determine whether authority has in fact been given.
- (e) Subject to the limitations set out in Sections 12.1(a) and 12.1(d) of the Project Agreement, unless otherwise notified in writing, Construction Contractor and the Construction Contractor Representative shall be entitled to treat any act of the SMH Representative which is authorized by the Project Agreement as being authorized by SMH, and Construction Contractor and the Construction Contractor Representative shall not be required to determine whether authority has in fact been given.

12.2 The Construction Contractor Representative

- (a) Subject to the limitations set out in Section 12.2(d), the Construction Contractor Representative shall have full authority to act on behalf of Construction Contractor for all purposes of the Design and Construction Contract.
- (b) Construction Contractor may change the Construction Contractor Representative with the prior written consent of Project Co, not to be unreasonably withheld or delayed.
- (c) During any period when the Construction Contractor Representative is unable, through illness, incapacity or any other reason whatsoever, to perform the Construction Contractor Representative's functions under the Design and Construction Contract, Construction Contractor shall perform or may, by written notice to Project Co, promptly appoint an alternative Construction Contractor Representative to perform the functions which would otherwise be performed by the Construction Contractor Representative, provided that, Construction Contractor must seek Project Co's consent in accordance with Section 12.2(b) if such alternative Construction Contractor Representative is in place for more than 180 days. Upon receipt of such written notice, Project Co shall be entitled to treat any act of such alternative Construction Contractor Representative which is permitted by the Design and Construction Contract as being authorized by Construction Contractor, and Project Co shall not be required to determine whether authority has in fact been given.

- (d) The Construction Contractor Representative shall not, except as otherwise provided in the Design and Construction Contract, be entitled to modify or waive any provision of the Design and Construction Contract.
- (e) Subject to the limitations set out in Section 12.2(d), unless otherwise notified in writing, Project Co shall be entitled to treat any act of the Construction Contractor Representative which is authorized by the Design and Construction Contract as being authorized by Construction Contractor, and Project Co shall not be required to determine whether authority has in fact been given.

12.3 Communications to Representatives

- (a) At the time that Construction Contractor appoints or changes the appointment of the Construction Contractor Representative, the Construction Contractor shall also provide Project Co with contact information for delivery of communications to such representative. Communications to such representative shall not constitute notices to the Party appointing such representative.

12.4 Key Individuals

- (a) The individuals who are critical to the performance of the Design and Construction Work are identified in Schedule 9 – Key Individuals. Construction Contractor shall use commercially reasonable efforts to ensure that such persons remain involved in the Design and Construction Work in the capacity set out in Schedule 9 – Key Individuals and, in particular, will not, for the duration of the Design and Construction Work, require or request any such person to be involved in any other project on behalf of Construction Contractor or any Construction Contractor Party if, in the opinion of Project Co, acting reasonably, such involvement would have a material adverse effect on the Design and Construction Work.
- (b) If Construction Contractor considers it necessary to replace any individual identified in Schedule 9 – Key Individuals, Construction Contractor shall provide SMH with relevant information on the proposed replacement and shall consult with SMH before finalizing the appointment of such replacement. Construction Contractor shall not replace any of the individuals identified in Schedule 9 – Key Individuals without the prior written consent of SMH and Project Co, which consent shall not be withheld or delayed where the proposed replacement is suitably qualified and experienced and of equal or better quality and experience than the individual being replaced.
- (c) If SMH or Project Co determines, acting reasonably, that it is in the best interests of Project Co that any individual identified in Schedule 9 – Key Individuals be replaced, Project Co shall notify Construction Contractor (including a detailed explanation of the reasons for such determination), and, within 30 days of receipt by Construction Contractor of such notice, Construction Contractor shall provide Project Co and SMH with relevant information on the proposed replacement and shall consult with Project Co and SMH before finalizing the appointment of such replacement. Construction Contractor shall not replace any of the individuals identified in Schedule 9 – Key

Individuals without the prior written consent of Project Co and SMH, which consent shall not be withheld or delayed where the proposed replacement is suitably qualified and experienced and of equal or better quality and experience than the individual being replaced.

13. DESIGN AND CONSTRUCTION WORKS SCHEDULE AND DESIGN AND CONSTRUCTION WORKS REPORT

13.1 Completion of the Design and Construction Work

- (a) Construction Contractor shall complete the Design and Construction Work in accordance with the Design and Construction Contract and achieve:
 - (i) each Phase Completion by the applicable Scheduled Phase Completion Date;
 - (ii) Tower Interim Completion by the Scheduled Tower Interim Completion Date;
 - (iii) Substantial Completion by the Scheduled Substantial Completion Date; and
 - (iv) Final Completion by the Scheduled Final Completion Date.

13.2 The Design and Construction Work Schedule

- (a) Construction Contractor shall, in accordance with Schedule 3 – Design and Construction Work Scheduling Requirements of the Design and Construction Contract, prepare and submit to Project Co or SMH, as applicable, and the Independent Certifier as soon as practical and in any event within 45 days of Financial Close, a detailed computerized draft Design and Construction Work Schedule. Project Co or SMH shall provide Construction Contractor with comments on the draft Design and Construction Work Schedule in accordance with Schedule 10 – Review Procedure, provided that the period for review of such draft schedule shall be 20 Business Days rather than the 15 Business Days prescribed in Section 2.4 of Schedule 10 – Review Procedure. Construction Contractor shall revise the draft Design and Construction Work Schedule to the extent required by Schedule 10 – Review Procedure within 30 days of receipt of any comments from Project Co or SMH. When agreed by the Parties, the draft schedule shall become the Design and Construction Work Schedule.
- (b) Project Co and Construction Contractor shall comply with the provisions of Schedule 3 – Design and Construction Work Scheduling Requirements of the Design and Construction Contract.

13.3 Changes to Critical Path

- (a) Any change to the critical path of the Design and Construction Work Schedule initiated by Construction Contractor which affects a Scheduled Phase Completion Date, the Scheduled Tower Interim Completion Date, the Scheduled Substantial Completion Date or the Scheduled Final Completion Date must be approved in writing by SMH and Project Co. Subject to Section 14 of the body of the Design and Construction Contract

and to the terms of Schedule 22 – Variation Procedure, any SMH and Project Co approval of such changes to the critical path does not entitle Construction Contractor to a Variation, an extension of time or an addition to the Guaranteed Price.

13.4 Failure to Maintain Schedule

- (a) Without limiting any other provision of the Design and Construction Contract but subject to Article 30 of this Appendix A – General Conditions of the Design and Construction Contract, if, at any time:
- (i) the actual progress of the Design and Construction Work has fallen significantly behind the Design and Construction Work Schedule including, for clarity, any failure of Construction Contractor to achieve a Design and Construction Work Milestone; or
 - (ii) Project Co or SMH is of the opinion that:
 - (A) the actual progress of the Design and Construction Work has fallen significantly behind the Design and Construction Work Schedule;
 - (B) Construction Contractor will not achieve one or more Phase Completions by the applicable Phase Completion Dates;
 - (C) Construction Contractor will not achieve Tower Interim Completion by the Scheduled Tower Interim Completion Date; or
 - (D) Construction Contractor will not achieve Substantial Completion by the Longstop Date,

Construction Contractor shall:

- (iii) within 5 Business Days of receipt of notice from Project Co or SMH, produce and deliver to each of the SMH Representative and the Independent Certifier:
 - (A) a report identifying the reasons for the delay; and
 - (B) a plan showing the steps that are to be taken by Construction Contractor to eliminate or reduce the delay to:
 - (I) achieve the applicable Phase Completion(s) by the relevant Phase Completion Date(s);
 - (II) achieve Tower Interim Completion by the Scheduled Tower Interim Completion Date;
 - (III) achieve Substantial Completion by the Scheduled Substantial Completion Date; or

- (IV) if Substantial Completion will not be achieved by the Scheduled Substantial Completion Date, achieve Substantial Completion by the Longstop Date;
- (C) a revised Design and Construction Work Schedule incorporating the measures required to bring the progress of the Design and Construction Work back on schedule in accordance with the plan delivered under Section 13.4(a)(iii)(B) and approved by the SMH Representative; and
- (iv) bring the progress of the Design and Construction Work back on schedule in accordance with the plan delivered under Section 13.4(a)(iii)(B) and approved by the SMH Representative.
- (b) Construction Contractor shall notify the SMH Representative if, at any time, the actual progress of the Design and Construction Work is significantly ahead of the Design and Construction Work Schedule.
- (c) For greater certainty, provided that Construction Contractor has complied with this Section 13.4 and is not in default under Section 34.1(a)(iii), the failure to achieve a Phase Completion by the applicable Scheduled Phase Completion Date or Tower Interim Completion by the Scheduled Tower Interim Completion Date on its own shall not be a Construction Contractor Event of Default.

13.4A Notification of Early Phase Completion

- (a) Unless Construction Contractor obtains the prior written consent of Project Co, based on the prior consent of SMH, in its sole discretion, Construction Contractor shall not be entitled to a Phase Completion Certificate prior to, and a Phase Completion Date shall not be earlier than, the applicable Scheduled Phase Completion Date.
- (b) If Construction Contractor advises SMH that it expects to be able to achieve a Phase Completion prior to the applicable Scheduled Phase Completion Date, Project Co, as required by the SMH Representative pursuant to the Project Agreement, shall be entitled to require Construction Contractor to produce and submit to the SMH Representative a revised Design and Construction Work Schedule showing the manner and the periods in which the Design and Construction Work shall be performed and what the revised date for such Phase Completion would be so as to enable SMH to consider at its sole discretion:
 - (i) whether to agree to an earlier Scheduled Phase Completion Date; and
 - (ii) what modifications, if any, shall be required to this Design and Construction Contract in order to accommodate such earlier Scheduled Phase Completion Date.

All costs associated with any such modifications to the Design and Construction Contract shall be borne by Construction Contractor.

13.4B Notification of Early Tower Interim Completion

- (a) Unless Construction Contractor obtains the prior written consent of Project Co, based on the prior consent of SMH, in its sole discretion, Construction Contractor shall not be entitled to the Tower Interim Completion Certificate prior to, and the Tower Interim Completion Date shall not be earlier than, the Scheduled Tower Interim Completion Date.
- (b) If Construction Contractor advises SMH that it expects to be able to achieve Tower Interim Completion prior to the Scheduled Tower Interim Completion Date, Project Co, as required by the SMH Representative pursuant to the Project Agreement, shall be entitled to require Construction Contractor to produce and submit to the SMH Representative a revised Design and Construction Work Schedule showing the manner and the periods in which the Design and Construction Work shall be performed and what the revised date for Tower Interim Completion would be so as to enable SMH to consider at its sole discretion:
 - (i) whether to agree to an earlier Scheduled Tower Interim Completion Date; and
 - (ii) what modifications, if any, shall be required to the Design and Construction Contract in order to accommodate such earlier Scheduled Tower Interim Completion Date.

All costs associated with any such modifications to the Design and Construction Contract shall be borne by Construction Contractor.

13.5 Notification of Early Substantial Completion

- (a) Unless Construction Contractor obtains the prior written consent of Project Co, based on the prior consent of SMH, in its sole discretion, Construction Contractor shall not be entitled to the Substantial Completion Certificate prior to, and the Substantial Completion Date shall not be earlier than, the Scheduled Substantial Completion Date.
- (b) If Construction Contractor advises SMH that Construction Contractor expects to be able to achieve Substantial Completion prior to the Scheduled Substantial Completion Date, Project Co, as required by the SMH Representative pursuant to the Project Agreement, shall be entitled to require Construction Contractor to produce and submit to the SMH Representative a revised Design and Construction Work Schedule showing the manner and the periods in which the Design and Construction Work shall be performed and what the revised date for Substantial Completion would be so as to enable SMH to consider at its sole discretion:
 - (i) whether to agree to an earlier Scheduled Substantial Completion Date; and
 - (ii) what modifications, if any, shall be required to the Design and Construction Contract in order to accommodate such earlier Scheduled Substantial Completion Date.

All costs associated with any such modifications to the Design and Construction Contract shall be borne by Construction Contractor.

13.6 Design and Construction Work Report

- (a) Construction Contractor shall continuously monitor the progress of the Design and Construction Work in relation to the Design and Construction Work Schedule and, within 15 Business Days following the end of each calendar month from Financial Close until the Final Completion Date, Construction Contractor shall provide to the SMH Representative and the Independent Certifier a works report (each, a “**Design and Construction Work Report**”), which will include:
- (i) an executive summary describing the general status of the Design and Construction Work and progress made over the relevant month;
 - (ii) a table setting out and responding to items of the Design and Construction Contract non-compliance and deficiencies in ongoing Design and Construction Work as identified by SMH and/or Construction Contractor;
 - (iii) an updated Design and Construction Work Schedule in summary and detailed formats in accordance with Section 7.1 of Appendix A – Minimum Design and Construction Submittal Requirements of Schedule 10 – Review Procedure;
 - (iv) a narrative with detailed descriptions of the progress of the Design and Construction Work, including:
 - (A) the progress towards achieving the Design and Construction Work Milestone;
 - (B) key deliveries to the Site;
 - (C) construction, erection, testing and commissioning;
 - (D) a discussion of the basis for any required changes to the sequencing of the Design and Construction Work, interdependencies or original activity durations set out in the Design and Construction Work Schedule, which changes, for clarity, shall be incorporated into the updated Design and Construction Work Schedule;
 - (v) comparisons of the actual versus the planned progress of the Design and Construction Work, with a brief commentary on any actual or forecasted delays or problems that might have an impact on the scheduled completion dates of the Design and Construction Work in the Design and Construction Work Schedule and a discussion of the measures being (or to be) adopted by Construction Contractor to overcome them, and
 - (vi) any other information specifically requested by SMH on the progress of the Design and Construction Work;

- (vii) a narrative description of any Disputes related to the Design and Construction Work, including any action that has taken place over the relevant month to resolve such Disputes; and
- (viii) an update on those matters set out in Schedule 17 – Design and Construction Work Report Requirements,

all in form and substance satisfactory to SMH and Project Co, acting reasonably. For greater certainty, for all updates and revisions to the Design and Construction Work Schedule, Construction Contractor must provide a revised critical path reflecting the updated or revised Design and Construction Work Schedule.

- (b) Construction Contractor shall use and interact with the On-line Project Management (“OCPM”) software system specified by SMH. It is contemplated that the OCPM software system will automate certain aspects of the processes identified in Schedule 10 – Review Procedure, Schedule 11 – Design Quality Plan and Construction Quality Plan, Schedule 22 – Variation Procedure and Schedule 17 – Design and Construction Work Report Requirements and other processes as determined by SMH in its sole discretion.

14. WORKS COMMITTEE

14.1 Establishment

- (a) Pursuant to the Project Agreement, SMH and Project Co shall, within 30 days following Financial Close, establish a committee (the “Works Committee”) consisting of:
 - (i) 1 representative appointed by IO from time to time;
 - (ii) the following 3 representatives appointed by SMH:
 - (A) the SMH Representative; and
 - (B) 2 other representatives appointed by SMH from time to time; and
 - (iii) the following 3 representatives appointed by Project Co:
 - (A) the Project Co Representative under the Project Agreement;
 - (B) 1 representative of the Construction Contractor; and
 - (C) such other representative appointed by Project Co from time to time.
- (b) The Independent Certifier and the Design Compliance Consultant (as referred to in the Project Agreement) shall be entitled, but not required, to attend meetings as non-voting members of the Works Committee. Members of the Works Committee may invite, on prior notice to all members, such advisors and consultants as they require from time to time to attend meetings and to provide briefings to the Works Committee members.
- (c) The SMH Representative shall be the chairperson of the Works Committee.

14.2 Function and Role

- (a) The Works Committee shall assist SMH and Project Co by promoting cooperative and effective communication with respect to matters related to the Works under the Project Agreement. The Works Committee shall interface with the Equipment Steering Committee as and when required.
- (b) The Works Committee shall be responsible for receiving and reviewing all matters related to the Works under the Project Agreement, including:
 - (i) any design, construction and commissioning issues under the Project Agreement;
 - (ii) the Works Schedule under the Project Agreement;
 - (iii) any issues arising from reports or documents provided by Project Co or the Independent Certifier under the Project Agreement;
 - (iv) any quality assurance and safety issues under the Project Agreement;
 - (v) the Works Reports under the Project Agreement;
 - (vi) the recommendations of the Transition Subcommittee;
 - (vii) any special matters referred to the Works Committee by SMH or Project Co;
 - (viii) any community and media relations issues in accordance with Schedule 18 – Communications Protocol under the Project Agreement;
 - (ix) monitoring each Phase Commissioning Program, the Tower Interim Completion Commissioning Program and the Final Commissioning Program under the Project Agreement; and
 - (x) any other issues pertaining to the Works under the Project Agreement.
- (c) Subject to Section 14.2(d) of the Project Agreement, any unanimous decision of the Works Committee shall be final and binding on the Parties. If the Works Committee is unable to reach a unanimous decision, either party, under the Project Agreement, may refer the matter for resolution in accordance with Schedule 27 – Dispute Resolution Procedure under the Project Agreement.
- (d) The Works Committee shall not have authority to make decisions with respect to or approve under the Project Agreement:
 - (i) any amendment to or waiver of any provision of the Project Agreement;
 - (ii) any change to a major milestone date set out in the Works Schedule, any Scheduled Phase Completion Date, the Scheduled Tower Interim Completion Date, the Scheduled Substantial Completion Date or the Scheduled Final Completion Date under the Project Agreement;

- (iii) any Variation under the Project Agreement;
- (iv) any change that may materially adversely affect Project Co's ability to achieve a Phase Completion by the applicable Scheduled Phase Completion Date, Tower Interim Completion by the Scheduled Tower Interim Completion Date, Substantial Completion by the Scheduled Substantial Completion Date or Final Completion by the Scheduled Final Completion Date under the Project Agreement; or
- (v) any matter with respect to which SMH has a right of consent or in respect of which SMH may exercise discretion pursuant to the Project Agreement.

14.3 Term of Works Committee

- (a) Unless otherwise agreed by SMH and Project Co, the Works Committee shall operate until the Final Completion Date under the Project Agreement.

14.4 Replacement of Committee Members

- (a) IO and SMH shall be entitled to replace any of their respective representatives on the Works Committee by written notice to Project Co. SMH, under the Project Agreement, 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 Works Committee with the prior written consent of SMH, not to be unreasonably withheld or delayed.

14.5 Procedures and Practices

- (a) As provided for under the Project Agreement, the members of the Works Committee may:
 - (i) adopt such procedures and practices for the conduct of the activities of the Works Committee as they consider appropriate from time to time;
 - (ii) invite to any meeting of the Works Committee such other persons as the members of the Works Committee may agree;
 - (iii) exclude from any meeting of the Works Committee such persons as the members of the Works Committee may agree; and
 - (iv) receive and review reports from any person or organization agreed to by the members of the Works Committee.
- (b) Once established, the Works Committee shall meet at least once each month from Financial Close of the Project Agreement until the Final Completion Date of the Project Agreement, unless otherwise agreed by the members of the Works Committee or SMH and Project Co.

- (c) Any one of the Project Co Representatives under the Project Agreement or SMH Representatives on the Works Committee may convene a special meeting of the Works Committee at any time. Special meetings of the Works Committee under the Project Agreement may be convened on not less than 5 Business Days' notice to all members of the Works 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 Works Committee, the Works Committee shall meet at the Site, in the City of Toronto, Ontario. Meetings of the Works 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 Works Committee must attend in person at least once each calendar quarter.
- (e) Under the Project Agreement, 2 representatives appointed by SMH (one of whom shall be the SMH Representative), 2 representatives appointed by Project Co (one of whom shall be the Project Co Representative) and a representative of IO (or a delegate thereof) shall constitute a quorum at any meeting of the Works Committee. A quorum of members may exercise all the powers of the Works Committee. The members shall not transact business at a meeting of the Works Committee unless a quorum is present.
- (f) Minutes of all meetings, recommendations and decisions of the Works Committee, including those made by telephone or other form of communication, shall be recorded and maintained by Construction Contractor. Construction Contractor shall circulate copies of such minutes within 5 Business Days of the holding of the meeting or the making of the recommendation or decision. Unless SMH notifies Project Co within 5 Business Days of receipt of the minutes that SMH disagrees with the contents of the minutes, Construction Contractor, Project Co and SMH shall be deemed to have approved such minutes. Construction Contractor shall maintain a complete set of all minutes of the meetings of the Works Committee and shall make such minutes available for inspection by SMH and Project Co during regular business hours.

15. QUALITY ASSURANCE

15.1 Quality Plans and Systems

- (a) Construction Contractor shall cause all of the Design and Construction Work to be the subject of quality management systems, which shall include a Design Quality Plan and a Construction Quality Plan (collectively, the "Quality Plans"), which may be incorporated into one document.
- (b) All Quality Plans shall be consistent with the requirements of the Output Specifications, each Phase Commissioning Program, the Tower Interim Completion Commissioning Program and the Final Commissioning Program.

- (c) The Design Quality Plan is attached as part of Schedule 11 – Design Quality Plan and Construction Quality Plan.
- (d) The Construction Quality Plan shall, at a minimum, comply with the requirements of the outline of the Construction Quality Plan attached as part of Schedule 11 – Design Quality Plan and Construction Quality Plan. Construction Contractor shall submit its proposed Construction Quality Plan to SMH within 60 days following Financial Close.
- (e) All Quality Plans shall be subject to review by SMH pursuant to Schedule 10 – Review Procedure, and Construction Contractor shall not be entitled to implement or cause the implementation of any Quality Plan unless and until Construction Contractor is entitled to proceed with such implementation pursuant to Schedule 10 – Review Procedure.
- (f) Construction Contractor shall implement the Quality Plans, shall perform and cause to be performed the Design and Construction Work in compliance with the Quality Plans, including by causing the Subcontractors to implement the Design Quality Plan and the Construction Quality Plan.
- (g) Where any aspect of the Design and Construction Work is performed by more than one Construction Contractor Party, then this Article 15, in so far as relevant or appropriate to the activities to be performed by such Construction Contractor Party, shall apply in respect of each of them and references in this Article 15 to such Construction Contractor Party, shall be construed accordingly.

15.2 Changes to Plans

- (a) Construction Contractor shall submit to SMH, in accordance with Schedule 10 – Review Procedure, any changes to any of the Quality Plans required to comply with Section 15.1, and shall amend such Quality Plans as required pursuant to Schedule 10 – Review Procedure.

15.3 Quality Manuals and Procedures

- (a) If any Quality Plan refers to, relies on or incorporates any quality manual or procedure, then such quality manual or procedure or the relevant parts of it shall be submitted to SMH at the time that the relevant Quality Plan, or part thereof or change thereto, is submitted in accordance with Schedule 10 – Review Procedure, and the contents of such quality manual or procedure shall be taken into account in the consideration of the relevant Quality Plan, or part thereof or change thereto, in accordance with Schedule 10 – Review Procedure.

15.4 Quality Monitoring

- (a) Without limiting Project Co's and SMH's other rights pursuant to the Design and Construction Contract, including Section 26, Project Co and SMH may, from time to time, directly or indirectly, perform periodic monitoring, spot checks and auditing of Construction Contractor's quality management systems, including all relevant Quality Plans and any quality manuals and procedures. Construction Contractor shall ensure that

Project Co and SMH also have the right to perform periodic monitoring, spot checks and auditing of the Construction Contractor's quality management systems.

- (b) Construction Contractor shall cooperate with Project Co and SMH in monitoring quality management systems and shall provide Project Co and SMH with all information and documentation reasonably required in connection with Project Co's and SMH's rights under this Section 15.4.

16. LICENCE

16.1 Licence to Site

- (a) Pursuant to Section 16.1 of the Project Agreement and effective from the date of Financial Close until the Termination Date and subject to Article 16, SMH granted or caused to be granted, and shall continuously until the earlier of the termination of the Design and Construction Contract or the Project Agreement or Final Completion grant or cause to be granted, to Construction Contractor and all Construction Contractor Parties such non-exclusive licence rights of use and access to, on and over the Site and the Facility in accordance with the Phasing Requirements, except such rights set out as a Construction Contractor responsibility to obtain under the Permits, Licences, Approvals and Agreements tables attached as Appendix "A" to Schedule 1 – Definitions and Interpretation, as are required by Construction Contractor and such Construction Contractor Parties and sufficient (subject to Construction Contractor performing its obligations described in the Permits, Licences, Approvals and Agreements tables attached as Appendix "A" to Schedule 1 – Definitions and Interpretation) to allow Construction Contractor and such Construction Contractor Parties to perform the Design and Construction Work. Following Final Completion, SMH shall grant or cause to be granted, pursuant to Section 16.1 of the Project Agreement, to Construction Contractor and all Construction Contractor Parties such rights of use and access to, on and over the Site and the Facility as are required by Construction Contractor and such Construction Contractor Parties sufficient (subject to Construction Contractor performing its obligations described in the Permits, Licences, Approvals and Agreements tables attached as Appendix "A" to Schedule 1 – Definitions and Interpretation) to allow Construction Contractor and such Construction Contractor Parties to carry out its remaining obligations under the Project Agreement.
- (b) In consideration for the licence granted pursuant to or contemplated by Section 16.1(a), Construction Contractor shall provide the Design and Construction Work subject to and in accordance with the Design and Construction Contract.
- (c) Without derogating from any of SMH's rights under the Project Agreement, in particular and subject to Section 16.1(c) therein, the rights of access to the Site and the Facility prior to a Phase Completion Date, the Tower Interim Completion Date and the Substantial Completion Date for purposes of the applicable Phase SMH Commissioning, the Tower Interim Completion SMH Commissioning and the SMH Commissioning, SMH has acknowledged that, in respect of the Design and Construction Work, Construction Contractor and the Construction Contractor Parties require, and SMH shall

provide, access to the Site and the Facility in accordance with the Phasing Requirements without material interference by SMH or any SMH Party from the date of Financial Close until the Termination Date. Construction Contractor further acknowledges that following Final Completion, its access to the Site and the Facility shall be subject to SMH Activities.

- (d) None of the rights granted pursuant or contemplated by this Section 16.1 shall extend beyond the boundaries of the Site, or to any lands other than the Site, other than easements and similar interests of SMH which benefit the Site, obtained after the date of the Design and Construction Contract, to the extent the same are necessary for the Design and Construction Work. Notwithstanding the foregoing, pursuant to the Project Agreement, SMH shall provide Construction Contractor with limited access to the Existing Facilities in accordance with the Phasing Requirements, to the extent necessary to perform the Design and Construction Work and subject to such reasonable conditions as are imposed by SMH.
- (e) Construction Contractor agrees to: (i) provide hoarding around the licensed area outside of the Existing Facilities in accordance with the Project Documents; (ii) cordon off areas within the Existing Facilities where Construction Contractor is performing the Design and Construction Work required under the Project Documents and as approved by the SMH Representative; and (iii) use such access to the Existing Facilities, including loading docks, freight elevators and access routes as provided in the Output Specifications and as otherwise directed by the SMH Representative.
- (f) The licence and access rights provided in this Section 16.1 shall terminate as of the Termination Date.

16.2 Non-Exclusive Licence/Development of Site

- (a) Construction Contractor acknowledges and agrees that the rights granted to Construction Contractor and the Construction Contractor Parties hereunder shall be non-exclusive and that SMH, Project Co and any person authorized by SMH or Project Co may occupy and possess the Site, the Facility and the Existing Facilities.
- (b) Without limiting Section 16.2(a), Construction Contractor acknowledges that SMH may from time to time use or develop (including by way of subdivision or expansion), or permit the use or development of, portions of the Site or the Facility and those other portions of the Site necessary for the performance of the Design and Construction Work. To the extent that such use or development materially adversely interferes with Construction Contractor's licence rights hereunder or materially adversely interferes with Construction Contractor's ability to perform the Design and Construction Work, Project Co shall, upon Construction Contractor's request and subject to Section 14 of the body of the Design and Construction Contract, pursue its rights under the Project Agreement to have such use or development treated as a Variation under the Project Agreement, subject to and in accordance with Schedule 22 – Variation Procedure.

16.3 Limited Access Areas

- (a) For purposes related to the provision of SMH Activities or to patient safety SMH may limit or restrict Construction Contractor's access to designated portions of the Site, the Facility or the Existing Facilities unless a person seeking access obtains the prior written consent of SMH, which consent may be subject to such reasonable conditions as are imposed by SMH.

16.4 Naming and Signage

- (a) Construction Contractor acknowledges that SMH 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, the Facility and the Existing Facilities; and (iii) all rights, Trade-Marks, naming or branding regarding the Facility and any part of the Facility and the Existing Facilities. It is agreed, however, that, with the prior written consent of SMH, not to be unreasonably withheld or delayed and which may take into consideration any applicable governmental guidelines, including the guidelines set out in Schedule 18 – Communications Protocol, Construction Contractor, the Construction Contractor Parties and the Lenders may, for the period prior to Substantial Completion, erect and maintain signage which may include such parties' logos and trade names identifying their respective roles in connection with the development and construction of the Project.

16.5 No Interest in Land

- (a) Construction Contractor acknowledges and agrees that, subject to the provisions of the CLA, in accordance with the principles of the IPFP Framework, neither Construction Contractor, Project Co nor the Lenders shall acquire any estate, right, title or ownership interest in the Site, the Facility or the Existing Facilities or any other interest in land pursuant to the Design and Construction Contract, the Project Documents or otherwise. Notwithstanding any provision herein or in any of the Project Documents to the contrary, all fee simple interest in and freehold title to the Site, or any part thereof, and the Project, shall at all times remain unencumbered by any interest of Construction Contractor or the Lenders. Project Co, Construction Contractor and the Lenders shall have access to the Site, the Facility and Existing Facilities under and subject to the licences and access rights granted under this Article 16, Article 16 of the Project Agreement, the Lenders' Direct Agreement, and all other applicable agreements.

16.6 Non-Disturbance Agreement

- (a) If SMH mortgages, charges or otherwise encumbers the Site, Project Co, upon notice from SMH, shall notify Construction Contractor and, at the request of Construction Contractor, provide Construction Contractor with an agreement, in form satisfactory to Construction Contractor, acting reasonably, executed by the mortgagee of the Site permitting Construction Contractor to access and use the Site under the licence granted pursuant to Section 16 of this Appendix A – General Conditions of the Design and Construction Contract and Section 16 of the Project Agreement, respectively, free from interference from the mortgagee or any person claiming by or through the mortgagee.

This Section 16.6 shall not apply in respect of any portion of the Site used or developed pursuant to Section 16.2(b) if neither the licence granted pursuant to Section 16 of the Project Agreement nor the Design and Construction Work pertain to such portion of the Site.

17. TITLE ENCUMBRANCES

17.1 Title Encumbrances

- (a) Construction Contractor shall perform all obligations under the Title Encumbrances for or on behalf of Project Co and SMH, other than:
 - (i) obligations under any Title Encumbrance which Construction Contractor is not legally capable of performing for or on behalf of Project Co and SMH (including, for clarity, any and all obligations under the SMH Mortgages);
 - (ii) obligations under any Title Encumbrance added after the date of the Design and Construction Contract unless such obligations are provided in the Output Specifications as obligations of Construction Contractor or the Parties agree that such obligations are obligations of Construction Contractor;
 - (iii) obligations under any Title Encumbrance which the City of Toronto may formally relieve or waive, with the consent of SMH, with respect to any Development Approval; and
 - (iv) obligations under the Title Encumbrances that Appendix "A" – Permits, Licences, Approvals and Agreements of Schedule 1 – Definitions and Interpretation provide for SMH performing.
- (b) All Design and Construction Work performed by or on behalf of Construction Contractor shall be performed in a manner which does not breach the Title Encumbrances or any of the Development Approvals.
- (c) Subject to Encumbrances that Construction Contractor shall remove pursuant to Section 17.2 and Section 17.3, the performance of the Design and Construction 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 Facilities or any part of it or them, except in accordance with the terms of the Design and Construction Contract.
- (d) For greater certainty, the obligations of Project Co in respect of the Output Specifications (as defined in the Project Agreement) shall hereby be assumed and performed by the Construction Contractor as a part of the Design and Construction Work.

17.2 No Site Encumbrances

- (a) Construction Contractor shall not create, incur, permit or suffer to exist any Encumbrance to be filed, issued or registered against the Site, the Facility or the Existing Facilities or

any part thereof or any interest therein due to an act or omission of Construction Contractor or any Construction Contractor Party.

- (b) Subject to Encumbrances that Construction Contractor shall remove pursuant to Section 17.2(c), the performance of the Design and Construction 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 Facilities or any part of it or them except in accordance with the terms of this Design and Construction Contract.
- (c) In the event that the Site, the Facilities or the Existing Facilities or any part thereof or any interest therein becomes subject to any Encumbrance arising in relation to the performance of the Design and Construction Work which has not been consented to in writing by SMH, Construction Contractor 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, Project Co 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 Project Co may seek immediate recovery from Construction Contractor of the amount of any such payment by Project Co and any associated costs, including legal costs (on a full indemnity basis), and all amounts which Project Co is responsible to SMH for under Section 17.2(b) of the Project Agreement, shall be payable on demand by Project Co.
- (d) Notwithstanding the provisions of this Section 17.2, the Parties acknowledge that the provisions of Section 17.3 of Appendix A – General Conditions of the Design and Construction Contract and Section 4.6 of the body of the Design and Construction Contract shall apply to claims for lien made against the Site, the Facility or the Existing Facilities pursuant to the CLA and shall also apply to claims made against the Legislative Holdback.

17.3 Construction Lien Act (Ontario)

- (a) Construction Contractor shall withhold from each Subcontractor the holdbacks required under the CLA and shall deal with such holdbacks in accordance with the CLA and, for the purposes of the CLA, this Design and Construction Contract may be considered a “contract” as defined in the CLA.
- (b) Not Used.
- (c) Construction Contractor shall follow the requirements of the CLA and Good Industry Practice for posting and advertising certificates of completion when issued.
- (d) Construction Contractor and Project Co agree to comply with the requirements of the CLA with respect to the Site, the Facility, the Existing Facilities and the Project whether or not any part of the Site, the Facility, the Existing Facilities or the Project is subject to the provisions of the CLA. For greater certainty, Construction Contractor and Project Co hereby covenant and agree to assume and undertake the same obligations that would exist

if the Project was subject to the CLA with respect to any part or parts of the Site, the Facility, the Existing Facilities or Project to which the CLA does not apply.

- (e) Notwithstanding anything to the contrary in the Design and Construction Contract, in the event that:
- (i) a claim for a construction lien arising in relation to the performance of the Design and Construction Work is registered against the Site, the Facility or the Existing Facilities, and unless Construction Contractor makes alternative arrangements to bond or otherwise secure the amount of the lien claim and costs associated therewith satisfactory to Project Co and SMH, acting reasonably, or
 - (ii) Project Co or SMH receives any written notice of lien arising in relation to the performance of the Design and Construction Work

Project Co shall be entitled to withhold such portion of any payment otherwise due to Construction Contractor in an amount Project Co, reasonably determines would be required to satisfy the applicable lien claimant and any costs and expenses incurred by Project Co or SMH, as applicable, in connection therewith, including such amount on account of costs of the lien claimant such that Project Co or SMH, as applicable, may, upon payment of the amount of the lien claim together with such costs into court, obtain an order vacating such lien pursuant to the CLA, until such time as such claim has been dealt with as provided below.

- (f) In the event that a written notice of a construction lien arising in relation to the performance of the Design and Construction Work is received by Project Co or SMH, and unless Construction Contractor makes alternative arrangements to bond or otherwise secure the amount of the lien claim and costs associated therewith satisfactory to Project Co and SMH, as applicable, acting reasonably, Construction Contractor shall, within 10 Business Days, at its sole expense, arrange for the withdrawal or other disposal of the written notice of a lien pursuant to the CLA.
- (g) If a construction lien arising in relation to the performance of the Design and Construction Work is registered against the Site, the Facility or the Existing Facilities, and unless Construction Contractor makes alternative arrangements to bond or otherwise secure the amount of the lien claim and costs associated therewith satisfactory to Project Co or SMH, acting reasonably, Construction Contractor shall, within 10 Business Days, at its sole expense, vacate or discharge the lien from title to the Site, the Facility and the Existing Facilities. If the lien is merely vacated, Construction Contractor shall, if requested by Project Co, undertake Project Co's and SMH's defence of any action, as applicable, commenced in respect of the lien at Construction Contractor's expense and (i) if an action against Project Co or SMH has been commenced in respect of the lien, Construction Contractor shall, at its sole cost and expense, promptly use best efforts to obtain a discontinuance of such action as it relates to Project Co or SMH, as applicable, or (ii) if no action has been commenced in respect of the lien, Construction Contractor shall, at its sole cost and expense, promptly use best efforts to obtain a release from the

lien claimant releasing Project Co and SMH from all claims of such claimant that arise from the subject matter of the lien.

- (h) If Construction Contractor fails or refuses to (i) vacate or discharge a construction lien or obtain the withdrawal or other disposal of a written notice of lien arising in relation to the performance of the Design and Construction Work within the time prescribed above, or (ii) promptly obtain the discontinuance of action or release described in Section 17.3(g) above, if applicable, and (iii) unless Construction Contractor makes alternative arrangements to bond or otherwise secure the amount of the lien claim and costs associated therewith satisfactory to Project Co or SMH, acting reasonably, then Project Co shall, at its option, be entitled to take all steps necessary to vacate and/or discharge the lien, and all costs incurred by Project Co in doing so (including legal fees on a full indemnity basis and any payment which may ultimately be made out of or pursuant to security posted to vacate the lien) shall be for the account of Construction Contractor, and Project Co, may deduct such amounts from the amounts otherwise due or owing to Construction Contractor. The Construction Contractor shall also be responsible for all amounts which Project Co is responsible for under Section 17.3(h) of the Project Agreement.
- (i) Without limiting any of the provisions of this Section 17.3, Construction Contractor shall satisfy all judgments and pay all costs resulting from any construction liens arising in relation to the performance of the Design and Construction Work or any actions brought in connection with any such liens, or in connection with any other claim or lawsuit brought against Project Co or SMH by any person that provided services or materials to the Site, the Facility or the Existing Facilities in relation to the Design and Construction Work.
- (j) The provisions of Sections 17.3(e) through 17.3(i) (inclusive) do not apply to construction liens (i) filed by Construction Contractor which are claimed as a result of any default of Project Co to make payments to Construction Contractor in accordance with the terms of the Design and Construction Contract or (ii) filed by any SMH Party, including for greater certainty SMH's own forces or SMH's other contractors, which are claimed as a result of work in relation to the Project.
- (k) For clarity, with each application for payment, Construction Contractor shall submit a Statutory Declaration on CCDC Form 9A (2001).

18. SITE CONDITION

18.1 Acceptance of Site Condition

- (a) Subject to Sections 7.4, 18.2 and 18.3 of this Appendix A – General Conditions of the Design and Construction Contract, Construction Contractor acknowledges and agrees that it has investigated the Site and its surroundings in accordance with Good Industry Practice taking into account all matters relating to the Site (including the buildings, structures and works, on, over and under the Site existing on the date hereof and the Background Information) prior to executing the Design and Construction Contract and

agrees to accept the Site and the Site Conditions on an “as is, where is” basis. Without limiting the generality of the foregoing, but subject to Sections 7.4, 18.2 and 18.3 of this Appendix A – General Conditions of the Design and Construction Contract, Construction Contractor shall not be entitled to make any claim of any nature whatsoever against Project Co, any Project Co Party, SMH or any SMH Party on any grounds relating to the Site, including the fact that incorrect or insufficient information on any matter relating to the Site was given to it by any person, whether or not Project Co, a Project Co Party, SMH or a SMH Party, unless the relevant person has given Construction Contractor an express written entitlement to rely on information relating to the Site provided by such person to Construction Contractor.

- (b) Subject to Sections 7.4, 18.2 and 18.3 of this Appendix A – General Conditions of the Design and Construction Contract, Construction Contractor acknowledges and agrees that it has and shall be deemed to have:
- (i) performed all necessary Site due diligence and investigations and investigated and examined the Site and its surroundings and any existing works on, over or under the Site in accordance with Good Industry Practice, taking into account all matters relating to the Site, including the buildings, structures and works, on, over and under the Site existing on the date hereof;
 - (ii) in accordance with Good Industry Practice, taking into account all matters relating to the Site, including the buildings, structures and works, on, over and under the Site existing on the date hereof, satisfied itself as to the nature of the Site Conditions, the ground and the subsoil, the level and quantity of groundwater, the form and nature of the Site, the loadbearing and other relevant properties of the Site, the risk of injury or damage to property affecting the Site, the nature of the materials (whether natural or otherwise) to be excavated and the nature of the design, work and materials necessary for the execution and delivery of the Design and Construction Work;
 - (iii) satisfied itself as to the presence of any Contamination on, in or under the Site, or migrating to or from the Site in accordance with Good Industry Practice, taking into account all matters relating to the Site, including the buildings, structures and works, on over and under the Site existing on the date hereof;
 - (iv) satisfied itself as to the adequacy of the rights of access to, from and through the Site and any accommodation it may require for the purposes of fulfilling its obligations under the Design and Construction Contract;
 - (v) satisfied itself as to the possibility of interference by persons of any description whatsoever with access to or use of, or rights in respect of, the Site; and
 - (vi) satisfied itself as to the precautions, times and methods of working necessary to prevent any nuisance or interference, whether public or private, being caused to any third parties.

- (b.1) In respect to the New Shuter Wing Lands the environmental conditions reported in the Environmental Report (Phase Two Environmental Site Assessment) in relation to lands to the south and to the west of the New Shuter Wing Lands shall be deemed to also apply to the New Shuter Wing Lands to the same extent as if the Environmental Report (Phase Two Environmental Site Assessment) had directly covered and applied to the New Shuter Wing Lands. Also in respect to the New Shuter Wing Lands the geotechnical and hydrogeological conditions reported in the Geotechnical Reports in relation to lands to the south and to the west of the New Shuter Wing Lands shall be deemed to also apply to the New Shuter Wing Lands to the same extent as if the Geotechnical Reports had directly covered and applied to the New Shuter Wing Lands. For clarity, for the purposes of Section 18.2(a), references to the Environmental Reports and to the Geotechnical Reports shall take into account the provisions of this Section 18.1(b.1).
- (c) Construction Contractor further acknowledges and agrees that, other than as referred to or contained in the Design and Construction Contract, no representations or warranties have been made, nor documentation delivered to Construction Contractor or any Construction Contractor Party, which would indicate that Construction Contractor would be unable to perform the Design and Construction Work in a lawful manner.

18.2 Contamination

- (a) Pursuant to the Project Agreement, SMH shall be responsible for Contamination on, in or under, or migrating to or from, the Site except for any such Contamination:
- (i) that was described in, or was properly inferable, readily apparent or readily discoverable from, the Environmental Reports, the Geotechnical Reports or the Hazardous Materials Survey Reports;
 - (ii) that could have been properly inferable, readily apparent or readily discoverable on the basis of investigations, inspections or other due diligence in accordance with Good Industry Practice, including as referred to in Section 18.1, taking into account all matters relating to the Site, including the buildings, structures and works, on, over and under the Site existing on the date hereof; or
 - (iii) that is caused by Construction Contractor or any Construction Contractor Party.
- (b) Upon the discovery of any Contamination for which SMH is responsible pursuant to Section 18.2(a), Construction Contractor shall immediately inform the SMH Representative and shall comply with all Applicable Law in respect thereof at SMH's cost pursuant to Section 18.2(d) of the Project Agreement.
- (c) In the event that SMH wishes Construction Contractor to perform actions which are in addition to any required pursuant to Section 18.2(b), then Project Co shall issue an instruction to Construction Contractor specifying what action SMH requires Construction Contractor to take and Construction Contractor shall promptly and diligently comply with all such instructions at SMH's cost pursuant to Section 18.2(d) of the Project Agreement.

- (d) If Sections 18.2(b) and 18.2(c) require Construction Contractor to perform any alteration, addition, Demolition, extension or variation in the Design and Construction Work as a result of Contamination for which SMH is responsible pursuant to Section 18.2(a) and which would not otherwise be required under the Design and Construction Contract, then any such alteration, addition, Demolition, extension or variation in the Design and Construction Work shall, subject to and in accordance with Section 30 of this Appendix A – General Conditions of the Design and Construction Contract, be treated as a Delay Event and, subject to and in accordance with Section 31 of this Appendix A – General Conditions of the Design and Construction Contract, be treated as a Compensation Event.

18.3 Items of Geological, Historical or Archaeological Interest or Value

- (a) As between the Parties, all fossils, artifacts 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 SMH.
- (b) Upon the discovery of any item referred to in Section 18.3(a) during the course of the Design and Construction Work, Construction Contractor shall:
- (i) immediately inform the SMH Representative of such discovery;
 - (ii) take all steps not to disturb the item and, if necessary, cease any Design and Construction Work in so far as performing such Design and Construction 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 Construction Contractor Parties, with Applicable Law and all requirements of Governmental Authorities with respect to such discovery, including the *Funeral, Burial and Cremations Act* and the Heritage Guidelines and Protocols.
- (c) In the event that Project Co or SMH wishes Construction Contractor to perform actions which are in addition to any required pursuant to Section 18.3(b), then Project Co shall issue an instruction to Construction Contractor specifying what action Project Co or SMH, as applicable, requires Construction Contractor to take and Construction Contractor shall promptly and diligently comply with all such instructions.
- (d) If Sections 18.3(b) and 18.3(c) require Construction Contractor to perform any alteration, addition, Demolition, extension or variation in the Design and Construction Work as a result of such discovery and which would not otherwise be required under the Design and Construction Contract, then any such alteration, addition, Demolition, extension or variation in the Design and Construction Work shall, subject to and in accordance with Article 30 of this Appendix A – General Conditions to the Design and Construction Contract, be treated as a Delay Event and, subject to and in accordance with Article 31 of this Appendix A – General Conditions to the Design and Construction Contract, be treated as a Compensation Event.

19. CITY OF TORONTO AND THIRD PARTY FINANCIAL OBLIGATIONS

19.1 Financial Obligations

- (a) Subject to Section 19.1(c), Construction Contractor shall be responsible for all Financial Obligations under or in respect of all Permits, Licences, Approvals and Agreements including to the City of Toronto, any Utility Company, any Governmental Authority or any other third party in respect of the Design and Construction Work, including:
- (i) any development charges relating to the Design and Construction Work, the Facility or the Site;
 - (ii) any engineering administration and inspection fees required in respect of works or services required to be performed;
 - (iii) any security deposits and letters of credit required under any Permits, Licences, Approvals and Agreements; and
 - (iv) any other amounts payable under any Construction Contractor Permits, Licences, Approvals and Agreements.
- (b) The Parties agree that any refund, partial rebate or credit granted by the City of Toronto, any applicable Utility Company or any applicable Governmental Authority or any other third party relating to the Financial Obligations referred to in Section 19.1(a) shall be for the benefit of SMH to the extent such Financial Obligations were paid by SMH and shall be for the benefit of Construction Contractor to the extent such Financial Obligations were paid by Construction Contractor.
- (c) Pursuant to Section 19.1(c) of the Project Agreement, SMH shall be responsible for all Financial Obligations required under the SMH Permits, Licences, Approvals and Agreements that are expressly described in Appendix "A" – Permits, Licences, Approvals and Agreements to Schedule 1 – Definitions and Interpretation of the Project Agreement as being the responsibility of SMH.

20. SMH ACCESS AND MONITORING

20.1 SMH Access During the Design and Construction Work

- (a) Subject to Section 20.1(b) but without limiting any of Project Co's or SMH's rights in respect of the Site and the Existing Facilities, Construction Contractor acknowledges and agrees that Project Co, Project Co Parties, SMH, the SMH Parties and the Government Entities and their respective representatives shall, prior to Final Completion, 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. For clarity, nothing in this Section 20.1 shall restrict or impede Project Co's or SMH's right to use and access the Existing Facilities or any part of the Site not required at that time for Construction Contractor's performance of the Design and Construction Work in accordance with the terms hereof.

- (b) In exercising their access rights under Section 20.1(a), Project Co, Project Co Parties, SMH, the SMH Parties and the Government Entities and their respective representatives shall:
- (i) provide reasonable prior notice appropriate to the circumstances (other than for any offices or other facilities provided at the Site for Project Co's or SMH's own use);
 - (ii) comply with all relevant safety procedures and any reasonable directions with regard to site safety that may be issued by or on behalf of the Construction Contractor Representative from time to time; and
 - (iii) if required by Construction Contractor, be accompanied by a representative of Construction Contractor or a Construction Contractor Party.

20.2 Increased Monitoring

- (a) If, at any stage, Project Co or SMH is of the opinion, acting reasonably, that there are defects in the Design and Construction Work or that Construction Contractor has failed to comply, in any material respect, with the requirements of the Design and Construction Contract, Project Co or SMH may, without prejudice to any other right or remedy available to it, by notice to Construction Contractor, increase the level of monitoring of Construction Contractor from that set out in the Design and Construction Contract to such level as Project Co or SMH considers reasonable taking into account the nature of the relevant defect or failure until such time as Construction Contractor shall have demonstrated, to Project Co's or SMH's satisfaction, that it is capable of performing and will perform, in all material respects, its obligations related to the Design and Construction Work under the Design and Construction Contract. Construction Contractor will compensate Project Co for any reasonable costs incurred as a result of such increased monitoring and compensate Project Co for any costs Project Co is responsible for pursuant to Section 20.2(a) of the Project Agreement.

20.3 Right to Open Up

- (a) Project Co and SMH shall have the right, at any time prior to the Final Completion Date to request Construction Contractor to open up and inspect (or allow Project Co and SMH to inspect) any part or parts of the Design and Construction Work, or to require testing of any part or parts of the Design and Construction Work, where Project Co and SMH reasonably believes that such part or parts of the Design and Construction Work is or are defective or that Construction Contractor has failed to comply with the requirements of the Design and Construction Contract (including the Design Data) relevant to such part or parts of the Design and Construction Work, and Construction Contractor shall comply with such request. When Project Co and SMH makes such a request, Project Co and SMH shall include reasonably detailed reasons with such request.
- (b) If the inspection shows that the relevant part or parts of the Design and Construction Work is or are defective or that Construction Contractor has failed to comply with the requirements of the Design and Construction Contract (including the Design Data)

relevant to such part or parts of the Design and Construction Work, Construction Contractor shall rectify all such defects and non-compliance diligently and at no cost to Project Co and Construction Contractor shall not be entitled to any additional compensation or extension of time in relation thereto.

- (c) If the inspection shows that the relevant part or parts of the Design and Construction Work is or are not defective and that Construction Contractor has complied with the requirements of the Design and Construction Contract (including the Design Data) relevant to such part or parts of the Design and Construction Work, the exercise by Project Co or SMH of its rights pursuant to this Section 20.3 shall, subject to and in accordance with Section 30 of this Appendix A – General Conditions of the Design and Construction Contract, be treated as a Delay Event and, subject to and in accordance with Section 31 of this Appendix A – General Conditions of the Design and Construction Contract, be treated as a Compensation Event.

20.4 No Relief from Obligations

- (a) The Parties acknowledge that the exercise by Project Co, SMH or the SMH Representative of the rights under this Article 20 shall in no way affect the obligations of Construction Contractor under the Design and Construction Contract except as set out in this Article 20.

20.5 Right of Access of Additional Contractors to Design and Construction Work

- (a) Subject to Section 11.13 of this Appendix A – General Conditions of the Design and Construction Contract, Construction Contractor shall grant, and shall cause all Construction Contractor Parties to grant, Additional Contractors access to those parts of the Design and Construction Work as may be necessary for the Additional Contractors to carry out any Additional Works.

21. EQUIPMENT

21.1 Equipment Steering Committee

- (a) Pursuant to the Project Agreement, SMH and the Project Co shall, within 30 days following Financial Close, establish a committee (the “**Equipment Steering Committee**”) consisting of:
 - (i) 1 representative appointed by IO from time to time;
 - (ii) 4 representatives of SMH, one of whom shall be the SMH Representative, appointed by SMH from time to time; and
 - (iii) 2 representatives of Project Co, one of whom shall be the Project Co Representative under the Project Agreement, appointed by Project Co from time to time.

- (b) Members of the Equipment Steering Committee may invite, on prior notice to all members, such advisors and consultants as they require from time to time to attend meetings and to provide briefings to the Equipment Steering Committee.
- (c) The Equipment Steering Committee shall assist SMH and the Project Co by promoting cooperative and effective communication with respect to matters related to the Equipment, including, but not limited to, the interaction between Not-In-Contract Equipment commissioning and Plant commissioning.
- (d) The primary role of the Equipment Steering Committee shall be to oversee and coordinate the planning, procurement, installation and commissioning of all Not-In-Contract Equipment in a timely and efficient manner and in accordance with the Works Schedule and the Equipment Sub-Plan. Construction Contractor and the Equipment Steering Committee will work co-operatively with any equipment consultant retained by SMH
- (e) 3 representatives of SMH (one of whom shall be either the SMH Representative or a senior project manager), one representative of Project Co and the representative of IO (or a delegate thereof) shall constitute a quorum at any meeting of the Equipment Steering Committee. A quorum of members may exercise all of the powers of the Equipment Steering Committee. The members shall not transact business at a meeting of the Equipment Steering Committee unless a quorum is present. Unless the Works Committee otherwise directs:
 - (i) a representative of Project Co shall be the chairperson of the Equipment Steering Committee;
 - (ii) Construction Contractor shall be responsible for preparing and providing to the members of the Equipment Steering Committee an agenda for each meeting of the Equipment Steering Committee no fewer than 10 Business Days prior to each meeting;
 - (iii) minutes of all meetings, recommendations and decisions of the Equipment Steering Committee, including those made by telephone or other form of communication, shall be recorded and maintained by Construction Contractor and Construction Contractor shall circulate copies of such minutes within 5 Business Days of the holding of the meeting or the making of the recommendation or decision. Unless SMH notifies Construction Contractor within 5 Business Days of receipt of the minutes that it disagrees with the contents of the minutes, Construction Contractor, Project Co and SMH shall be deemed to have approved such minutes; and
 - (iv) Construction Contractor shall maintain a complete set of all minutes of the meetings of the Equipment Steering Committee and shall make such minutes available for inspection by SMH during regular business hours.

- (f) The members of the Equipment Steering Committee may adopt such other procedures and practices for the conduct of the activities of the Equipment Steering Committee as they consider appropriate from time to time.

21.2 SMH Equipment Responsibilities

- (a) SMH, pursuant to the Project Agreement, shall be responsible for the procurement of each and every item of Not-In-Contract Equipment and the execution of any and all purchase orders, contracts, manufacturer's installation invoices and other documentation related thereto. For clarity, SMH shall, in its sole discretion:
 - (i) determine the method of planning, procurement, quantity, make, model, vendor and any terms and conditions of financing for all Not-In-Contract Equipment based upon tenders, quotations or proposals for Not-In-Contract Equipment obtained by or on behalf of SMH;
 - (ii) prepare and issue Not-In-Contract Equipment procurement documentation (which documents shall, for clarity, include the terms and conditions of each procurement, the Not-In-Contract Equipment specifications and, where applicable, any Not-In-Contract service and preventative maintenance arrangements);
 - (iii) conduct procurement and product evaluations; and
 - (iv) make vendor and Not-In-Contract Equipment selections and awards.
- (b) SMH, pursuant to the Project Agreement, shall approve the selection of and the entering into of each and every purchase order, contract and manufacturer's installation invoice by Construction Contractor with respect to each item of In-Contract Equipment. Prior to SMH providing any such approval, pursuant to the Project Agreement, if applicable, Construction Contractor shall present to SMH different options for In-Contract Equipment service agreements or other similar arrangements which SMH may, in its sole discretion, select.
- (c) For greater certainty:
 - (i) SMH, pursuant to the Project Agreement, not Construction Contractor, shall be liable as "purchaser" to the vendor under every purchase order, contract and manufacturer's installation invoice related to Not-In-Contract Equipment, and shall make all payments related thereto in accordance with the relevant invoice terms; and
 - (ii) Construction Contractor, and not SMH, shall be liable as "purchaser" to the vendor under every purchase order, contract and manufacturer's installation invoice related to In-Contract Equipment, and shall make all payments related thereto in accordance with the relevant invoice terms and, if applicable, the provisions of Section 3.2 in respect of cash allowances.

- (d) SMH, pursuant to the Project Agreement, will assume the obligation to make any payments in respect of In-Contract Equipment that are payable to a vendor after the Substantial Completion Date under any and all leases, managed equipment programs, usage based pricing and other such arrangements or for service agreements, provided, pursuant to the Project Agreement, that SMH has given its prior written approval to such arrangements.
- (e) SMH, pursuant to the Project Agreement, shall be responsible for any and all decontamination of Existing Equipment (as required under Applicable Law or by SMH in its sole discretion) prior to the decommissioning of such Existing Equipment by Construction Contractor.

21.3 SMH Early Procured In-Contract Equipment

- (a) Upon Financial Close, SMH shall assign and/or Project Co shall assume and Project Co shall assign and/or Construction Contractor shall assume:
 - (i) any incomplete procurement of SMH Early Procured In-Contract Equipment and any and all related documents; and
 - (ii) if any procurement of SMH Early Procured In-Contract Equipment has been completed by SMH prior to Financial Close, all purchase orders, contracts, manufacturer's installation invoices and other documentation related to such SMH Early Procured In-Contract Equipment,

(collectively, the "SMH Early Procured In-Contract Equipment Assumption"). Construction Contractor shall complete any assigned procurement and shall enter into any and all future purchase orders, contracts, manufacturer's installation invoices and other documentation respecting any and all SMH Early Procured In-Contract Equipment for which procurement of SMH Early Procured In-Contract Equipment was initiated by SMH but was not completed by Financial Close.
- (b) For greater clarity:
 - (i) SMH, pursuant to the Project Agreement, shall approve and select all SMH Early Procured In-Contract Equipment and assist Project Co with the completion of the related design development in respect of such SMH Early Procured In-Contract Equipment; and
 - (ii) From and after the date of the SMH Early Procured In-Contract Equipment Assumption, Construction Contractor has the same obligations in respect of SMH Early Procured In-Contract Equipment as it does for In-Contract Equipment under the Design and Construction Contract and, for clarity, Construction Contractor shall be liable as "purchaser" to the vendor under every purchase order and other related contract, including manufacturer's installation invoice, related to SMH Early Procured In-Contract Equipment.

- (c) For the purpose of this Section 21.3(c), all capitalized terms not defined in the Project Agreement or the Design and Construction Contract have the meanings given to them in the SMH Early Procured In-Contract Equipment Assumption. Pursuant to Section 21.3(c) of the Project Agreement, SMH may, in its sole discretion, require Project Co to procure and perform other Works in relation to items of additional In-Contract Equipment identified by SMH from time to time following the date of the Project Agreement and prior to Substantial Completion pursuant to the SMH Early Procured In-Contract Equipment Agreements (“**Additional In-Contract Equipment and Works**”), including, but not limited to, requiring Project Co to purchase additional optional equipment (including consumables) at the fixed price set out in (i) Sections A-3 – Optional Equipment and Pricing and A-4 – Consumables Pricing of Schedule “A” – Equipment, Products of the Steris Early Procured In-Contract Equipment Agreement, and (ii) Section A-4 – Consumables Pricing of Schedule “A” – Equipment, Products of the Getinge Early Procured In-Contract Equipment Agreement. In such an event a Variation will arise, pursuant to the Project Agreement, in respect of such Additional In-Contract Equipment and Works and SMH may, in its sole discretion, elect to either (A) pay for such Additional In-Contract Equipment and Works out of its own funds or (B) notify Project Co in writing that such Additional In-Contract Equipment and Works are Discretionary SMH Additional In-Contract Equipment and Works Items and direct Project Co to pay the cost of such Additional In-Contract Equipment and Works with all or a portion of the Discretionary SMH Additional In-Contract Equipment and Works Amount. In such an event, there shall be a corresponding Variation under the Design and Construction Contract and the Construction Contractor shall comply with any and all instructions given by Project Co as provided to Project Co by SMH under Section 21.3(c) of the Project Agreement.
- (d) Construction Contractor acknowledges that, pursuant to Section 21.3(d) of the Project Agreement, immediately following Financial Close, Project Co shall pay to SMH the SMH Early Procured In-Contract Equipment Reimbursement Amount to reimburse SMH for all payments made by SMH prior to Financial Close for SMH Early Procured In-Contract Equipment.

21.4 Construction Contractor Equipment Responsibilities

- (a) Construction Contractor shall be responsible for:
- (i) completing the design of the Facility to accommodate all Equipment and Existing Equipment, (including, for clarity, in response to any alternatives to any Not-In-Contract Equipment identified and/or selected by the SMH Representative from time to time);
 - (ii) revising, coordinating and finalizing the plan to procure, transfer, install and commission, as applicable, all Equipment and Existing Equipment (including, but not limiting to, finalizing and updating the lists of Not-In-Contract Equipment set out in Part 4 of Schedule 15 – Output Specifications) based on the development of Construction Contractor’s Design Data and the latest information available from the SMH Representative (including, but not limited to, the to-be-SMH-approved

Not-In-Contract Equipment budget, as a result of which substantial revisions to the lists of Not-In-Contract Equipment and Existing Equipment in Part 4 of Schedule 15-Output Specifications may be required) and in consultation with the Equipment Steering Committee;

- (iii) if applicable, completing the procurement of any SMH Early Procured In-Contract Equipment;
 - (iv) all costs and expenses associated with the commissioning of Equipment and Existing Equipment;
 - (v) procuring and purchasing all In-Contract Equipment as set out in Part 4 of Schedule 15 – Output Specifications;
 - (vi) subject to Section 21.2(e), decommissioning, de-installing, disconnecting and transferring all Existing Equipment as set out in Section C of Part 4 of Schedule 15 – Output Specifications;
 - (vii) providing all structural, mechanical, electrical and information and communications technology building system services to produce a complete working system for all Equipment and Existing Equipment, as applicable;
 - (viii) expediting, assembly, unpacking, offloading, handling and storing all Equipment;
 - (ix) coordinating, scheduling and completing the installation or reinstallation, as applicable, of all Equipment and Existing Equipment in accordance with manufacturer's instructions and Schedule 15 – Output Specifications; and
 - (x) coordinating, scheduling and completing the commissioning of all Equipment and Existing Equipment, in accordance with each Phase Commissioning Program, the Tower Interim Completion Commissioning Program and the Final Commissioning Program.
- (b) For the purpose of achieving a Phase Completion, all Equipment Construction Contractor is required to commission to achieve such Phase Completion must be successfully commissioned by Construction Contractor in accordance with each Phase Commissioning Program. Not less than 10 Business Days prior to Construction Contractor's submission of a draft Phase Commissioning Program under Section 23A.1(a), SMH, pursuant to the Project Agreement, shall identify for Construction Contractor the Existing Equipment, if any, that must be successfully commissioned by Construction Contractor in accordance with the applicable Phase Commissioning Program for each Phase Completion to be achieved. Provided that, in respect of any item of (i) In-Contract Equipment, such requirements shall be waived by SMH, pursuant to the Project Agreement, if (A), despite having used commercially reasonable efforts to do so, Construction Contractor is unable to complete the procurement, installation or commissioning of such item of equipment due to a delay in the performance of any of its obligations by an equipment vendor or manufacturer, and (B) the inability of Construction Contractor to complete the procurement, installation or commissioning of

such item of equipment does not prevent or materially impede the ability of SMH to deliver patient care in respect of the applicable portion of the Facility; and (ii) Not-In-Contract Equipment, such requirements shall be waived by SMH, pursuant to the Project Agreement, if, despite having used commercially reasonable efforts to do so, Construction Contractor is unable to complete the installation or commissioning of such item of equipment due to a delay in the performance of any of its obligations by SMH, an equipment vendor or manufacturer.

- (c) For the purpose of achieving Tower Interim Completion, all Equipment Construction Contractor is required to commission to achieve Tower Interim Completion must be successfully commissioned by Construction Contractor in accordance with the Tower Interim Completion Commissioning Program. Not less than 10 Business Days prior to Construction Contractor's submission of the draft Tower Interim Completion Commissioning Program under Section 23B.2(a), SMH, pursuant to the Project Agreement, shall identify for Construction Contractor the Existing Equipment, if any, that must be successfully commissioned by Construction Contractor in accordance with the Tower Interim Completion Commissioning Program for Tower Interim Completion to be achieved. Provided that, in respect of any item of (i) In-Contract Equipment, such requirements shall be waived by SMH, pursuant to the Project Agreement, if, (A) despite having used commercially reasonable efforts to do so, Construction Contractor is unable to complete the procurement, installation or commissioning of such item of equipment due to a delay in the performance of any of its obligations by an equipment vendor or manufacturer, and (B) the inability of Construction Contractor to complete the procurement, installation or commissioning of such item of equipment does not prevent or materially impede the ability of SMH to deliver patient care in respect of the applicable portion of the Facility; and (ii) Not-In-Contract Equipment, such requirements shall be waived by SMH, pursuant to the Project Agreement, if, despite having used commercially reasonable efforts to do so, Construction Contractor is unable to complete the installation or commissioning of such item of equipment due to a delay in the performance of any of its obligations by SMH, an equipment vendor or manufacturer.
- (d) For the purpose of achieving Substantial Completion, all Equipment must be successfully commissioned by Construction Contractor in accordance with the Final Commissioning Program. Not less than 10 Business Days prior to Construction Contractor's submission of the draft Final Commissioning Program under Section 24.2(a), SMH, pursuant to the Project Agreement, shall identify for Construction Contractor the Existing Equipment, if any, that must be successfully commissioned by Construction Contractor in accordance with the Final Commissioning Program for Substantial Completion to be achieved. Provided that, in respect of any item of (i) In-Contract Equipment, such requirements shall be waived by SMH, pursuant to the Project Agreement, if, (A) despite having used commercially reasonable efforts to do so, Construction Contractor is unable to complete the procurement, installation or commissioning of such item of equipment due to a delay in the performance of any of its obligations by an equipment vendor or manufacturer, and (B) the inability of Construction Contractor to complete the procurement, installation or commissioning of such item of equipment does not prevent or materially impede the ability of SMH to deliver patient care in respect of the applicable portion of the Facility; and (ii) Not-In-Contract Equipment, such requirements shall be waived by SMH,

pursuant to the Project Agreement, if, despite having used commercially reasonable efforts to do so, Construction Contractor is unable to complete the installation or commissioning of such item of equipment due to a delay in the performance of any of its obligations by SMH, an equipment vendor or manufacturer.

- (e) Whether or not Substantial Completion has been achieved, until such time as Construction Contractor has completed the installation and commissioning of all Not-In-Contract Equipment in accordance with this Section 21, Project Co may withhold from any payment or payments due to Construction Contractor a holdback amount equal to the greater of the Not-In-Contract Equipment Fee and \$250,000.00

21.5 Project Co Procurement Responsibilities

- (a) Construction Contractor, on behalf of Project Co, shall act as purchasing and procurement manager for SMH and shall:
 - (i) in consultation with the Equipment Steering Committee, update and finalize the lists of Not-In-Contract Equipment and Existing Equipment set out in Part 4 of Schedule 15 – Output Specifications based on the development of Construction Contractor's Design Data and the latest information available from the SMH Representative and update the budget for Not-In-Contract Equipment for approval by the Equipment Steering Committee;
 - (ii) in consultation with the Equipment Steering Committee, review the building system requirements for the Equipment and the Existing Equipment, as applicable, and the layout in respect of the Equipment and the Existing Equipment, as applicable, onto the design drawings for reconciliation with the services and space designed prior to purchasing or moving any Equipment or Existing Equipment;
 - (iii) upon the request of SMH, provide advice to the Equipment Steering Committee in respect of the evaluation of tenders, quotations or proposals from Not-In-Contract Equipment vendors;
 - (iv) upon the request of SMH, assist the Equipment Steering Committee in the review of the tenders, quotations or proposals from Not-In-Contract Equipment vendors by clearly delineating the costs and performance of the Not-In-Contract Equipment, the training methods and values, the testing and calibration protocols, the acceptable end results and the party responsible for such testing, be it the vendor, a third party or individuals engaged by Construction Contractor;
 - (v) upon the request of SMH, assist the Equipment Steering Committee with the selection of tenders, quotations or proposals received from Not-In-Contract Equipment vendors; and
 - (vi) manage and perform the procurement of all In-Contract Equipment (except, for clarity, in respect of any SMH Early Procured In-Contract Equipment for which the procurement was completed by Financial Close), which includes, but is not

- limited to, the responsibility for executing any purchase orders, contracts, manufacturer's installation invoices and other documentation related to In-Contract Equipment, as approved by SMH;
- (vii) in respect of Not-In-Contract Equipment, providing such documentation as SMH requires, acting reasonably;
 - (viii) test and calibrate any Equipment not tested and calibrated by vendors and coordinate the acceptance testing of all Equipment as designated in Part 4 of Schedule 15 – Output Specifications; and
 - (ix) during each Warranty Period, coordinate and manage any warranty issues with the In-Contract Equipment vendors.
- (b) Based on the awards, tenders, quotations and proposals received by SMH from Not-In-Contract Equipment vendors, Construction Contractor shall be responsible for:
- (i) providing analyses and recommendations to SMH of the effect of the type, quality and quantity of Not-In-Contract Equipment items on the overall design of the Facility and on the relevant areas within the Facility;
 - (ii) the coordination of vendor installation, service agreements, training, supplies, spare parts and start-up consumables included with the items of Not-In-Contract Equipment by the relevant manufacturer or vendor;
 - (iii) the coordination of training for all applicable SMH staff;
 - (iv) the coordination of Not-In-Contract Equipment acceptance testing procedures (including, without limitation, the results and guidelines for acceptance) proposed by the relevant Not-In-Contract Equipment vendor; and
 - (v) the coordination of the dates and times when the items of Not-In-Contract Equipment shall be delivered to the Site.

21.6 Minimizing Disruptions

- (a) Construction Contractor shall perform all of its obligations under this Section 21 so as to minimize, to the greatest extent reasonably possible, any disruption of the SMH Activities. Construction Contractor acknowledges and agrees that such activities may require work outside of normal working hours in order to accommodate the efficient operation of the Facility.

21.7 Equipment Training

- (a) For and in respect of each item of Equipment operated by SMH, Construction Contractor shall, in accordance with Schedule 14 - Outline Commissioning Program, provide or arrange for adequate, appropriate and timely training in the item's proper operation and maintenance for all applicable SMH staff.

- (b) SMH, pursuant to the Project Agreement, shall make its staff available for training purposes in accordance with the Design and Construction Work Schedule, each Phase Commissioning Program, the Tower Interim Completion Commissioning Program and the Final Commissioning Program, as applicable.
- (c) Construction Contractor's obligation to complete all applicable Equipment training prior to and as a condition of its achievement of each Phase Completion, Tower Interim Completion and Substantial Completion may be waived in writing by SMH in its sole discretion. If SMH, pursuant to the Project Agreement, elects to exercise such right from time to time, no later than 30 days prior to the applicable Scheduled Phase Completion Date, the Scheduled Tower Interim Completion Date or the Scheduled Substantial Completion Date, as the case may be, Project Co shall provide to Construction Contractor, upon receipt from SMH under the Project Agreement, a written list of the Equipment training that Construction Contractor shall be required to complete following the achievement of such Phase Completion, Tower Interim Completion or Substantial Completion, as the case may be, and for which such waiver is being provided by SMH pursuant to the Project Agreement. Promptly following the receipt of such written list, Project Co and Construction Contractor, with input from SMH, shall agree to the time(s) and date(s) upon which such training shall be completed by Construction Contractor following the applicable Phase Completion Date, Tower Interim Completion Date or Substantial Completion Date, as the case may be, and Construction Contractor shall incorporate the time(s) and date(s) of such training into the Design and Construction Work Schedule and the Phase Commissioning Program, the Tower Interim Commissioning Program or the Final Commissioning Program, as applicable.

21.8 Scheduling of Equipment Procurement and Installation

- (a) Construction Contractor shall, in consultation with SMH and in accordance with Schedule 3 – Works Scheduling Requirements, prepare a schedule for the procurement or transfer, as applicable, installation and commissioning of all Equipment and Existing Equipment, as applicable, and shall incorporate the timing of procurement, transfer, installation and commissioning, as applicable, of all Equipment and Existing Equipment into the Design and Construction Work Schedule, each Phase Commissioning Program, the Tower Interim Completion Commissioning Program and the Final Commissioning Program, as applicable. Such schedule shall include the date by which SMH must procure and make a final determination of the quantity, make, model and vendor of each piece of Not-In Contract Equipment.
- (b) Pursuant to the Project Agreement, SMH shall procure and determine the quantity, make, model and vendor of each piece of Not-In-Contract Equipment, and, as applicable, shall execute any purchase order, contract, manufacturer's installation invoice and/or other documentation related thereto, by the relevant date set out in the Design and Construction Work Schedule, provided that the SMH Representative shall have received such documentation as SMH requires, acting reasonably, to discharge its obligations under Section 21 of the Project Agreement no later than 30 days prior to the relevant date set out in the Design and Construction Work Schedule. Notwithstanding the foregoing, SMH, pursuant to the Project Agreement may, in its sole discretion and at any time and

from time to time, delay or cancel the procurement of any item of Not-In-Contract Equipment and/or the execution of any purchase order, contract, manufacturer's installation invoice and/or other documentation related thereto.

22. LEADERSHIP IN ENVIRONMENTAL DESIGN AND OTHER REQUIREMENTS

22.1 LEED Design and Construction Obligations

- (a) Construction Contractor shall perform the Design and Construction Work so as to achieve the prerequisites and credits required to achieve a LEED Silver Rating and, except as set out in Section 1.1.6.2 of Part 1 of Schedule 15 – Output Specifications and Section 3.10 of Part 3 of Schedule 15 – Output Specifications, Construction Contractor may, in its sole discretion, determine which additional credits to pursue.

22.2 Mandatory Prerequisites and Credits

- (a) Construction Contractor shall, at a minimum, achieve the credits and prerequisites under the LEED Rating System provided for in Section 1.1.6.2 of Part 1 of Schedule 15 – Output Specifications and Section 3.10 of Part 3 of Schedule 15 – Output Specifications.

22.3 LEED Progress Reports

- (a) As part of each Design and Construction Work Report, Construction Contractor shall submit a monthly progress report comparing actual construction and procurement activities with the LEED Silver Rating requirements.

22.4 LEED Silver Rating

- (a) Construction Contractor shall cause the Project to be registered with CaGBC on behalf of SMH. Construction Contractor shall verify that the Project is registered with CaGBC within 60 days following Financial Close and confirm to SMH and Project Co that Construction Contractor is satisfied that the registration is valid, and is effective as of the date it was made.
- (b) If there is a change in the requirements for the achievement of a LEED Silver Rating under the LEED Rating System, and Construction Contractor is required by the CaGBC to comply with such change, then Construction Contractor shall notify SMH and Project Co of such change and such change shall, subject to and in accordance with Schedule 22 – Variation Procedure, result in a Variation.
- (c) Construction Contractor shall apply to the CaGBC to obtain a LEED Silver Rating for the Tower and the New Shuter Wing as soon as possible.
- (d) Pursuant to Section 22.4 of the Project Agreement, in the event that:
 - (i) Construction Contractor fails to obtain the credits and prerequisites under the LEED Rating System within 24 months after the Tower Interim Completion Date

provided for in Section 1.1.6.2 of Part 1 of Schedule 15 – Output Specifications and Section 3.10 of Part 3 of Schedule 15 – Output Specifications; or

- (ii) a LEED Silver Rating is not obtained for the Tower by 24 months after the Tower Interim Completion Date and for the New Shuter Wing by 24 months after the Substantial Completion Date,

other than as a direct result of any act or omission of any SMH Party, SMH or any Government Entity, SMH shall be entitled to be paid liquidated damages by Project Co in the amount of: (i) \$2,000,000 in relation to the Tower LEED requirements; and (ii) \$250,000 in relation to the New Shuter Wing LEED requirements. The Construction Contractor shall be liable and responsible for any liquidated damages payable to SMH by Project Co pursuant to Section 22.4 of the Project Agreement. The Parties agree that such liquidated damages are not a penalty but represent a genuine and reasonable pre-estimate of the damages that SMH will suffer as a result of the occurrence of either of the specified event and would be difficult or impossible to quantify upon the occurrence of either of such events. Such payment shall constitute full and final settlement of any and all damages that may be claimed by Project Co as a result of the occurrence of either of such events. For greater certainty, Construction Contractor's failure to obtain the credits and prerequisites under the LEED Rating System provided for in Section 1.1.6.2 of Part 1 of Schedule 15 – Output Specifications and Section 3.10 of Part 3 of Schedule 15 – Output Specifications or to obtain a LEED Silver Rating for the Tower by 24 months after the Tower Interim Completion Date and for the New Shuter Wing by 24 months after the Substantial Completion Date shall not result in a Project Co Event of Default. The Parties and SMH agree that such liquidated damages shall be payable whether or not SMH incurs or mitigates its damages, and that SMH shall not have any obligation to mitigate any such damages.

22.5 Greenhouse Gas Credits

- (a) Any greenhouse gas credits which may be guaranteed as a result of the Project shall be owned by SMH and Construction Contractor shall have no entitlement to any of such credits whatsoever.

22.6 LEED Obligations in Design and Construction Contract

- (a) All obligations of Project Co with respect to LEED arising under the Project Agreement, including for certainty all obligations under Article 22 of the Project Agreement, are the obligations of the Construction Contractor under the Design and Construction Contract.

23. INDEPENDENT CERTIFIER

23.1 Appointment

- (a) On or prior to Financial Close, SMH and Project Co pursuant to the Project Agreement, shall appoint an independent and suitably qualified and experienced consultant to act as the Independent Certifier for the purposes of the Project Agreement and shall enter into an agreement with the Independent Certifier substantially in the form of Schedule 6 –

Independent Certifier Agreement of the Project Agreement. If SMH and Project Co are unable to agree upon the Independent Certifier within such period of time, then the determination of the Independent Certifier shall be made in the same manner as the identification of a replacement Independent Certifier under Section 23.7(b).

- (b) Pursuant to the Project Agreement, neither SMH nor Project Co shall, without the other's prior written consent, enter into any agreement with the Independent Certifier in connection with the Project other than the Independent Certifier Agreement. Construction Contractor shall not enter into, and shall ensure that no Construction Contractor Party enters into, any agreement with the Independent Certifier in connection with the Project.

23.2 Role of Independent Certifier

- (a) The general role, obligations and functions of the Independent Certifier are described in Schedule 6 – Independent Certifier Agreement.

23.3 Changes to Terms of Appointment

- (a) Pursuant to the Project Agreement, neither SMH nor Project Co shall without the other's prior written approval (not to be unreasonably withheld or delayed):
 - (i) waive, settle, compromise or otherwise prejudice any rights or claims which the other may from time to time have against the Independent Certifier; or
 - (ii) vary the terms of the Independent Certifier Agreement or the service performed or to be performed by the Independent Certifier.
- (b) Pursuant to the Project Agreement, each of SMH and Project Co shall perform their respective obligations arising under or in connection with the Independent Certifier Agreement.

23.4 Right to Change Appointment

- (a) Pursuant to the Project Agreement, the parties acknowledge that the Independent Certifier shall provide certain services and reports to Project Co, the Lenders and Project Co Parties (as defined in the Project Agreement) in addition to performing the functions of the Independent Certifier under the Project Agreement. SMH and Project Co may agree to terminate the Independent Certifier Agreement upon 30 days' notice to the Independent Certifier. If such notice is given, then, pursuant to Section 23.7 of the Project Agreement, a new Independent Certifier will be appointed. The Parties and SMH agree that, notwithstanding the 30 days' notice of termination, the Independent Certifier shall continue on a day-to-day basis thereafter until a new Independent Certifier is appointed.

23.5 Cooperation

- (a) The Construction Contractor agrees to cooperate with SMH and Project Co generally in relation to all matters within the scope of or in connection with the Independent Certifier Agreement.

23.6 Payment of Independent Certifier

- (a) Pursuant to the Project Agreement, SMH and Project Co shall share equally the responsibility for the payment of all fees and costs of the Independent Certifier.

23.7 Replacement

- (a) Pursuant to the Project Agreement, in the event of the Independent Certifier's engagement being terminated otherwise than for full performance, SMH and Project Co pursuant to the Project Agreement, shall liaise and cooperate with each other in order to appoint a replacement consultant to act as the Independent Certifier as soon as reasonably practicable. The identity of any such replacement shall be as agreed by SMH and Project Co and the terms of his/her appointment shall, unless otherwise agreed, be as set out in the Independent Certifier Agreement.
- (b) Pursuant to the Project Agreement, in the event SMH and Project Co fail to agree upon the identity of a replacement Independent Certifier within five Business Days of the original Independent Certifier's appointment being terminated, then a replacement Independent Certifier shall be chosen as follows:
 - (i) Both SMH and Project Co shall, within five Business Days thereafter, select three suitably qualified and experienced replacements that would be acceptable to that party, and shall provide notice thereof to the other party, with a ranking of preference for replacements;
 - (ii) if both SMH and Project Co have selected a common replacement, then such common replacement shall be the Independent Certifier, and if there is more than one common replacement, then the common replacement with the highest overall ranking (calculated by adding together the ordinal rank assigned by both SMH and Project Co) shall be selected, and in the event of a tie, the lowest-cost of such tied replacements shall be selected; and
 - (iii) if SMH and Project Co have not selected a common replacement, then the determination of the new replacement may be referred for resolution in accordance with Schedule 27 – Dispute Resolution Procedure of the Project Agreement.

23A. PHASE COMMISSIONING AND COMPLETION

23A.1 Phase Commissioning Activities

- (a) Construction Contractor shall perform all Phase Construction Contractor Commissioning, and shall facilitate the performance of the Phase SMH Commissioning, set out in each Phase Commissioning Program.

23A.2 Phase Commissioning Program

- (a) Construction Contractor shall prepare a draft of the applicable Phase Commissioning Program in respect of each Phase Construction Contractor Commissioning and Phase SMH Commissioning and shall provide a copy thereof to the Independent Certifier, the SMH Commissioning Consultant and the SMH Representative not less than 90 days prior to each applicable Scheduled Phase Completion Date.
- (b) Each Phase Commissioning Program shall, at a minimum:
 - (i) describe the requirements, and the timing and sequence of such requirements, necessary in order that the applicable Phase Construction Contractor Commissioning shall be completed to achieve Phase Completion on or before each Scheduled Phase Completion Date;
 - (ii) describe the requirements, and the timing and sequence of such requirements, of the applicable Phase SMH Commissioning activities;
 - (iii) comply with all requirements of the Outline Commissioning Program and include all details, including for all appendices, required to be completed in the Outline Commissioning Program;
 - (iv) be consistent with the Outline Commissioning Program and impose no greater or more onerous obligations on SMH than those set out in the Outline Commissioning Program, unless otherwise agreed to by SMH;
 - (v) include the names of the individuals or companies proposed to perform all applicable Phase Construction Contractor Commissioning;
 - (vi) include a schedule of each of the Phase Construction Contractor Commissioning Tests and the Phase SMH Commissioning Tests proposed to be performed and the timeframe for completion, with start and end dates;
 - (vii) include a schedule of meetings to be held between the Parties and SMH to coordinate the performance of the applicable Phase Construction Contractor Commissioning and Phase SMH Commissioning;
 - (viii) provide for the re-verification of systems following the applicable Phase SMH Commissioning;
 - (ix) list the approvals required from any Governmental Authority, manufacturer or other person that are necessary to meet the requirements of each Phase Commissioning Program or Applicable Law; and
 - (x) comply with the requirements and the timing and sequence of such requirements of each applicable Transition (as set out in the Transition Parameters).

- (c) Pursuant to the Project Agreement, SMH shall endeavour to provide Project Co with comments on each draft Phase Commissioning Program in accordance with the procedures contemplated by Section 4.1 of Schedule 10 – Review Procedure, and Construction Contractor shall revise each draft Phase Commissioning Program to the extent contemplated by Schedule 10 – Review Procedure within 30 days of receipt of any comments from SMH.
- (d) When agreed by the Parties, the applicable Phase Commissioning Program shall replace the Outline Commissioning Program with respect to the applicable Phase Completion.

23A.3 Commencement of Phase Construction Contractor Commissioning

- (a) Construction Contractor shall give 30 days' written notice to the Independent Certifier, the SMH Commissioning Consultant and the SMH Representative of the proposed commencement of each Phase Construction Contractor Commissioning.
- (b) Construction Contractor shall give at least five Business Days' notice in respect of the commencement of each Phase Construction Contractor Commissioning and shall invite the Independent Certifier, the SMH Commissioning Consultant and the SMH Representative, to witness, and to comment on, each aspect of each Phase Construction Contractor Commissioning. Construction Contractor shall, together with such notice, provide all information that the Independent Certifier, the SMH Commissioning Consultant and the SMH Representative may reasonably require in relation thereto, including:
 - (i) tests proposed;
 - (ii) test methodology; and
 - (iii) expected test results.

23A.4 Phase Completion Certificate

- (a) Construction Contractor shall, on behalf of Project Co, give the Independent Certifier and the SMH Representative at least ten Business Days' notice prior to the date upon which Construction Contractor anticipates delivering a Phase Completion Notice.
- (b) Construction Contractor shall, on behalf of Project Co, give the Independent Certifier and the SMH Representative notice (the "**Phase Completion Notice**") upon the satisfaction of all requirements for a Phase Completion, which Phase Completion Notice shall describe, in reasonable detail, the satisfaction of the requirements for the Phase Completion, together with Construction Contractor's opinion as to whether the conditions for issuance of the applicable Phase Completion Certificate have been satisfied.
- (c) Pursuant to the Project Agreement, SMH will endeavour to, within five Business Days after receipt of the applicable Phase Completion Notice, provide the Independent Certifier and Project Co with SMH's opinion as to whether the conditions for issuance of the applicable Phase Completion Certificate have been satisfied and, if applicable, any

reasons as to why it considers that such Phase Completion Certificate should not be issued.

- (d) Within five Business Days after Project Co's receipt of SMH's opinion pursuant to Section 23A.4(c) of the Project Agreement, SMH and Project Co shall cause the Independent Certifier to determine whether the conditions for issuance of the applicable Phase Completion Certificate have been satisfied, having regard for the opinions of Project Co (provided that pursuant to this Design and Construction Contract, Project Co will consider the comments of the Construction Contractor in formulating Project Co's opinions) and SMH, to determine whether any Phase Minor Deficiencies exist, and to issue to SMH and to Project Co either:
- (i) the applicable "**Phase Completion Certificate**", confirming the date of issue as the applicable Phase Completion Date and setting out the Phase Minor Deficiencies List (if applicable) in accordance with Section 23A.8 of the Project Agreement; or
 - (ii) a report detailing the matters that the Independent Certifier considers are required to be performed by Project Co (which is assumed by Construction Contractor pursuant to this Design and Construction Contract) to satisfy the conditions for issuance of the applicable Phase Completion Certificate.
- (e) Where the Independent Certifier has issued a report in accordance with Section 23A.4(d)(ii) of the Project Agreement and Project Co has not referred a Dispute in relation thereto for resolution in accordance with Schedule 27 – Dispute Resolution Procedure, Construction Contractor on behalf of Project Co shall, within five Business Days after receipt of such report, provide the Independent Certifier and the SMH Representative 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 Phase Construction Contractor Commissioning that needs to be undertaken as a result of the rectification actions,
- and Construction Contractor shall perform all such additional rectification actions and applicable Phase Construction Contractor Commissioning in a timely manner. Upon completion thereof, Construction Contractor on behalf of Project Co may give a further Phase Completion Notice and Sections 23A.4(c) to (e), inclusive, shall be repeated until the applicable Phase Completion Certificate has been issued.
- (f) Construction Contractor shall provide As-Built Drawings and specifications, Design Data, spare parts and Shop Drawings as soon as possible and in any event no later than 30 days after each Phase Completion Date.

23A.5 Operation and Maintenance Manuals

- (a) Construction Contractor shall prepare and deliver to SMH draft copies of all necessary operation and maintenance manuals for the applicable Phase of the Works in the format set out in the Output Specifications no later than 30 days prior to each Scheduled Phase Completion Date.

23A.5A Maintenance Instructions

- (a) No later than 30 days prior to each Scheduled Phase Completion Date, Construction Contractor shall prepare and deliver to SMH maintenance data in the format set out in the Output Specifications which is compatible with SMH's CMMS. The maintenance data shall detail all required planned activities (including, but not limited to, preventive maintenance) for the applicable portion of the Works prescribed by the applicable operation and maintenance manuals and Good Industry Practice and shall be subject to the review and approval of SMH, acting reasonably. Following SMH's approval, pursuant to the Project Agreement, of such maintenance data, SMH shall upload it into the CMMS.

23A.6 Phase SMH Commissioning

- (a) The Parties and SMH acknowledge that each Phase SMH Commissioning shall be performed both before and after each Phase Completion Date. Prior to each Phase Completion, Construction Contractor shall give Project Co and SMH full access to the Site, the Facility, any portion of the Existing Facilities in which any Design and Construction Work are to be performed and all relevant parts thereof at such times as may be set out in the applicable Phase Commissioning Program to enable SMH to undertake the applicable Phase SMH Commissioning in accordance with such Phase Commissioning Program. Pursuant to the Project Agreement, SMH shall comply, and shall ensure that all SMH Parties comply, with the directions, procedures and safety guidelines established by Project Co for the Site (where the establishment of such directions, procedures and safety guidelines is the responsibility of the Construction Contractor as a part of the Design and Construction Work) and shall use commercially reasonable efforts to minimize disruption to the Design and Construction Work in performing all Phase SMH Commissioning.
- (b) Pursuant to the Project Agreement, SMH acknowledges that, during each Phase SMH Commissioning Period, Construction Contractor and each Subcontractor will be active in the Facility and, if applicable, in the Existing Facilities, in both the rectification of any Phase Minor Deficiencies and the completion of the applicable Phase Construction Contractor Commissioning, and SMH shall take commercially reasonable steps to allow such activities to proceed in accordance with each Phase Commissioning Program.
- (c) Construction Contractor acknowledges that, prior to and during each Phase SMH Commissioning Period, Construction Contractor and each Subcontractor shall cooperate with SMH and all SMH Parties and use commercially reasonable efforts to ensure that all requirements, and the timing and sequence of such requirements, of the applicable Phase

SMH Commissioning activities are able to be completed in the timeframe for completion set out in the applicable Phase Commissioning Program.

23A.7 Phase Countdown Notice

- (a) With respect to each Phase Completion, Construction Contractor, on behalf of Project Co, shall deliver a notice (the “**Phase Countdown Notice**”) to SMH and the Independent Certifier specifying the date (which, for greater certainty, will be on or before the applicable Scheduled Phase Completion Date) on which Construction Contractor anticipates that such Phase Completion will be achieved (the “**Anticipated Phase Completion Date**”).
- (b) Each Phase Countdown Notice shall be delivered not less than 90 days prior to each Anticipated Phase Completion Date. If Construction Contractor fails to deliver a Phase Countdown Notice not less than 90 days prior to the applicable Scheduled Phase Completion Date, such Anticipated Phase Completion Date shall be deemed to be the same date as such Scheduled Phase Completion Date.
- (c) Construction Contractor acknowledges and agrees that SMH requires a minimum of 90 days’ notice prior to each Anticipated Phase Completion Date to prepare for the applicable Phase SMH Commissioning.
- (d) In accordance with Section 13.4A, no Anticipated Phase Completion Date shall be earlier than the applicable Scheduled Phase Completion Date without the prior written consent of SMH, pursuant to the Project Agreement, in its sole discretion.

23A.8 Phase Minor Deficiencies

- (a) In the event that Phase Minor Deficiencies in respect of a Phase of the Works exist when Construction Contractor, on behalf of Project Co, gives a Phase Completion Notice, the Independent Certifier, in consultation with Project Co and SMH, shall prepare a list of all Phase Minor Deficiencies in respect of such Phase of the Works (the “**Phase Minor Deficiencies List**”) identified at that time and an estimate of the cost and the time for rectifying such Phase Minor Deficiencies.
- (b) Each Phase Minor Deficiencies List will contain the schedule for the completion and rectification of the applicable Phase Minor Deficiencies. In determining the relevant time for rectifying Phase Minor Deficiencies, Construction Contractor shall schedule the completion and rectification of Phase Minor Deficiencies so as to minimize, to the greatest extent reasonably possible, any impairment of SMH’s use and enjoyment of a Phase of the Works or disruption of the Works.
- (c) The Independent Certifier, pursuant to the Project Agreement, must prepare a Phase Minor Deficiencies List in relation to each Phase Completion Notice before a Phase Completion Certificate is issued, but shall not withhold such Phase Completion Certificate by reason solely that there are Phase Minor Deficiencies.

- (d) Pursuant to the Project Agreement, SMH may, in its sole discretion, waive any requirement for a Phase Completion, including with respect to Equipment and Existing Equipment, provided that the failure to meet any such requirement shall constitute a Phase Minor Deficiency.

23A.9 Rectification of Phase Minor Deficiencies

- (a) Construction Contractor shall, in consultation with the SMH Representative and so as to minimize, to the greatest extent reasonably possible, any disruption of the Design and Construction Works, complete and rectify all Phase Minor Deficiencies within 45 days of the issuance of each Phase Minor Deficiencies List or such other period as the Independent Certifier may specify in such Phase Minor Deficiencies List.
- (b) Construction Contractor acknowledges and agrees that the completion and rectification of Phase Minor Deficiencies may require work outside of normal working hours in order to accommodate the efficient operation of the Phase of the Works.

23A.10 Failure to Rectify Phase Minor Deficiencies

- (a) If Construction Contractor has failed to complete and rectify any Phase Minor Deficiency specified in a Phase Minor Deficiencies List:
- (i) within 75 days of the issuance of the Phase Minor Deficiencies List for all Phase Minor Deficiencies where no time for rectification or completion has been specified by the Independent Certifier, or
- (ii) within 30 days after the time for completion and rectification of any Phase Minor Deficiency where such a time has been specified in the Phase Minor Deficiencies List by the Independent Certifier,

Project Co may engage others to perform the work necessary to complete and rectify any such Phase Minor Deficiencies, at the risk and cost of Construction Contractor, and, if and as applicable, Project Co may deduct such cost (and any costs of SMH which Project Co is responsible for pursuant to Section 23A.10 of the Project Agreement) from the Tower Interim Completion Holdback and interest earned thereon or from the Completion Holdback and interest earned thereon.

23A.11 Effect of Certificates/Use

- (a) The issuance of a Phase Completion Certificate and any taking over or use by SMH of any part of a Phase of the Works under the terms of the Project Agreement, shall, in no way:
- (i) limit the obligations of Construction Contractor under the Design and Construction Contract including in respect of any defects, deficiencies or items of outstanding work existing or discovered prior to or after the date of any of such certificates or the date of the applicable Phase Minor Deficiencies List; or

- (ii) be construed as an approval by SMH or Project Co of the Design and Construction Work or the way in which they have been carried out.

23B. TOWER INTERIM COMPLETION COMMISSIONING AND COMPLETION

23B.1 Tower Interim Completion Commissioning Activities

- (a) Construction Contractor shall perform all Tower Interim Completion Construction Contractor Commissioning, and shall facilitate the performance of all Tower Interim Completion SMH Commissioning, pursuant to the Tower Interim Completion Commissioning Program.

23B.2 Tower Interim Completion Commissioning Program

- (a) Construction Contractor shall prepare a draft of the Tower Interim Completion Commissioning Program in respect of the Tower Interim Completion Construction Contractor Commissioning and the Tower Interim Completion SMH Commissioning and shall provide a copy thereof to the Independent Certifier, the SMH Commissioning Consultant and the SMH Representative not less than 365 days prior to the Scheduled Tower Interim Completion Date.
- (b) The Tower Interim Completion Commissioning Program shall, at a minimum:
 - (i) describe the requirements, and the timing and sequence of such requirements, necessary in order that the Tower Interim Completion Construction Contractor Commissioning shall be completed to achieve Tower Interim Completion on or before the Scheduled Tower Interim Completion Date;
 - (ii) describe the requirements, and the timing and sequence of such requirements, of the Tower Interim Completion SMH Commissioning activities;
 - (iii) comply with all requirements of the Outline Commissioning Program and include all details, including for all appendices, required to be completed in the Outline Commissioning Program;
 - (iv) be consistent with the Outline Commissioning Program and impose no greater or more onerous obligations on SMH than those set out in the Outline Commissioning Program, unless otherwise agreed to by SMH;
 - (v) include the names of the individuals or companies proposed to perform all Tower Interim Completion Construction Contractor Commissioning;
 - (vi) include a schedule of each of the Tower Interim Completion Construction Contractor Commissioning Tests and the Tower Interim Completion SMH Commissioning Tests proposed to be performed and the timeframe for completion, with start and end dates;

- (vii) include a schedule of meetings to be held between the Parties and SMH to coordinate the performance of the Tower Interim Completion Construction Contractor Commissioning and the Tower Interim Completion SMH Commissioning;
 - (viii) provide for the re-verification of systems following the Tower Interim Completion SMH Commissioning;
 - (ix) list the approvals required from any Governmental Authority, manufacturer or other person that are necessary to meet the requirements of the Tower Interim Completion Commissioning Program or Applicable Law ; and
 - (x) comply with the requirements and the timing and sequence of such requirements of the applicable Transition (as set out in the Transition Parameters).
- (c) Pursuant to the Project Agreement, SMH shall provide Construction Contractor with comments on the draft Tower Interim Completion Commissioning Program in accordance with the procedures contemplated by Section 4.1 of Schedule 10 – Review Procedure, and Construction Contractor shall revise the draft Tower Interim Completion Commissioning Program to the extent contemplated by Schedule 10 – Review Procedure within 30 days of receipt of any comments from SMH.
 - (d) When agreed by the Parties and SMH, the Tower Interim Completion Commissioning Program shall replace the Outline Commissioning Program with respect to Tower Interim Completion.

23B.3 Commencement of Tower Interim Completion Construction Contractor Commissioning

- (a) Construction Contractor, on behalf of Project Co, shall give 30 days' written notice to the Independent Certifier, the SMH Commissioning Consultant and the SMH Representative of the proposed commencement of the Tower Interim Completion Construction Contractor Commissioning.
- (b) Construction Contractor, on behalf of Project Co, shall give at least five Business Days' notice to, and shall invite, the Independent Certifier, the SMH Commissioning Consultant and the SMH Representative to witness, and to comment on, each aspect of the Tower Interim Completion Construction Contractor Commissioning. Construction Contractor shall, together with such notice, provide all information that the Independent Certifier, the SMH Commissioning Consultant and the SMH Representative may reasonably require in relation thereto, including:
 - (i) tests proposed;
 - (ii) test methodology; and
 - (iii) expected test results.

23B.4 Tower Interim Completion Certificate

- (a) Construction Contractor, on behalf of Project Co, shall give the Independent Certifier and the SMH Representative at least ten Business Days' notice prior to the date upon which Construction Contractor anticipates delivering the Tower Interim Completion Notice.
- (b) Construction Contractor, on behalf of Project Co, shall give the Independent Certifier and the SMH Representative notice (the "**Tower Interim Completion Notice**") upon the satisfaction of all requirements for Tower Interim Completion, which Tower Interim Completion Notice shall describe, in reasonable detail, the satisfaction of the requirements for Tower Interim Completion, together with Construction Contractor's opinion as to whether the conditions for issuance of the Tower Interim Completion Certificate have been satisfied.
- (c) Pursuant to the Project Agreement, SMH shall within five Business Days after receipt of the Tower Interim Completion Notice, provide the Independent Certifier and Project Co with SMH's opinion as to whether the conditions for issuance of the Tower Interim Completion Certificate have been satisfied and, if applicable, any reasons as to why it considers that the Tower Interim Completion Certificate should not be issued.
- (d) Within five Business Days after Project Co's receipt of SMH's opinion pursuant to Section 23B.4(c) of the Project Agreement, SMH and Project Co shall cause the Independent Certifier to determine whether the conditions for issuance of the Tower Interim Completion Certificate have been satisfied, having regard for the opinions of both Project Co (provided that pursuant to this Design and Construction Contract, Project Co will consider the comments of the Construction Contractor in formulating Project Co's opinions) and SMH, to determine whether any Tower Interim Completion Minor Deficiencies exist, and to issue to SMH and to Project Co either:
 - (i) the Tower Interim Completion Certificate, confirming the date of issue as the Tower Interim Completion Date and setting out the Tower Interim Completion Minor Deficiencies List (if applicable) in accordance with Section 23B.8 of the Project Agreement; or
 - (ii) a report detailing the matters that the Independent Certifier considers are required to be performed by Project Co (which is assumed by Construction Contractor pursuant to the Design and Construction Contract) to satisfy the conditions for issuance of the Tower Interim Completion Certificate.
- (e) Where the Independent Certifier has issued a report in accordance with Section 23B.4(d)(ii) of the Project Agreement and Project Co has not referred a Dispute in relation thereto for resolution in accordance with Schedule 27 – Dispute Resolution Procedure, Construction Contractor shall, on behalf of Project Co, within 5 Business Days after receipt of such report, provide the Independent Certifier and the SMH Representative 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 Tower Interim Completion Construction Contractor Commissioning that needs to be undertaken as a result of the rectification actions,

and Construction Contractor shall perform all such additional rectification actions and Tower Interim Completion Construction Contractor Commissioning in a timely manner. Upon completion thereof, Construction Contractor may give a further Tower Interim Completion Notice and Sections 23B.4(c) to (e), inclusive, shall be repeated until the Tower Interim Completion Certificate has been issued.

- (f) The Independent Certifier's decision, pursuant to the Project Agreement, to issue or not to issue the Tower Interim Completion Certificate shall be final and binding on the Parties and SMH solely in respect of determining the Tower Interim Completion Payment Date, and a Dispute in relation to the Tower Interim Completion Payment Date shall not be subject to resolution pursuant to the Dispute Resolution Procedure, provided, however, that any other Dispute in relation to the Independent Certifier's decision to issue or not to issue the Tower Interim Completion Certificate may be referred for resolution pursuant to the Schedule 27 – Dispute Resolution Procedure.
- (g) Construction Contractor shall provide As-Built Drawings and specifications, Design Data, spare parts and Shop Drawings as soon as possible and in any event no later than 30 days after the Tower Interim Completion Date.

23B.5 Tower Operation and Maintenance Manuals

- (a) Construction Contractor shall prepare and deliver to SMH draft copies of all necessary operation and maintenance manuals for the Tower in the format set out in the Output Specifications no later than 30 days prior to the Tower Interim Completion Date.

23B.5A Maintenance Instructions

- (a) No later than 30 days prior to the Tower Interim Completion Date, Construction Contractor shall prepare and deliver to SMH maintenance data in the format set out in the Output Specifications which is compatible with SMH's CMMS. The maintenance data shall detail all required planned activities (including, but not limited to, preventive maintenance) for the applicable portion of the Works prescribed by the applicable operation and maintenance manuals and Good Industry Practice and shall be subject to the review and approval of SMH, acting reasonably. Following SMH's approval, pursuant to the Project Agreement, of such maintenance data, SMH shall upload it into the CMMS.

23B.6 Tower Interim Completion SMH Commissioning

- (a) The Parties acknowledge that the Tower Interim Completion SMH Commissioning shall be performed both before and after the Tower Interim Completion Date. Prior to Tower Interim Completion, Construction Contractor shall give SMH full access to the Site, the Facility, any portion of the Existing Facilities in which any Design and Construction

Work is to be performed and all relevant parts thereof at such times as may be set out in the Tower Interim Completion Commissioning Program to enable SMH to undertake the Tower Interim Completion SMH Commissioning in accordance with the Tower Interim Completion Commissioning Program. Pursuant to the Project Agreement, SMH shall comply, and shall ensure that all SMH Parties comply, with the directions, procedures and safety guidelines established by Project Co for the Site (where the establishment of such directions, procedures and safety guidelines is the responsibility of the Construction Contractor as a part of the Design and Construction Work) and shall use commercially reasonable efforts to minimize disruption to the Works in performing the Tower Interim Completion SMH Commissioning.

- (b) Pursuant to the Project Agreement, SMH has acknowledged that, during the Tower Interim Completion SMH Commissioning Period, Construction Contractor and each subcontractor of Construction Contractor will be active in the Facility and, if applicable, in the Existing Facilities, in both the rectification of Tower Interim Completion Minor Deficiencies and the completion of Tower Interim Completion Construction Contractor Commissioning, and SMH shall take commercially reasonable steps to allow such activities to proceed in accordance with the Tower Interim Completion Commissioning Program.
- (c) Construction Contractor acknowledges that, prior to and during the Tower Interim Completion SMH Commissioning Period, Construction Contractor and each Subcontractor shall cooperate with SMH and all SMH Parties and use commercially reasonable efforts to ensure that all requirements, and the timing and sequence of such requirements, of the Tower Interim Completion SMH Commissioning activities are able to be completed in the timeframe for completion set out in the Tower Interim Completion Commissioning Program.

23B.7 Tower Interim Completion Countdown Notice

- (a) Construction Contractor, on behalf of Project Co, shall deliver a notice (the “**Tower Interim Completion Countdown Notice**”) to SMH and the Independent Certifier specifying the date (which, for greater certainty, will be on or before the Scheduled Tower Interim Completion Date) on which Construction Contractor anticipates that Tower Interim Completion will be achieved (the “**Anticipated Tower Interim Completion Date**”).
- (b) The Tower Interim Completion Countdown Notice shall be delivered not less than 90 days prior to the Anticipated Tower Interim Completion Date. If Construction Contractor fails to deliver the Tower Interim Completion Countdown Notice not less than 90 days prior to the Scheduled Tower Interim Completion Date, the Anticipated Tower Interim Completion Date shall be deemed to be the same date as the Scheduled Tower Interim Completion Date.
- (c) Construction Contractor acknowledges and agrees that SMH requires a minimum of 90 days’ notice prior to the Anticipated Tower Interim Completion Date to prepare for the Tower Interim Completion SMH Commissioning.

- (d) In accordance with Section 13.4B(a), the Anticipated Tower Interim Completion Date shall not be earlier than the Scheduled Tower Interim Completion Date without the prior written consent of SMH, pursuant to the Project Agreement, in its sole discretion.

23B.8 Tower Interim Completion Minor Deficiencies

- (a) In the event that any Tower Interim Completion Minor Deficiencies exist when Construction Contractor, on behalf of Project Co, gives the Tower Interim Completion Notice, the Independent Certifier, pursuant to the Project Agreement, in consultation with Project Co and SMH, shall prepare a list of all Tower Interim Completion Minor Deficiencies (the "**Tower Interim Completion Minor Deficiencies List**") identified at that time and an estimate of the cost and the time for rectifying such Tower Interim Completion Minor Deficiencies. Pursuant to Section 23B.8(a) of the Project Agreement, SMH may withhold from the Tower Interim Completion Payment (as defined in the Project Agreement), a holdback amount that is 200% of the amount estimated by the Independent Certifier for SMH to complete and rectify (i) all Phase Minor Deficiencies identified, incomplete and unrectified in respect of Phases of the Works which have achieved Phase Completion at that time and (ii) all such Tower Interim Completion Minor Deficiencies (the "**Tower Interim Completion Holdback**"), which holdback shall be held in an interest bearing account.

The Construction Contractor shall pay the Tower Interim Completion Holdback Shortfall on the Tower Interim Completion Payment Date, to Project Co.

- (b) The Tower Interim Completion Minor Deficiencies List will contain the schedule for the completion and rectification of the Tower Interim Completion Minor Deficiencies. In determining the relevant time for rectifying Tower Interim Completion Minor Deficiencies, Construction Contractor shall schedule the completion and rectification of Tower Interim Completion Minor Deficiencies so as to minimize, to the greatest extent reasonably possible, any impairment of SMH's use and enjoyment of the Tower or disruption of the Works.
- (c) Construction Contractor acknowledges that pursuant to the Project Agreement, the Independent Certifier must prepare the Tower Interim Completion Minor Deficiencies List in relation to the Tower Interim Completion Notice before the Tower Interim Completion Certificate is issued, but shall not withhold the Tower Interim Completion Certificate by reason solely that there are Tower Interim Completion Minor Deficiencies.
- (d) SMH may, in its sole discretion, pursuant to the Project Agreement, waive any requirement for Tower Interim Completion, including with respect to Equipment and Existing Equipment, and the failure to meet any such requirement shall constitute a Tower Interim Completion Minor Deficiency.

23B.9 Rectification of Tower Interim Completion Minor Deficiencies

- (a) Construction Contractor shall, in consultation with the SMH Representative and so as to minimize, to the greatest extent reasonably possible, any disruption of the Design and Construction Work, complete and rectify all Tower Interim Completion Minor

Deficiencies within 45 days of the issuance of the Tower Interim Completion Minor Deficiencies List or such other period as the Independent Certifier may specify in the Tower Interim Completion Minor Deficiencies List.

- (b) Construction Contractor acknowledges and agrees that the completion and rectification of Tower Interim Completion Minor Deficiencies may require work outside of normal working hours in order to accommodate the efficient operation of the Tower.

23B.10 Failure to Rectify Tower Interim Completion Minor Deficiencies

- (a) If Construction Contractor has failed to complete and rectify any Tower Interim Completion Minor Deficiency specified in the Tower Interim Completion Minor Deficiencies List:
- (i) within 75 days of the issuance of the Tower Interim Completion Minor Deficiencies List for all Tower Interim Completion Minor Deficiencies where no time for rectification or completion has been specified by the Independent Certifier, or
 - (ii) within 30 days after the time for completion and rectification of any Tower Interim Completion Minor Deficiency where such a time has been specified in the Tower Interim Completion Minor Deficiencies List by the Independent Certifier,

Project Co may engage others to perform the work necessary to complete and rectify any such Tower Interim Completion Minor Deficiencies, at the risk and cost of Construction Contractor, and Project Co may deduct such cost (and any cost of SMH for which Project Co is responsible pursuant to Section 23B.10(a) of the Project Agreement) from the Tower Interim Completion Holdback and interest earned thereon.

- (b) Upon completion and rectification of each Phase Minor Deficiency for which a holdback has been retained by SMH pursuant to Section 23B.8(a) of the Project Agreement, Project Co shall release to Construction Contractor the amount of the Tower Interim Completion Holdback related to such Phase Minor Deficiency in accordance with Section 4.6(a) of Appendix A – General Conditions of the Design and Construction Contract. Upon completion and rectification of each Tower Interim Completion Minor Deficiency, Project Co shall release to Construction Contractor the amount of the Tower Interim Completion Holdback related to such Tower Interim Completion Minor Deficiency in accordance with Section 4.6(a) of Appendix A – General Conditions of the Design and Construction Contract. Upon completion and rectification of all applicable Phase Minor Deficiencies and all Tower Interim Completion Minor Deficiencies, Project Co shall release to Construction Contractor the then remaining amount of Tower Interim Completion Holdback, together with all interest accrued thereon to the extent applicable pursuant to Section 4.6(a) of Appendix A – General Conditions of the Design and Construction Contract. Where Project Co exercises its rights pursuant to Section 23A.10(a) or Section 23B.10(a), if the cost of such completion and rectification exceeds the amount of the Tower Interim Completion Holdback and interest, then Construction Contractor shall reimburse Project Co for all such excess cost incurred by Project Co

and/or, to the extent the responsibility of Project Co under Section 23B.10(b) of the Project Agreement, Construction Contractor shall reimburse Project Co for all such excess costs incurred by SMH, as applicable..

23B.11 Effect of Certificate/Use

- (a) The issue of the Tower Interim Completion Certificate and any taking over or use by SMH of any part of the Tower under the terms of the Project Agreement, shall, in no way:
 - (i) limit the obligations of Construction Contractor under the Design and Construction Contract including in respect of any defects, deficiencies or items of outstanding work existing or discovered prior to or after the date of any of such certificates or the date of the Tower Interim Completion Minor Deficiencies List; or
 - (ii) be construed as an approval by Project Co or SMH of the Design and Construction Work or the way in which they have been carried out.

24. COMMISSIONING AND COMPLETION

24.1 Commissioning Activities

- (a) Construction Contractor shall perform all Construction Contractor Commissioning, and shall facilitate the performance of all SMH Commissioning, pursuant to the Final Commissioning Program.

24.2 Final Commissioning Program

- (a) The Construction Contractor shall prepare a draft of the Final Commissioning Program in respect of the Construction Contractor Commissioning and SMH Commissioning and shall provide a copy thereof to the Independent Certifier, SMH Commissioning Consultant and the SMH Representative not less than 365 days prior to the Scheduled Substantial Completion Date.
- (b) The Final Commissioning Program shall, at a minimum:
 - (i) describe the requirements, and the timing and sequence of such requirements, necessary in order that the Construction Contractor Commissioning shall be completed to achieve:
 - (A) Substantial Completion on or before the Scheduled Substantial Completion Date; and
 - (B) Final Completion on or before the Scheduled Final Completion Date;
 - (ii) describe the requirements, and the timing and sequence of such requirements, of SMH Commissioning activities;

- (iii) comply with all requirements of the Outline Commissioning Program and include all details, including for all appendices, required to be completed in the Outline Commissioning Program;
 - (iv) be consistent with the Outline Commissioning Program and impose no greater or more onerous obligations on SMH than those set out in the Outline Commissioning Program, unless otherwise agreed to by SMH;
 - (v) include the names of the individuals or companies proposed to perform all Construction Contractor Commissioning;
 - (vi) include a schedule of each of the Construction Contractor Commissioning Tests and SMH Commissioning Tests proposed to be performed and the timeframe for completion, with start and end dates;
 - (vii) include a schedule of meetings to be held between the Parties to coordinate the performance of the Construction Contractor Commissioning and SMH Commissioning;
 - (viii) provide for the re-verification of systems following SMH Commissioning;
 - (ix) list the approvals required from any Governmental Authority, manufacturer or other person that are necessary to meet the requirements of the Final Commissioning Program or Applicable Law; and
 - (x) comply with the requirements and the timing and sequence of such requirements of the applicable Transitions (as set out in the Transition Parameters).
- (c) Project Co shall provide the Construction Contractor with comments from SMH on the draft Final Commissioning Program in accordance with the procedures contemplated by Section 4.1 of Schedule 10 – Review Procedure, and Construction Contractor shall revise the draft Final Commissioning Program to the extent contemplated by Schedule 10 – Review Procedure within 30 days of Project Co’s receipt of any comments from SMH.
- (d) When agreed by SMH and Project Co, the Final Commissioning Program shall replace the Outline Commissioning Program with respect to Substantial Completion and Final Completion.

24.3 Commencement of Construction Contractor Commissioning

- (a) Construction Contractor, on behalf of Project Co, shall give 30 days’ written notice to the Independent Certifier, SMH Commissioning Consultant and the SMH Representative of the proposed commencement of the Construction Contractor Commissioning.
- (b) Construction Contractor shall give at least five Business Days’ notice to, and shall invite, the Independent Certifier, SMH Commissioning Consultant and the SMH Representative to witness, and to comment on, each aspect of the Construction Contractor Commissioning. Construction Contractor shall, together with such notice, provide all

information that the Independent Certifier, SMH Commissioning Consultant and the SMH Representative may reasonably require in relation thereto, including:

- (i) tests proposed;
- (ii) test methodology; and
- (iii) expected test results.

24.4 Substantial Completion Certificate

- (a) Construction Contractor, on behalf of Project Co, shall give the Independent Certifier and the SMH Representative at least ten Business Days' notice prior to the date upon which Construction Contractor anticipates delivering the Substantial Completion Notice.
- (b) Construction Contractor, on behalf of Project Co, shall give the Independent Certifier and the SMH Representative notice (the "**Substantial Completion Notice**") upon the satisfaction of all requirements for Substantial Completion, which Substantial Completion Notice shall describe, in reasonable detail, the satisfaction of the requirements for Substantial Completion, together with Construction Contractor's opinion as to whether the conditions for issuance of the Substantial Completion Certificate have been satisfied.
- (c) Pursuant to the Project Agreement, SMH shall, within five Business Days after receipt of the Substantial Completion Notice, provide the Independent Certifier and Project Co with SMH's opinion as to whether the conditions for issuance of the Substantial Completion Certificate have been satisfied and, if applicable, any reasons as to why it considers that the Substantial Completion Certificate should not be issued.
- (d) Pursuant to the Project Agreement, within five Business Days after Project Co's receipt of SMH's opinion pursuant to Section 24.4(c), SMH and Project Co shall cause the Independent Certifier to determine whether the conditions for issuance of the Substantial Completion Certificate have been satisfied, having regard for the opinions of SMH and Project Co (provided that pursuant to this Design and Construction Contract, Project Co will consider the comments of the Construction Contractor in formulating Project Co's opinions), to determine whether any Minor Deficiencies exist, and to issue to SMH and to Project Co either:
 - (i) the Substantial Completion Certificate confirming the date of issue as the Substantial Completion Date and setting out the Minor Deficiencies List (if applicable) in accordance with Section 24.8; or
 - (ii) a report detailing the matters that the Independent Certifier considers are required to be performed by Project Co to satisfy the conditions for issuance of the Substantial Completion Certificate.
- (e) Where the Independent Certifier has issued a report in accordance with Section 24.4(d)(ii) of the Project Agreement and Project Co has not referred a Dispute in relation

thereto for resolution in accordance with Schedule 27 – Dispute Resolution Procedure, Construction Contractor on behalf of Project Co shall, within 5 Business Days after Project Co's receipt of such report, provide the Independent Certifier and the SMH Representative 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 Construction Contractor Commissioning that needs to be undertaken as a result of the rectification actions,

and Construction Contractor shall perform all such additional rectification actions and Construction Contractor Commissioning in a timely manner. Upon completion thereof, Construction Contractor, on behalf of Project Co, may give a further Substantial Completion Notice and Sections 24.4(c) to (e), inclusive, shall be repeated until the Substantial Completion Certificate has been issued.

- (f) The Independent Certifier's decision pursuant to the Project Agreement, to issue or not to issue the Substantial Completion Certificate shall be final and binding on the Parties and SMH solely in respect of determining the Substantial Completion Payment Date, and a Dispute in relation to the Substantial Completion Payment Date shall not be subject to resolution pursuant to the Dispute Resolution Procedure, provided, however, that any other Dispute in relation to the Independent Certifier's decision to issue or not to issue the Substantial Completion Certificate may be referred for resolution pursuant to the Schedule 27 – Dispute Resolution Procedure.
- (g) Construction Contractor shall provide As-Built Drawings and specifications, Design Data, spare parts and Shop Drawings as soon as possible and in any event no later than 30 days after the Substantial Completion Date.

24.5 Operation and Maintenance Manuals

- (a) Construction Contractor shall prepare and deliver to SMH draft copies of all necessary operation and maintenance manuals for the Facility in the format set out in the Output Specifications no later than 30 days prior to the Substantial Completion Date.

24.5A Maintenance Instructions

- (a) No later than 30 days prior to the Substantial Completion Date, Construction Contractor shall prepare and deliver to SMH maintenance data in the format set out in the Output Specifications which is compatible with SMH's CMMS. The maintenance data shall detail all required planned activities (including, but not limited to, preventive maintenance) for the applicable portion of the Design and Construction Work prescribed by the applicable operation and maintenance manuals and Good Industry Practice and shall be subject to the review and approval of SMH, acting reasonably. Following

SMH's approval of such maintenance data, pursuant to the Project Agreement, SMH shall upload it into the CMMS

24.6 SMH Commissioning

- (a) Construction Contractor acknowledges that SMH Commissioning shall be performed both before and after the Substantial Completion Date. Prior to Substantial Completion, Construction Contractor shall give SMH full access to the Site, the Facility, any portion of the Existing Facilities in which any Design and Construction Work are to be performed and all relevant parts thereof at such times as may be set out in the Final Commissioning Program to enable SMH to undertake SMH Commissioning in accordance with the Final Commissioning Program. Pursuant to the Project Agreement, SMH is required to comply, and ensure that all SMH Parties comply, with the directions, procedures and safety guidelines established by Project Co for the Site (where the establishment of such directions, procedures and safety guidelines is the responsibility of the Construction Contractor as a part of the Design and Construction Work) and use commercially reasonable efforts to minimize disruption to the Design and Construction Work in performing SMH Commissioning.
- (b) Pursuant to the Project Agreement, SMH acknowledges that, during SMH Commissioning Period, Construction Contractor and each subcontractor of Construction Contractor will be active in the Facility and, if applicable, in the Existing Facilities, in both the rectification of Minor Deficiencies and the completion of Construction Contractor Commissioning, and SMH shall take commercially reasonable steps to allow such activities to proceed in accordance with the Final Commissioning Program.
- (c) Construction Contractor acknowledges that, prior to and during SMH Commissioning Period, Construction Contractor and each Subcontractor shall cooperate with SMH and all SMH Parties and use commercially reasonable efforts to ensure that all requirements, and the timing and sequence of such requirements, of SMH Commissioning activities are able to be completed in the timeframe for completion set out in the Final Commissioning Program.

24.7 Countdown Notice

- (a) Construction Contractor, on behalf of Project Co, shall deliver a notice (the "**Countdown Notice**") to SMH and the Independent Certifier specifying the date (which, for greater certainty, will be on or before the Scheduled Substantial Completion Date) on which Construction Contractor anticipates that Substantial Completion will be achieved (the "**Anticipated Substantial Completion Date**").
- (b) The Countdown Notice shall be delivered not less than 90 days prior to the Anticipated Substantial Completion Date. If Construction Contractor fails to deliver the Countdown Notice not less than 90 days prior to the Scheduled Substantial Completion Date, the Anticipated Substantial Completion Date shall be deemed to be the same date as the Scheduled Substantial Completion Date.

- (c) Construction Contractor acknowledges and agrees that SMH requires a minimum of 90 days' notice prior to the Anticipated Substantial Completion Date to prepare for SMH Commissioning.
- (d) In accordance with Section 13.5(a), the Anticipated Substantial Completion Date shall not be earlier than the Scheduled Substantial Completion Date without the prior written consent of SMH, in its sole discretion.

24.8 Minor Deficiencies

- (a) In the event that any Minor Deficiencies exist when Construction Contractor, on behalf of Project Co, gives the Substantial Completion Notice, the Independent Certifier, in consultation with Project Co and SMH, shall prepare a list of all Minor Deficiencies (the "**Minor Deficiencies List**") identified at that time and an estimate of the cost and the time for rectifying such Minor Deficiencies. Pursuant to Section 24.8 of the Project Agreement, SMH may withhold from the Substantial Completion Payment (as defined in the Project Agreement) a holdback amount that is 200% of the amount estimated by the Independent Certifier for SMH to complete and rectify (i) all Phase Minor Deficiencies identified, incomplete and unrectified at that time for which a holdback has not already been retained pursuant to Section 23B.8(a) and (ii) all such Minor Deficiencies (the "**Completion Holdback**"), which holdback shall be held in an interest bearing account. The Construction Contractor shall pay the Completion Holdback Shortfall on the Substantial Completion Payment Date, to Project Co. For greater certainty, the amounts provided for in items (i) and (ii) of this Section 24.8 shall not be duplicative.
- (b) The Minor Deficiencies List will contain the schedule for the completion and rectification of the Minor Deficiencies. In determining the relevant time for rectifying Minor Deficiencies, Construction Contractor shall schedule the completion and rectification of Minor Deficiencies so as to minimize, to the greatest extent reasonably possible, any impairment of SMH's use and enjoyment of the Facility or disruption of the Design and Construction Work.
- (c) The Independent Certifier must prepare the Minor Deficiencies List in relation to the Substantial Completion Notice before the Substantial Completion Certificate is issued, but shall not withhold the Substantial Completion Certificate by reason solely that there are Minor Deficiencies.
- (d) SMH may, in its sole discretion, pursuant to the Project Agreement, waive any requirement for Substantial Completion, including with respect to Equipment and Existing Equipment, and the failure to meet any such requirement shall constitute a Minor Deficiency.

24.9 Rectification of Minor Deficiencies

- (a) Construction Contractor shall in consultation with the SMH Representative and so as to minimize, to the greatest extent reasonably possible, any disruption of the Design and Construction Work, complete and rectify all Minor Deficiencies within 45 days of the

issuance of the Minor Deficiencies List or such other period as the Independent Certifier may specify in the Minor Deficiencies List.

- (b) Construction Contractor acknowledges and agrees that the completion and rectification of Minor Deficiencies may require work outside of normal working hours in order to accommodate the efficient operation of the Facility.

24.10 Failure to Rectify Minor Deficiencies

- (a) If Construction Contractor has failed to complete and rectify any Minor Deficiency specified in the Minor Deficiencies List:
 - (i) within 75 days of the issuance of the Minor Deficiencies List for all Minor Deficiencies where no time for rectification or completion has been specified by the Independent Certifier, or
 - (ii) within 30 days after the time for completion and rectification of any Minor Deficiency where such a time has been specified in the Minor Deficiencies List by the Independent Certifier,

Project Co may engage others to perform the work necessary to complete and rectify any such Minor Deficiencies, at the risk and cost of Construction Contractor, and Project Co may deduct such cost (and any costs to SMH which Project Co is responsible for pursuant to Section 24.10(a) of the Project Agreement) from Completion Holdback and interest earned thereon.

- (b) Upon completion and rectification of each Phase Minor Deficiency for which a holdback has been retained by SMH pursuant to Section 24.8(a) of the Project Agreement, Project Co shall release to Construction Contractor the amount of the Completion Holdback related to such Phase Minor Deficiency in accordance with Section 4.6(b) of Appendix A to the General Conditions of the Design and Construction Contract. Upon completion and rectification of each Minor Deficiency, Project Co shall release to Construction Contractor, the amount of the Completion Holdback related to such Minor Deficiency in accordance with Section 4.6(b) of Appendix A to the General Conditions of the Design and Construction Contract. Upon completion and rectification of all applicable Phase Minor Deficiencies and Minor Deficiencies, Project Co shall release to Construction Contractor, the then remaining amount of Completion Holdback, together with all interest accrued thereon, to the extent applicable pursuant to Section 4.6(b) of Appendix A to the General Conditions of the Design and Construction Contract. Where Project Co exercises the rights pursuant to Section 23A.10 (a) or Section 24.10(a), if the cost of such completion and rectification exceeds the amount of Completion Holdback and interest, then Construction Contractor shall reimburse Project Co for all such excess cost incurred by Project Co and/or, to the extent the responsibility of Project Co under Section 24.10(b) of the Project Agreement, Construction Contractor shall reimburse Project Co for all such excess costs incurred by SMH, as applicable.

24.11 Final Completion Countdown Notice

- (a) Construction Contractor, on behalf of Project Co, shall deliver a notice (the “**Final Completion Countdown Notice**”) to SMH and the Independent Certifier specifying the date (which, for greater certainty, will be on or before the Scheduled Final Completion Date) on which Construction Contractor 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 Construction Contractor 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.

24.12 Final Completion Certificate

- (a) Construction Contractor, on behalf of Project Co, shall give the Independent Certifier and the SMH Representative at least ten Business Days’ notice prior to the date upon which Construction Contractor anticipates delivering the Final Completion Notice.
- (b) Construction Contractor, on behalf of Project Co, shall give the Independent Certifier and the SMH Representative 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 Phase Minor Deficiencies and all Minor Deficiencies, together with Construction Contractor’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 the Completion Holdback, including a declaration that no written notice of lien arising in relation to the performance of the Works has been received by it that has not been withdrawn by the lien claimant;
 - (ii) Project Co’s Statutory Declaration CCDC 9A (2001);
 - (iii) Project Co’s WSIB Certificate of Clearance; and
 - (iv) a written statement that the Works (as defined in the Project Agreement) have been performed to the requirements of the Ancillary Documents, itemizing approved changes in the Works (as defined in the Project Agreement), the Independent Certifier’s written instructions, and modifications required by Governmental Authorities.
- (c) Pursuant to the Project Agreement, SMH shall, within five Business Days after receipt of the Final Completion Notice, provide the Independent Certifier and Project Co with SMH’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 five Business Days after Project Co's receipt of SMH's opinion pursuant to Section 24.12(c) of the Project Agreement, SMH and Project Co shall cause the Independent Certifier to determine whether the conditions for issuance of the Final Completion Certificate have been satisfied, having regard for the opinions of both Project Co (provided that pursuant to this Design and Construction Contract, Project Co will consider the comments of the Construction Contractor in formulating Project Co's opinions) and SMH, and to issue to SMH and to Project Co, either:
- (i) the Final Completion Certificate confirming the date of issue as the Final Completion Date; or
 - (ii) a report detailing the matters that the Independent Certifier considers are required to be performed by Project Co to satisfy the conditions for issuance of the Final Completion Certificate.
- (e) Where the Independent Certifier has issued a report in accordance with Section 24.12(d)(ii) of the Project Agreement and Project Co has not referred a Dispute in relation thereto for resolution in accordance with Schedule 27 – Dispute Resolution Procedure, Construction Contractor shall, on behalf of Project Co within five Business Days after Project Co's receipt of such report, provide the Independent Certifier and the SMH Representative 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 Construction Contractor Commissioning that needs to be undertaken as a result of the rectification actions,
- and Construction Contractor, shall perform all such additional rectification actions and Construction Contractor Commissioning in a timely manner. Upon completion thereof, Construction Contractor, on behalf of Project Co, may give a further Final Completion Notice and Sections 24.12(c) to (e), inclusive, shall be repeated until the Final Completion Certificate has been issued.
- (f) Any Dispute in relation to the Independent Certifier's decision to issue or not to issue the Final Completion Certificate may be referred for resolution in accordance with Schedule 27 – Dispute Resolution Procedure.

24.13 Effect of Certificates/Use

- (a) The issue of the Substantial Completion Certificate and the Final Completion Certificate and any taking over or use by SMH of any part of the Facility under the terms of the Project Agreement, shall, in no way:
- (i) limit the obligations of Construction Contractor under the Design and Construction Contract including in respect of any defects, deficiencies or items of

outstanding work existing or discovered prior to or after the date of any of such certificates or the date of the Minor Deficiencies List; or

- (ii) be construed as an approval by SMH or Project Co of the Design and Construction Work or the way in which they have been carried out.

24.14 Transitions

- (a) Subject to Section 24.14(b), Construction Contractor shall, in cooperation with the Transition Subcommittee:
 - (i) plan, coordinate, manage and execute the physical transitions to and within the Facility, including, without limitation:
 - (A) the transfer, storage and installation of all Existing Equipment, except such Existing Equipment that is connected to patients, in accordance with each applicable Phase Commissioning Program, the Tower Interim Completion Commissioning Program and the Final Commissioning Program; and
 - (B) the physical transitions of certain resources relating to the operations and activities of the Existing Facilities (including, for clarity, the associated contents of the Existing Facilities) as identified by Project Co and SMH; and
 - (ii) plan, schedule and coordinate, but not perform, the transportation of patients, Existing Equipment connected to patients and items currently in use for the direct provision of care to such patients,

in each case incorporating the requirements set out in the document entitled “**Transition Parameters**” in Section 3.9 of Part 3 of the Output Specifications (each such transition is a “**Transition**” and, collectively, all of them are the “**Transitions**”). For clarity, each Transition shall be carried out by Construction Contractor at all times in accordance with the applicable requirements of Schedule 11 – Design Quality Plan and Construction Quality Plan.

- (b) Construction Contractor acknowledges that pursuant to Section 24.14 of the Project Agreement, SMH shall be responsible for and at all times maintain absolute control over the transportation to and within the Facility of patients, Existing Equipment connected to patients and applicable items currently in use for the direct provision of care within the Existing Facilities. Construction Contractor acknowledges that pursuant to Section 24.14 of the Project Agreement, SMH shall at all times maintain absolute control over all decisions relating to patient care and shall, in its sole discretion, approve of the timing of the transportation of patients, Existing Equipment connected to patients and items currently in use for the direct provision of care within the Existing Facilities.
- (c) Construction Contractor shall, within 30 days following Financial Close, prepare and submit to Project Co and SMH a list of prospective candidates (each a “**Transition**”

Advisor Candidate”) for appointment as the Transitions advisor (the “**Transition Advisor**”), each of which must have experience planning and executing hospital relocation assignments of similar size, scope and complexity and who will, in accordance with this Section 24.14(c)(i) ensure that a complete and all-encompassing service is provided that will fulfill all aspects of each Transition and all related planning, occupancy planning and operational preparedness planning required by Project Co and SMH and (ii) perform the physical relocation of all items involved in such Transitions, subject at all times to Section 24.14(b).

- (d) Subject to Section 24.14(c), Construction Contractor shall conduct a competitive bid process for the selection of the Transition Advisor from among the Transition Advisor Candidates. Construction Contractor shall consult with Project Co and SMH in the design and implementation of such competitive bid process, including the development of the evaluation criteria, and shall accommodate any reasonable request of Project Co and SMH with respect thereto. Construction Contractor acknowledges that pursuant to Section 24.14 of the Project Agreement, SMH shall be entitled to participate in the evaluation and selection of the successful Transition Advisor Candidate for appointment as Transition Advisor.

24.15 Transition Subcommittee

- (a) Construction Contractor acknowledges that pursuant to Section 24.15 of the Project Agreement, Project Co and SMH shall, within 30 days following Financial Close, establish a transition subcommittee of the Works Committee (the “**Transition Subcommittee**”) consisting of 3 representatives from each of Project Co and SMH. A representative of the Transition Advisor shall be required to attend meetings of the Transition Subcommittee. Members of the Transition Subcommittee may invite, on prior notice to all members, such other advisors and consultants as they require from time to time to attend meetings and to provide briefings to the Transition Subcommittee.
- (b) The Transition Subcommittee shall assist the Parties and SMH by promoting cooperative and effective communication with respect to matters related to each Transition, including issues related to decanting to and within the Facility and the transfer and installation of all Existing Equipment.
- (c) The primary role of the Transition Subcommittee shall be to oversee and coordinate each Transition in a timely and efficient manner and in accordance with the Design and Construction Work Schedule and with each applicable Phase Commissioning Program, the Tower Interim Completion Commissioning Program and the Final Commissioning Program.
- (d) Construction Contractor acknowledges that pursuant to Section 24.15 of the Project Agreement, the Transition Subcommittee shall be responsible for receiving and reviewing all matters related to each Transition and shall make recommendations to the Works Committee, which, after consulting with the Works Committee, SMH may accept or reject in its sole discretion.

- (e) Construction Contractor acknowledges that pursuant to Section 24.15 of the Project Agreement, the members of the Transition Subcommittee may adopt such procedures and practices for the conduct of the activities of the Transition Subcommittee as they consider appropriate from time to time.
- (f) Construction Contractor acknowledges that pursuant to Section 24.15 of the Project Agreement, the Transition Subcommittee shall operate until the Final Completion Date.

25. HUMAN RESOURCES

25.1 Admittance of Personnel, Security and Safety

- (a) Without limitation, Construction Contractor acknowledges that the security of the occupants of the Site, the Facility and the Existing Facilities and the safety and health of the patients, employees, visitors and other persons on the Site and/or in the Facility and the Existing Facilities is paramount. If any employee of Construction Contractor, or any Construction Contractor Party is considered by SMH to constitute a concern for the security of the Site, the Facility and/or the Existing Facilities or for the safety or health of the patients, employees, visitors and/or other persons on the Site and/or in the Facility or the Existing Facilities, SMH may require that Construction Contractor replace such employee or restrict access to the Site, the Facility and/or the Existing Facilities to that employee and Construction Contractor shall engage or cause the Construction Contractor Parties to engage substitute employees to proceed with the Design and Construction Work so as not to jeopardize security or safety or cause delay to the progress of the Design and Construction Work contrary to the Design and Construction Work Schedule.
- (b) SMH shall have the right to refuse admittance to, or order the removal from the Site, the Facility and/or the Existing Facilities of any person employed by (or acting on behalf of) Construction Contractor, or any Construction Contractor Party who fails to comply with the Human Rights Policies or who has been convicted of a Relevant Conviction.
- (c) Any decision of SMH made pursuant to Section 25.1 of the Project Agreement shall be final and conclusive.
- (d) Any action taken under Section 25.1 of the Project Agreement shall promptly be confirmed by SMH to Project Co and, for greater certainty, shall not relieve Construction Contractor of any of its obligations under the Design and Construction Contract.

25.2 Notification of Convictions

- (a) To the extent permitted by Applicable Law, Construction Contractor shall ensure that Project Co and SMH are immediately notified in the event that Construction Contractor or any Construction Contractor Party becomes aware that any person employed or engaged by Construction Contractor or any Construction Contractor Party in the provision of any of the Design and Construction Work has been convicted of a Relevant Conviction. Construction Contractor shall use commercially reasonable efforts to obtain, or to cause all Construction Contractor Parties to obtain, all consents as may be required

by Applicable Law or otherwise authorizing the disclosure of such information to Project Co and SMH as contemplated in this Section 25.2.

25.3 Human Resources Policies

- (a) Construction Contractor shall ensure that there are set up and maintained by it and by all Construction Contractor Parties, human resources policies and procedures covering all relevant matters relating to the Design and Construction Work (including, for example, health and safety). Construction Contractor shall ensure that the terms and the implementation of such policies and procedures comply with Applicable Law, Authority Requirements, Good Industry Practice and the Human Rights Policies and that they are published in written form and that copies of them (and any revisions and amendments to them) are directly issued to Project Co, SMH and all Construction Contractor Parties.

25.4 Management Organizations

- (a) Construction Contractor shall provide, and shall ensure that all Construction Contractor Parties provide, to Project Co and SMH, as required to keep such information current, the names of the management teams responsible for the provision of the Design and Construction Work.

25A PROJECT CO'S REMEDIAL RIGHTS

25A.1 Exercise of Remedial Rights

- (a) Project Co may exercise all rights set out in this Article 25A at any time and from time to time if:
- (i) Project Co, acting reasonably, considers that a breach by Construction Contractor of any obligation under the Design and Construction Contract, or any act or omission on the part of Construction Contractor or any Construction Contractor Party:
- (A) does or can reasonably be expected to create a serious threat to the health, safety or security of any user of any part of or the whole of the Facility and/or Existing Facilities, including employees of and visitors to the Facility and/or Existing Facilities and members of the public; or
- (B) may potentially compromise SMH's reputation or integrity 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 Construction Contractor of any obligation under the Design and Construction Contract or any act or omission on the part of Construction Contractor or any Construction Contractor Party which can reasonably be expected to cause any of the consequences set out in Section

25A.1(a)(i)(A), Project Co shall not exercise its rights under this Article 25A unless Construction Contractor has failed to cure the relevant breach, act or omission within 5 Business Days of notice from Project Co or, if such breach, act or omission cannot reasonably be cured within such 5 Business Day period, Construction Contractor thereafter fails to diligently and continuously pursue such cure and to cure such breach, act or omission within a reasonable period thereafter, provided that Construction Contractor shall not be entitled to a cure period if any of the consequences set out in Section 25A.1(a)(i)(A) actually occur;

- (D) in respect of Section 25A.1(a)(i)(B), Project Co shall not exercise its rights under this Article 25A unless Construction Contractor has failed to cure the relevant breach, act or omission within 5 Business Days of notice from Project Co or, if such breach, act or omission cannot reasonably be cured within such 5 Business Day period, Construction Contractor thereafter fails to diligently and continuously pursue such cure and to cure such breach, act or omission within a reasonable period thereafter; and
- (E) subject to Section 9.1(c) of this Appendix A – General Conditions of the Design and Construction Contract, Construction Contractor has failed to comply with any written direction issued by or on behalf of SMH's board of directors.

25A.2 Emergency

- (a) Notwithstanding that Construction Contractor is not in breach of its obligations under the Design and Construction Contract, Project Co may exercise all of the rights set out in this Article 25A at any time and from time to time if Project Co, acting reasonably, considers the circumstances to constitute an Emergency.

25A.3 Rectification

- (a) Without prejudice to Project Co's rights under Article 34 of this Appendix A – General Conditions of the Design and Construction Contract and any other rights under the Design and Construction Contract, in any of the circumstances set out in Sections 25A.1 or 25A.2, Project Co may, by written notice, require Construction Contractor to take such steps as Project Co, acting reasonably, considers necessary or expedient to mitigate, rectify or protect against such circumstance, including, if applicable, the termination and replacement of any Construction Contractor Party, and Construction Contractor shall use commercially reasonable efforts to comply with Project Co's requirements as soon as reasonably practicable.
- (b) If Project Co gives notice to Construction Contractor pursuant to Section 25A.3(a) and either:
 - (i) Construction Contractor 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

Project Co to mitigate, rectify and protect against such circumstances that Project Co may accept or reject acting reasonably; or

- (ii) Construction Contractor 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 Project Co, acting reasonably, shall think fit,

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

- (c) Notwithstanding the foregoing provisions of this Section 25A.3, in the event of an Emergency, the notice under Section 25A.3(a) shall be given as promptly as possible having regard to the nature of the Emergency and Project Co and/or SMH, as applicable, may, prior to Construction Contractor's confirmation under Section 25A.3(b)(i), take such steps as are appropriate having regard to the nature of the Emergency.

25A.4 Costs and Expenses

- (a) Subject to Project Co's obligations pursuant to Sections 25A.5 and 25A.6:
 - (i) Construction Contractor shall bear all costs and expenses incurred by Construction Contractor in relation to the exercise of Project Co's rights pursuant to this Article 25A or which Project Co is responsible for pursuant to Article 25A.4(a)(i) of the Project Agreement; and
 - (ii) Construction Contractor shall reimburse Project Co for all reasonable costs and expenses incurred by Project Co and/or, to the extent the responsibility of Project Co under Section 25A of the Project Agreement, Construction Contractor shall reimburse Project Co for all reasonable costs and expenses incurred by SMH, as applicable, in relation to the exercise of Project Co's rights pursuant to this Article 25A and SMH's rights pursuant to Article 25A of the Project Agreement, as applicable, including in relation to Project Co and/or SMH, as applicable, taking such steps, either itself or by engaging others (including a third party) to take any such steps as Project Co considers appropriate and as are in accordance with this Article 25A and/or Article 25A of the Project Agreement.

25A.5 Reimbursement Events –

- (a) In this Section 25A.5, a “**Reimbursement Event**” means:
 - (i) an act or omission of Construction Contractor or any Construction Contractor Party or a breach of any obligation under the Design and Construction Contract, but only to the extent such act, omission or breach is caused by SMH, a SMH Party, Project Co or a Project Co Party; or
 - (ii) an Emergency that is not caused or contributed to by an act or omission of Construction Contractor or any Construction Contractor Party or a breach by

Construction Contractor or any Construction Contractor Party of any obligation under the Design and Construction Contract.

- (b) If Project Co either takes steps itself (or SMH takes steps pursuant to Article 25A of the Project Agreement) or requires Construction Contractor to take steps in accordance with this Article 25A as a result of a Reimbursement Event:
- (i) Project Co shall, subject to Section 14 of the body of the Design and Construction Contract, reimburse Construction Contractor for the reasonable costs and expenses incurred by Construction Contractor in relation to the exercise of Project Co's rights pursuant to this Article 25A, or SMH's rights pursuant to Article 25A of the Project Agreement, that would not otherwise have been incurred by Construction Contractor in the proper performance of its obligations under the Design and Construction Contract; and
 - (ii) Project Co shall bear all costs and expenses incurred by Project Co in relation to the exercise of Project Co's rights pursuant to this Article 25A, and pursuant to Article 25A of the Project Agreement, SMH is responsible for its costs and expenses.

25A.6 Reimbursement if Improper Exercise of Rights

- (a) If Project Co exercises its rights pursuant to this Article 25A, but Project Co was not entitled to do so, Project Co shall reimburse Construction Contractor for the reasonable costs and expenses directly incurred by Construction Contractor over and above those that would otherwise have been incurred by Construction Contractor in the proper performance of its obligations under the Design and Construction Contract and that are directly and reasonably incurred by Construction Contractor in complying with those written requirements of Project Co issued as a result of Project Co having exercised such rights, subject to Section 14 of the body of the Design and Construction Contract, to the extent that Project Co exercised such rights as a consequence of direction from SMH under the Project Agreement.
- (b) Construction Contractor acknowledges and agrees that Construction Contractor has no right to require a determination of whether or not Project Co is entitled to exercise its rights pursuant to this Article 25A before taking any such action that Project Co may require and Construction Contractor shall comply with all of Project Co's requirements. Only concurrently with or after complying with Project Co's requirements shall Construction Contractor be entitled to refer any dispute for resolution in accordance with Schedule 27 – Dispute Resolution Procedure.

26. RECORDS, INFORMATION AND AUDIT

26.1 Records Provisions

- (a) Construction Contractor shall comply with Schedule 26 – Record Provisions.

26.2 Information and General Audit Rights

- (a) Construction Contractor shall provide, and shall cause each Subcontractor to provide, to Project Co and SMH all information, reports, documents, records and the like, including as referred to in Schedule 26 – Record Provisions, in the possession of, or available to, Construction Contractor as Project Co and SMH may reasonably require from time to time for any purpose in connection with the Design and Construction Contract, other than Sensitive Information. Construction Contractor shall use commercially reasonable efforts to ensure that, for such purpose, all such information, reports, documents, records and the like in the possession of, or available to, the Subcontractors shall be available to Construction Contractor and Construction Contractor shall include relevant terms in all Subcontracts to this effect.
- (b) Construction Contractor shall also provide to Project Co and SMH, and shall require each Subcontractor, to provide to Project Co and SMH (at Project Co's or SMH's reasonable cost, as applicable), all information, reports, documents, records and the like required to be provided pursuant to Section 26.2(a) which subsequently come into the possession of, or become available to, Construction Contractor or each Subcontractor, as Project Co and SMH may reasonably require from time to time to enable Project Co or SMH to provide reports, notices, returns and the like pursuant to Applicable Law, including information and documentation pertaining to the physical condition of the Site, security, health and safety, fire safety, emergency preparedness, environmental matters, employees and human resources related matters and patient care, other than Sensitive Information.
- (c) Construction Contractor shall promptly after receipt provide Project Co and SMH with a copy of any material notice, order, direction, requirement or other similar communication received by it or by any Subcontractor from any Governmental Authority in relation to any of the Design and Construction Work, or the Site, and Construction Contractor shall include relevant terms in all Subcontracts to this effect.
- (d) Construction Contractor shall promptly notify Project Co and SMH of any actions, suits, proceedings, or investigations commenced, pending or threatened against Construction Contractor or, to Construction Contractor's knowledge, any Subcontractor 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 Construction Contractor or in any impairment of its ability to perform its obligations under the Design and Construction Contract.
- (e) All information, reports, documents and records in the possession of, or available to, Construction Contractor, including as referred to in Schedule 26 – Record Provisions which are required to be provided to or available to Project Co and SMH hereunder, shall be subject and open to inspection and audit by Project Co and SMH at any time and from time to time, which inspection and audit shall take place during normal business hours and at Construction Contractor's normal places of business unless Project Co and Construction Contractor otherwise agree. Project Co and SMH shall also have the right to monitor and audit the performance of any and all parts of the Design and Construction Work wherever located, and Construction Contractor shall cooperate with, and shall require each Subcontractor to cooperate with, and provide access to the representatives of

Project Co and SMH monitoring and auditing such parts of the Design and Construction Work, including providing them with access and copies (at Project Co's or SMH's reasonable cost, as applicable) of all relevant information, reports, documents and records pertaining to the performance of such parts of the Design and Construction Work. Except as otherwise provided herein, all of Project Co's and SMH's costs for the inspections, audits and monitoring shall be borne by Project Co or SMH, as applicable.

- (f) In conducting an audit of Construction Contractor under Section 26.2(e) or as otherwise provided under the Design and Construction Contract, Project Co and SMH shall have all rights necessary or incidental to conducting an audit, including the right to have access to and inspect and take copies (at Project Co's and SMH's reasonable cost) of all books and records of Construction Contractor required to be provided to or available to Project Co and SMH hereunder, upon reasonable notice and at reasonable times. Construction Contractor shall fully cooperate with Project Co and SMH and its auditors in the conduct of any audits, including by making available all such records and accounts (other than Sensitive Information) in existence at that time as they may require to perform a full and detailed audit, and Construction Contractor further agrees to promptly review and settle with Project Co and SMH all matters arising from such audits, including the refunding of monies to Project Co and SMH where applicable. At the reasonable request of Project Co's and SMH's auditors, Construction Contractor shall provide such information, reports, documents and records as Project Co's and SMH's auditors may reasonably require, other than Sensitive Information.
- (g) Project Co's and SMH's rights pursuant to this Section 26.2 shall be in addition to, and shall not limit, any other audit, information, inspection or similar rights under the Design and Construction Contract and the Project Agreement.
- (h) Project Co's and SMH's rights pursuant to this Section 26.2 shall not limit or restrict any Governmental Authority's right of review, audit, information or inspection under Applicable Law.

27. COMMUNICATIONS

27.1 Communications Protocol

- (a) Each of the Parties shall comply with Schedule 18 – Communications Protocol.

28. CHANGES IN LAW

28.1 Performance after Change in Law

- (a) Following any and all Changes in Law, Construction Contractor shall perform the Design and Construction Work in accordance with the terms of the Design and Construction Contract, including in compliance with Applicable Law.

28.2 Design and Construction Work Change in Law

- (a) Construction Contractor acknowledges the provisions of Section 28.2 of the Project Agreement. On the occurrence of a Design and Construction Work Change in Law:
- (i) either Party may give notice to the other of the need for a Variation as a result of such Design and Construction Work Change in Law;
 - (ii) the Parties shall meet within ten Business Days of such notice to consult with respect to the effect of the Design and Construction Work Change in Law and to reach an agreement on whether a Variation is required as a result of such Design and Construction Work Change in Law, and, if the Parties have not, within ten Business Days of this meeting, reached an agreement, either Party may refer the question of whether a Design and Construction Work Change in Law has occurred or the effect of any Design and Construction Work Change in Law for resolution in accordance with Schedule 27 – Dispute Resolution Procedure, provided that the Parties acknowledge and agree that there shall be no Variation hereunder if SMH has not determined pursuant to Section 28.2 of the Project Agreement that a Variation is required thereunder; and
 - (iii) Project Co shall, within ten Business Days of agreement or determination that a Variation is required, issue a Variation Enquiry and the relevant provisions of Schedule 22 – Variation Procedure shall apply except that:
 - (A) Construction Contractor may only object to any such Variation Enquiry on the grounds that the implementation of the Variation would not enable it to comply with the Design and Construction Work Change in Law;
 - (B) Construction Contractor shall be responsible for obtaining all Development Approvals and Construction Contractor Permits, Licences, Approvals and Agreements required in respect of the Variation;
 - (C) Project Co shall not be entitled to withdraw any such Variation Enquiry unless the Parties otherwise agree;
 - (D) Construction Contractor shall proceed to implement the Variation within such period as will enable it to comply with the Design and Construction Work Change in Law as soon as reasonably practicable; and
 - (E) Construction Contractor shall not be entitled to any payment or other compensation or relief from performance of its obligations under the Design and Construction Contract in respect of any Design and Construction Work Change in Law or associated Variation other than as established pursuant to Schedule 22 – Variation Procedure.

28.3 Relevant Change in Law

- (a) Construction Contractor acknowledges Section 28.3 of the Project Agreement. 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

Construction Contractor of performing the Design and Construction 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 28.3.

- (b) On the occurrence of a Relevant Change in Law:
- (i) either Party may give notice to the other of the need for a Variation as a result of such Relevant Change in Law;
 - (ii) the Parties shall meet within ten 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 Variation is required as a result of such Relevant Change in Law, and, if the Parties have not, within ten Business Days of this meeting, reached an agreement, 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 27 – Dispute Resolution Procedure, provided that the Parties acknowledge and agree that there shall be no Variation hereunder if SMH has not determined pursuant to Section 28.3 of the Project Agreement that a Variation is required thereunder; and
 - (iii) Project Co shall, within ten Business Days of agreement or determination that a Variation is required, issue a Variation Enquiry and the relevant provisions of Schedule 22 – Variation Procedure shall apply except that:
 - (A) Construction Contractor may only object to any such Variation Enquiry on the grounds that the implementation of the Variation would not enable it to comply with the Relevant Change in Law;
 - (B) Construction Contractor shall be responsible for obtaining all Development Approvals and Construction Contractor Permits, Licences, Approvals and Agreements required in respect of the Variation;
 - (C) Project Co shall not be entitled to withdraw any such Variation Enquiry unless the Parties otherwise agree;
 - (D) Construction Contractor shall proceed to implement the Variation within such period as will enable it to comply with the Relevant Change in Law as soon as reasonably practicable;
 - (E) the Parties shall, without prejudice to their respective general obligations to comply with the terms of the Design and Construction Contract:
 - (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
- (F) any entitlement to compensation payable shall be in accordance with this Section 28.3, and any calculation of compensation shall take into consideration, inter alia:
- (I) any failure by a Party to comply with Section 28.3(b)(iii);
 - (II) any increase or decrease in its costs resulting from such Relevant Change in Law; and
 - (III) any amount which Construction Contractor recovers under any insurance policy (or would recover if it complied with its obligations to insure under the Design and Construction Contract or the terms of any policy of insurance required under the Design and Construction Contract) 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) Construction Contractor shall not be entitled to any payment or compensation or, except as provided in Article 30 or otherwise in the Design and Construction Contract, relief in respect of any Relevant Change in Law, or the consequences thereof, other than in accordance with this Section 28.3, and Article 31 shall be construed accordingly.

29. VARIATIONS

29.1 Variation Procedure

- (a) Except as otherwise expressly provided in the Design and Construction Contract, Schedule 22 – Variation Procedure shall apply in respect of Variations.
- (b) For greater certainty, Construction Contractor shall, subject to and in accordance with Schedule 22 – Variation Procedure, be entitled to a Variation if a written direction issued by or on behalf of Project Co to Construction Contractor or any Construction Contractor Party results in a variation, addition, reduction, substitution, omission, modification, deletion, removal or other change to the whole or any part of the Design and Construction Work, provided that the Parties acknowledge and agree that there shall be no Variation hereunder if SMH has not determined pursuant to Section 29.1 of the Project Agreement that a Variation is required thereunder.
- (c) Without limiting Construction Contractor's obligations pursuant to Section 11.11(a) and Schedule 22 – Variation Procedure, Construction Contractor shall include in each Subcontract, or shall otherwise cause each Construction Contractor Party to comply with,

the Variation Procedure, to the extent that the Variation Procedure requires Construction Contractor to minimize the cost and impact of Variations.

29.2 Innovation and Value Engineering

- (a) Construction Contractor acknowledges that SMH at all times desires to reduce the overall cost to SMH of the Project, and Construction Contractor agrees to cooperate, explore and work with SMH in investigating and considering innovation and value engineering and other cost saving measures.
- (b) If an innovation and value engineering proposal is at any time and from time to time originated and initiated solely by Construction Contractor, Construction Contractor may, on behalf of Project Co, make a proposal (the "**Innovation Proposal**") by notice to SMH.
- (c) The Parties agree that the subject of an Innovation Proposal shall not include:
 - (i) any Variation Enquiry initiated by Project Co; or
 - (ii) any Variation resulting from a Change in Law.
- (d) The Innovation Proposal must:
 - (i) set out sufficient detail to enable SMH to evaluate the Innovation Proposal in full;
 - (ii) specify Construction Contractor's reasons and justification for proposing the Innovation Proposal;
 - (iii) request SMH, pursuant to the Project Agreement, to consult with Project Co with a view to deciding whether to agree to the Innovation Proposal and, if so, what consequential changes SMH requires as a result;
 - (iv) indicate any implications of the Innovation Proposal, including a difference between the existing and the proposed requirements of the Design and Construction Contract, and the comparative advantages of each to Construction Contractor, Project Co and SMH;
 - (v) indicate if there are any dates by which a decision by SMH must be made;
 - (vi) indicate the capital cost of the Innovation Proposal, including the cost of financing; and
 - (vii) include such other information and documentation as may be reasonably requested by SMH to fully evaluate and consider the Innovation Proposal.
- (e) SMH shall, acting in good faith, evaluate the Innovation Proposal, taking into account all relevant issues, including whether:

- (i) the Innovation Proposal affects the quality of the Design and Construction Work, the Facility, or the likelihood of successful completion of the Design and Construction Work;
 - (ii) the Innovation Proposal will benefit or interfere with the efficient operation of the Facility or the performance of SMH Activities;
 - (iii) the Innovation Proposal will interfere with the relationship between SMH and third parties;
 - (iv) the financial strength of Construction Contractor is sufficient to deliver the changed Design and Construction Work, as applicable;
 - (v) the residual value of the Site or Facility is affected;
 - (vi) the Innovation Proposal materially affects the risks or costs to which SMH is exposed; or
 - (vii) any other matter SMH considers relevant.
- (f) SMH, pursuant to the Project Agreement, may request clarification or additional information regarding the Innovation Proposal, and may request modifications to the Innovation Proposal.
- (g) SMH, pursuant to the Project Agreement, may, in its sole discretion, accept or reject any Innovation Proposal.
- (h) If SMH, pursuant to the Project Agreement, accepts the Innovation Proposal, with or without modification, the relevant Innovation Proposal shall be documented and evidenced by a written Variation Confirmation, together with any other documents necessary to amend the Design and Construction Contract or any relevant Project Documents to give effect to the Innovation Proposal.
- (i) If, after taking into account the agreed implementation and reasonably allocated development costs incurred by Construction Contractor in connection with the Innovation Proposal and any other uses of the Innovation Proposal by Construction Contractor, the Innovation Proposal causes or will cause the costs of Construction Contractor and/or of a Subcontractor to decrease, the net savings in the costs of Construction Contractor and/or the Subcontractor will be shared pursuant to the Project Agreement, equally by Project Co and SMH, and Project Co's share of the net savings shall, if the Parties agree, be reflected in a lump sum payment, such amount to be determined by the Parties.
- (j) If an Innovation Proposal causes or will cause the costs of SMH to decrease pursuant to the Project Agreement, the net savings in the costs of SMH will be shared:
- (i) equally by Project Co and SMH following the implementation of the Innovation Proposal until the Termination Date; and

- (ii) thereafter, SMH shall be entitled to the full benefit of the net savings in costs (if applicable).

and Project Co's share of the net savings shall, if the Parties agree, be reflected in a lump sum payment to the Construction Contractor, such amount to be determined by the Parties.

30. DELAY EVENTS

30.1 Definition

- (a) For the purposes of the Design and Construction Contract, "**Delay Event**" means any of the following events or circumstances only to the extent, in each case, that it causes a delay in achieving a Phase Completion by the applicable Scheduled Phase Completion Date, Tower Interim Completion by the Scheduled Tower Interim Completion Date or Substantial Completion by the Scheduled Substantial Completion Date:
 - (i) the implementation of a Variation to the extent Construction Contractor has identified such delay in its Estimate and such delay has been documented in the Variation Confirmation;
 - (ii) any breach by SMH of any of SMH's obligations under the Project Agreement (including, subject to Section 30.2(h) of the Project Agreement, any delay by SMH in giving access to the Site or to the Existing Facilities pursuant to Section 16.1 of the Project Agreement), any obstruction of the rights afforded to Construction Contractor under Section 16.1 of Appendix A – General Conditions of the Design and Construction Contract, any delay by SMH in carrying out its obligations set forth in Section 21.8(b) of the Project Agreement or any delay by SMH in carrying out its obligations set forth in Schedule 10 – Review Procedure), except to the extent that any such breach is caused, or contributed to, by Construction Contractor or any Construction Contractor Party;
 - (iii) an opening up of the Design and Construction Work pursuant to Section 20.3 of Appendix A – General Conditions of the Design and Construction Contract where such Design and Construction Work are not subsequently found to be defective or not in compliance with the requirements of the Design and Construction Contract (including the Output Specifications, the Construction Contractor Proposal Extracts and the Design Data), unless such opening up of the Design and Construction Work was reasonable in the light of other defects or non-compliance previously discovered by SMH or Project Co, as applicable, in respect of the same or a similar component of the Design and Construction Work or subset of the Design and Construction Work;
 - (iv) a requirement pursuant to Sections 18.2(b) or 18.2(c) of Appendix A – General Conditions of the Design and Construction Contract for Construction Contractor to perform any alteration, addition, Demolition, extension or variation in the Design and Construction Work, or to suspend or delay performance of the Design and Construction Work, upon the discovery of Contamination, which alteration,

addition, Demolition, extension or variation in the Design and Construction Work, or suspension or delay in the performance of the Design and Construction Work, would not otherwise be required under the Design and Construction Contract;

- (v) a requirement pursuant to Sections 18.3(b) or 18.3(c) of Appendix A – General Conditions of the Design and Construction Contract for Construction Contractor to perform any alteration, addition, Demolition, extension or variation in the Design and Construction Work, or to suspend or delay performance of the Design and Construction Work, upon the discovery of any fossils, artifacts 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 Design and Construction Work, or suspension or delay in the performance of the Design and Construction Work, would not otherwise be required under the Design and Construction Contract;
- (vi) subject to the provisions of Section 11.13 of Appendix A – General Conditions of the Design and Construction Contract, the execution of Additional Works on the Site by Additional Contractors;
- (vii) a requirement pursuant to Section 11.1 of Schedule 27 – Dispute Resolution Procedure for Construction Contractor to proceed in accordance with the direction of Project Co during the pendency of a Dispute, which Dispute is subsequently determined in Construction Contractor’s favour;
- (viii) a Relief Event;
- (ix) an event of Force Majeure; or
- (x) a Relevant Change in Law.

30.2 Consequences of a Delay Event

- (a) Construction Contractor shall provide written notice to Project Co, with a copy on behalf of Project Co, to the SMH Representative and the Independent Certifier within five Business Days of becoming aware of the occurrence of a Delay Event. Construction Contractor shall, within ten Business Days after such notification, provide further written details to Project Co, with a copy on behalf of Project Co, to the SMH Representative and the Independent Certifier which shall include:
 - (i) a statement of which Delay Event the claim is based upon;
 - (ii) details of the circumstances from which the Delay Event arises;
 - (iii) details of the contemporary records which Construction Contractor shall maintain to substantiate its claim for extra time;

- (iv) details of the consequences (whether direct or indirect, financial or non-financial) which such Delay Event may have upon any Phase Completion Date, the Scheduled Tower Interim Completion Date and/or the Scheduled Substantial Completion Date, as applicable; and
 - (v) details of any measures which Construction Contractor proposes to adopt to mitigate the consequences of such Delay Event.
- (b) As soon as possible but in any event within three Business Days of Construction Contractor receiving, or becoming aware of, any supplemental information which may further substantiate or support Construction Contractor's claim, Construction Contractor shall submit further particulars based on such information, on behalf of Project Co, to the SMH Representative and the Independent Certifier.
- (c) Pursuant to the Project Agreement, the SMH Representative shall, after receipt of written details under Section 30.2(a), or of further particulars under Section 30.2(b), be entitled by written notice to require Project Co to provide such further supporting particulars as the SMH Representative may reasonably consider necessary. Construction Contractor shall afford the SMH Representative and the Independent Certifier reasonable facilities for investigating the validity of the claim submitted by Construction Contractor on behalf of Project Co including, without limitation, on-site inspection.
- (d) Subject to the provisions of this Section 30, Project Co shall allow Construction Contractor an extension of time equal to the delay caused by the Delay Event and shall fix (A) one or more revised Scheduled Phase Completion Dates; (B) a revised Scheduled Tower Interim Completion Date; (C) a revised Scheduled Substantial Completion Date; or (D) a revised Scheduled Final Completion Date, as applicable, as soon as reasonably practicable and in any event within 10 Business Days of the later of:
- (i) the date of receipt by the SMH Representative of notice submitted by Construction Contractor, on behalf of Project Co, given in accordance with Section 30.2(a) and the date of receipt of any further particulars (if such are required under Section 30.2(c)), whichever is later; and
 - (ii) the date of receipt by the SMH Representative of any supplemental information supplied by Construction Contractor in accordance with Section 30.2(b) and the date of receipt of any further particulars (if such are required under Section 30.2(c)), whichever is later.
- (e) If:
- (i) Project Co declines to fix (A) any applicable revised Scheduled Phase Completion Date(s); (B) a revised Scheduled Tower Interim Completion Date; (C) a revised Scheduled Substantial Completion Date; or (D) a revised Scheduled Final Completion Date, as applicable;
 - (ii) Construction Contractor considers that a different (A) Scheduled Phase Completion Date(s); (B) Scheduled Tower Interim Completion Date; (C);

Scheduled Substantial Completion Date; or (D) Scheduled Final Completion Date should be fixed; or

- (iii) there is a dispute as to whether a Delay Event has occurred,

then Construction Contractor shall be entitled to refer the matter for determination by the Independent Certifier. The decision of the Independent Certifier may be disputed by either Party and referred for resolution in accordance with Schedule 27 – Dispute Resolution Procedure.

- (f) If the Design and Construction Work should be behind schedule for a reason other than a Delay Event, or if a Construction Contractor Party delays the progress of any portion of the Design and Construction Work necessary to complete the Design and Construction Work on schedule, Construction Contractor shall use all reasonable measures to bring the Design and Construction Work back on schedule. Construction Contractor shall exercise all means within its discretion, such as directing any Construction Contractor Party that is creating delays to increase their labour forces and equipment, to improve the organization and expediting of the Design and Construction Work, or to work overtime as may be necessary. Construction Contractor 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 Construction Contractor and/or the Construction Contractor Parties and there shall be no adjustment to the Guaranteed Price as a result of such costs and expenses and for clarity, no extension to any Phase Completion Date(s), the Scheduled Tower Interim Completion Date or the Scheduled Substantial Completion Date.
- (g) Where there are concurrent delays, some of which are caused by Project Co or SMH or others for whom Project Co or SMH is responsible (other than the Construction Contractor), and some of which are caused by Construction Contractor or others for whom Construction Contractor is responsible, Construction Contractor shall not be entitled to either an extension in the Scheduled Phase Completion Date(s), the Scheduled Tower Interim Completion Date or the Scheduled Substantial Completion Date 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 Phase Completion Date(s), the Scheduled Tower Interim Completion Date or the Scheduled Substantial Completion Date, as applicable, where the time period over which such delays occur overlap in time, but only for the duration of the overlap.
- (h) Construction Contractor acknowledges Section 11.17 of the Project Agreement. Subject to Sections 11.17(b) and 11.17(c) of this Appendix A – General Conditions of the Design and Construction Contract, SMH, pursuant to the Project Agreement, shall provide Construction Contractor with access to and use of the Site and the Existing Facilities as required pursuant to Article 16 of the Project Agreement, in a manner consistent with the Project Agreement and in accordance with the notification requirements and restrictions set out in the Design and Construction Contract, provided that Construction Contractor agrees that the inability of SMH to provide Construction Contractor with access to an

area for construction activities not on the critical path for reasons set out in Sections 11.17(b) and 11.17(c) of this Appendix A – General Conditions of the Design and Construction Contract will not result in the occurrence of a Delay Event (and, for greater certainty, there shall not be a resulting change to any Scheduled Phase Completion Date, the Scheduled Tower Interim Completion Date or the Scheduled Substantial Completion Date) or a Compensation Event (and, for certainty, there shall not be any resulting change to the Guaranteed Price).

- (i) In no event shall the extension of time for a Delay Event be more than the necessary extension of the critical path as a result of the Delay Event.
- (j) Construction Contractor acknowledges and agrees that the Design and Construction Work Schedule includes a Schedule Cushion at no additional cost or expense to Project Co. Construction Contractor shall separately identify the extent of the Schedule Cushion in the Design and Construction Work Schedule.
- (k) Construction Contractor acknowledges and agrees that in the event that an extension of the time for achieving a Phase Completion, Tower Interim Completion or Substantial Completion is allowed under any provision of the Design and Construction Contract (including an extension to a Phase Completion Date, the Scheduled Tower Interim Completion Date and/or the Scheduled Substantial Completion Date granted pursuant to this Section 30 or in accordance with Schedule 22 – Variation Procedure), Project Co may, in its sole discretion, elect to apply all or any portion of the Schedule Cushion with the result that such extension shall be reduced or eliminated, as the case may be, by the number of days of the Schedule Cushion Project Co has elected to apply.

30.3 Mitigation

- (a) If Construction Contractor is (or claims to be) affected by a Delay Event, Construction Contractor shall, and shall require all Construction Contractor Parties to, take and continue to take commercially reasonable steps:
 - (i) to eliminate or mitigate the consequences of such event upon the performance of its obligations under the Design and Construction Contract;
 - (ii) to continue to perform its obligations under the Design and Construction Contract to the extent possible notwithstanding the Delay Event; and
 - (iii) to resume performance of its obligations under the Design and Construction Contract affected by the Delay Event as soon as practicable.
- (b) To the extent that Construction Contractor does not comply with its obligations under this Section 30.3, such failure shall be taken into account in determining Construction Contractor's entitlement to an extension of time pursuant to this Section 30.

31. COMPENSATION EVENTS

31.1 Definition

- (a) For the purposes of the Design and Construction Contract, “**Compensation Event**” means any event referred to in Sections 30.1(a)(ii) (subject to Section 30.2(h)), 30.1(a)(iii), 30.1(a)(iv), 30.1(a)(v), 30.1(a)(vi) and 30.1(a)(vii) as a direct result of which Construction Contractor has incurred loss or expense, whether or not any of these events has also caused a delay.

31.2 Consequences of a Compensation Event

- (a) If a Compensation Event occurs, Construction Contractor’s sole right to compensation shall be as set out in this Section 31. For greater certainty, except as aforesaid, no other Delay Event shall entitle Construction Contractor to receive any compensation, except as otherwise provided in:
- (i) Schedule 22 – Variation Procedure, in the case of a Delay Event referred to in Section 30.1(a)(i);
 - (ii) Section 33, in the case of a Delay Event referred to in Section 30.1(a)(ix);
 - (iii) Section 32, in the case of a Delay Event referred to in Section 30.1(a)(viii); and
 - (iv) Section 28, in the case of a Delay Event referred to in Section 30.1(a)(x).
- (b) Subject to Sections 31.3 and 31.4, if it is agreed, or determined in accordance with Schedule 27 – Dispute Resolution Procedure and subject to Section 14 of the body of the Design and Construction Contract, that there has been a Compensation Event, Construction Contractor shall be entitled to such compensation as would place Construction Contractor 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 Project Co to Construction Contractor. Construction Contractor shall promptly provide the Project Co, with a copy to the SMH Representative on behalf of Project Co, with any information the SMH Representative may require in order to determine the amount of such compensation.
- (c) If Project Co is required, subject to Section 14 of the body of the Design and Construction Contract, to compensate Construction Contractor pursuant to this Section 31.2, then Project Co may either pay such compensation as a lump sum payment or payments at times and in a manner to be agreed with Construction Contractor, acting reasonably.
- (d) Notwithstanding any other provision in the Design and Construction Contract, including Section 31.2(b), where Project Co elects to apply all or any portion of the number of days of the Schedule Cushion, Construction Contractor 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 for in Schedule 22 – Variation Procedure.

31.3 Mitigation

- (a) If Construction Contractor is (or claims to be) affected by a Compensation Event, Construction Contractor shall, and shall require all Construction Contractor Parties to, take and continue to take commercially reasonable steps to minimize the amount of compensation due in accordance with this Section 31 in relation to any Compensation Event.
- (b) To the extent that Construction Contractor does not comply with its obligations under this Section 31.3, such failure shall be taken into account in determining Construction Contractor's entitlement to relief pursuant to this Section 31.

31.4 Insured Exposure

- (a) The compensation payable to Construction Contractor pursuant to this Section 31 shall be reduced by any amount which Construction Contractor or a Construction Contractor Party recovers, or is entitled to recover, under any insurance policy, or would have recovered if it had complied with the requirements of the Design and Construction Contract in respect of insurance or the terms of any policy of insurance required under the Design and Construction Contract, 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.

32. RELIEF EVENTS

32.1 Definition

- (a) For the purposes of the Design and Construction Contract, "**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 the Design and Construction Contract or a party to the Project Agreement to perform any of its obligations under the 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 Design and Construction Work and/or the Facility or any roads servicing the Site;
 - (iv) without prejudice to any obligation of Construction Contractor to provide stand-by power facilities in accordance with the Design and Construction Contract, 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 Design and Construction 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 Construction Contractor claiming relief, as a result of any act or omission of any Construction Contractor Party and (ii) in the case of Project Co claiming relief, as a result of any act or omission of any Project Co Party.

32.2 Consequences of a Relief Event

- (a) Subject to Section 32.3, no right of termination, other than either Party's right to terminate the Design and Construction Contract pursuant to Section 36.1, shall arise under the Design and Construction Contract by reason of any failure by a Party to perform any of its obligations under the Design and Construction Contract, 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 the Design and Construction Contract 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 30.1(a)(viii):
 - (i) Construction Contractor shall only be relieved of its obligations under the Design and Construction Contract to the extent, if any, provided for in Section 30, subject to Section 14 of the body of the Design and Construction Contract.
- (c) If a Relief Event occurs, Construction Contractor shall not be entitled to receive any compensation other than as expressly provided in Section 38.
- (d) Subject to Section 38, Construction Contractor's sole right to payment or otherwise in relation to the occurrence of a Relief Event shall be as provided in this Section 32, subject to Section 14 of the body of the Design and Construction Contract.

32.3 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 the Design and Construction Contract, 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 32.3, such failure shall preclude such Party's entitlement to relief pursuant to this Section 32.
- (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 32.3(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 32.3(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.

32.4 Insured Exposure

- (a) The compensation payable to Construction Contractor pursuant to this Section 32 shall be reduced by any amount which Construction Contractor or a Construction Contractor Party recovers, or is entitled to recover, under any insurance policy, or would have recovered if it had complied with the requirements of the Design and Construction Contract in respect of insurance or the terms of any policy of insurance required under the Design and Construction Contract, 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.

33. FORCE MAJEURE

33.1 Definition

- (a) For the purposes of the Design and Construction Contract, "**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 the Design and Construction Contract:
 - (i) war, civil war, armed conflict, terrorism, acts of foreign enemies or hostilities;

- (ii) nuclear or radioactive contamination of the Design and Construction Work, the Facility and/or the Site, unless Construction Contractor or any Construction Contractor Party is the source or cause of the contamination;
- (iii) chemical or biological contamination of the Design and Construction Work, the Facility and/or the Site from any event referred to in Section 33.1(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 Design and Construction Work to be abandoned.

33.2 Consequences of Force Majeure

- (a) Subject to Section 33.3, and subject to Section 14 of the body of the Design and Construction Contract, the Party claiming relief shall be relieved from liability under the Design and Construction Contract to the extent that, by reason of the Force Majeure, it is not able to perform its obligations under the Design and Construction Contract.
- (b) In respect of an event of Force Majeure that is also a Delay Event pursuant to Section 30.1(a)(ix):
 - (i) Construction Contractor shall only be relieved of its obligations under the Design and Construction Contract to the extent, if any, provided for in Section 30, subject to Section 14 of the body of the Design and Construction Contract.
- (c) If an event of Force Majeure occurs prior to the Substantial Completion Date, Construction Contractor shall not be entitled to receive any compensation other than as expressly provided in Section 38.
- (d) Subject to Section 38, Construction Contractor's sole right to payment or otherwise in relation to the occurrence of an event of Force Majeure shall be as provided in this Section 33.

33.3 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 the Design and Construction Contract, 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 Design and Construction Work Schedule.

- (b) To the extent that the Party claiming relief does not comply with its obligations under Section 33.3(a), such failure shall be taken into account in determining such Party's entitlement to relief pursuant to this Section 33.
- (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 33.3(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 33.3(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.

33.4 Insured Exposure

- (a) The compensation payable to Construction Contractor pursuant to this Section 33 shall be reduced by any amount which Construction Contractor or a Construction Contractor Party recovers, or is entitled to recover, under any insurance policy, or would have recovered if it had complied with the requirements of the Design and Construction Contract in respect of insurance or the terms of any policy of insurance required under the Design and Construction Contract, 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.

33.5 Modifications

- (a) The Parties shall use commercially reasonable efforts to agree to any modifications to the Design and Construction Contract which may be equitable having regard to the nature of an event or events of Force Majeure. Schedule 27 – Dispute Resolution Procedure shall not apply to a failure of Project Co and Construction Contractor to reach agreement pursuant to this Section 33.5.

34. CONSTRUCTION CONTRACTOR DEFAULT

34.1 Construction Contractor Events of Default

- (a) For the purposes of the Design and Construction Contract, “**Construction Contractor 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 Project Co of its payment obligations hereunder:
- (A) Construction Contractor 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 Construction Contractor with respect to Construction Contractor or any of the property, assets or undertaking of Construction Contractor, or any creditor of Construction Contractor takes control, or takes steps to take control, of Construction Contractor or any of Construction Contractor’s assets, or any proceedings are instituted against Construction Contractor that result in Construction Contractor being declared or ordered bankrupt or in 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 Construction Contractor seeking any such result, or any such proceedings are instituted by a person other than Project Co, a Project Co 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 Design and Construction Work or of SMH Activities (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 Construction Contractor are taken to authorize any of the actions set forth in this Section 34.1(a)(i);
- (B) Construction Contractor 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 Construction Contractor’s ability to perform its obligations under the Design and Construction Contract;
- (C) if any execution, sequestration, extent or other process of any court becomes enforceable against Construction Contractor or if a distress or analogous process is levied against any property of Construction

Contractor that materially adversely affects Construction Contractor's ability to perform its obligations hereunder; or

- (D) Construction Contractor 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 this Section 34.1(a)(i) in any jurisdiction in which it is incorporated or resident and such event or set of circumstances would, if set out in Section 34.1(a)(i)(A), (B) or (C), constitute a Construction Contractor Event of Default;
- (ii) Construction Contractor failing to achieve Substantial Completion within 180 days after the Scheduled Substantial Completion Date (the "Longstop Date");
- (iii) Construction Contractor either:
 - (A) failing to deliver a rectification plan under Section 13.4(a)(iii)(B) of this Appendix A – General Conditions of the Design and Construction Contract;
 - (B) delivering a rectification plan under Section 13.4(a)(iii)(B) of this Appendix A – General Conditions of the Design and Construction Contract which indicates that Construction Contractor will not achieve Substantial Completion by the Longstop Date; or
 - (C) delivering a rectification plan under Section 13.4(a)(iii)(B) of this Appendix A – General Conditions of the Design and Construction Contract that is not acceptable to the Independent Certifier, acting reasonably, as to the matters set out in Section 13.4(a)(iii)(B)(IV) of this Appendix A – General Conditions of the Design and Construction Contract;
- (iv) Not Used;
- (v) Construction Contractor committing a breach of Sections 40 or 41 of this Appendix A – General Conditions of the Design and Construction Contract;
- (vi) Construction Contractor committing a breach of its obligations under the Design and Construction Contract which has or will have a material adverse effect on the performance of SMH operations or SMH Activities (other than a breach that is otherwise referred to in Section 34.1(a)(i) to (v) (inclusive) or 34.1(a)(vii) to (xvi) (inclusive)) other than where such breach is a consequence of a breach by Project Co of its obligations under the Design and Construction Contract, and upon becoming aware of such breach Construction Contractor failing to remedy such breach in accordance with all of the following:
 - (A) Construction Contractor shall:

- (I) immediately commence and thereafter diligently continue to remedy the breach and to mitigate any adverse effects on Project Co and the performance of SMH operations and SMH Activities;
 - (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 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;
- (vii) Construction Contractor wholly abandoning the Design and Construction Work for a period which exceeds three Business Days from receipt by Construction Contractor of a written request to return to the Site, other than as a consequence of a breach by Project Co of its obligations under the Design and Construction Contract;
 - (viii) Construction Contractor failing to comply with Sections 47.1 or 47.3 of this Appendix A – General Conditions of the Design and Construction Contract;
 - (ix) the occurrence of any Change in Ownership or Change in Control which is prohibited by Section 47.4 of this Appendix A – General Conditions of the Design and Construction Contract;
 - (x) Subject to Section 4.6 of the body of the Design and Construction Contract, Construction Contractor failing to remove an Encumbrance that arose due to an act or omission of Construction Contractor or any Construction Contractor Party (other than a Title Encumbrance and any Encumbrance derived through SMH) within 45 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 Construction Contractor or any Construction Contractor Party knew, or ought to have known, about the existence of the Encumbrance;
 - (xi) Construction Contractor failing to pay any sum or sums due to Project Co under the Design and Construction Contract, which sum or sums are not being disputed by Construction Contractor in accordance with Schedule 27 – Dispute Resolution Procedure and which sum or sums, either singly or in aggregate, exceed(s)

\$250,000 (index linked), and such failure continues for 30 days from receipt by Construction Contractor of a notice of non-payment from Project Co;

- (xii) Construction Contractor failing to comply with Section 48 of this Appendix A – General Conditions of the Design and Construction Contract;
- (xiii) Not used;
- (xiv) Construction Contractor failing to obtain any bond, security or insurance required to be obtained by or on behalf of Construction Contractor pursuant to the Design and Construction Contract 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 the Design and Construction Contract, other than as a consequence of a breach by Project Co of its obligations under the Design and Construction Contract, and:
 - (A) in respect of insurance, such breach by Construction Contractor 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 Construction Contractor is not remedied within 5 Business Days of Construction Contractor becoming aware of such breach;

For clarity, the security referred to in this Section 34.1(a)(xiv) includes, without limitation, the security described in Section 11.16A of this Appendix A – General Conditions of the Design and Construction Contract.

- (xv) Construction Contractor failing to comply with any determination, order or award made against Construction Contractor in accordance with Schedule 27 – Dispute Resolution Procedure;
- (xvi) A default by Construction Contractor or any Construction Contractor Party under any of the Ancillary Documents following the expiry of any applicable notice and cure periods thereunder.

34.2 Notification of Occurrence

- (a) Construction Contractor shall, promptly upon Construction Contractor becoming aware of the occurrence, notify Project Co of the occurrence, and details, of any Construction Contractor 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 Construction Contractor Event of Default.

34.3 Right to Termination

- (a) On the occurrence of a Construction Contractor Event of Default, or at any time after Project Co becomes aware of a Construction Contractor Event of Default, and, if the occurrence of a Construction Contractor Event of Default is disputed by Construction

Contractor in good faith, then following confirmation in accordance with Schedule 27 – Dispute Resolution Procedure that a Construction Contractor Event of Default has occurred, Project Co may, subject to Section 34.4, terminate the Design and Construction Contract in its entirety by written notice having immediate effect, such notice to be given to Construction Contractor.

34.4 Remedy Provisions

- (a) In the case of a Construction Contractor Event of Default referred to in the following Sections of this Appendix A – General Conditions of the Design and Construction Contract 34.1(a)(i)(B), 34.1(a)(i)(C), 34.1(a)(i)(D) (where the Construction Contractor Event of Default referred to in Section 34.1(a)(i)(D) is analogous to a Construction Contractor Event of Default referred to in Section 34.1(a)(i)(B) or 34.1(a)(i)(C)), 34.1(a)(iii), 34.1(a)(v), 34.1(a)(vii), 34.1(a)(viii), 34.1(a)(ix), (where the Construction Contractor Event of Default referred to in Section 34.1(a)(ix) is capable of being remedied), 34.1(a)(xi), 34.1(a)(xiv) (where the Construction Contractor Event of Default referred to in Section 34.1(a)(xiv) is not in respect of insurance), 34.1(a)(xv), or 34.1(a)(xvi), Project Co shall, prior to being entitled to terminate the Design and Construction Contract, give notice of default to Construction Contractor, and Construction Contractor shall:
- (i) within five Business Days of such notice of default, put forward a reasonable plan and schedule for diligently remedying the Construction Contractor Event of Default, which schedule shall specify in reasonable detail the manner in, and the latest date by which, such Construction Contractor Event of Default is proposed to be remedied, which latest date shall, in any event, be within 30 days of the notice of default, or if such breach is not capable of being remedied in such period then such longer period as is acceptable to Project Co, acting reasonably; and
 - (ii) 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.
- (b) Where Construction Contractor puts forward a plan and schedule in accordance with Section 34.4(a)(i) that has a date for the Construction Contractor Event of Default to be remedied that is beyond 30 days from the notice of default, Project Co shall have 5 Business Days from receipt of the same within which to notify Construction Contractor that Project Co does not accept such longer period in the plan and schedule and that the 30 day limit will apply, failing which Project Co shall be deemed to have accepted the longer period in the plan and schedule.
- (c) If a Construction Contractor Event of Default, of which a notice of default was given under Section 34.4(a), occurs and:
- (i) Construction Contractor fails to immediately commence and thereafter diligently continue to remedy the Construction Contractor Event of Default and to mitigate any adverse effects on Project Co; or

- (ii) Construction Contractor fails to put forward a plan and schedule pursuant to Section 34.4(a)(i); or
- (iii) such Construction Contractor Event of Default is not remedied within 30 days of such notice of default or such longer period as is established pursuant to the plan and schedule established pursuant to Sections 34.4(a) and (b); or
- (iv) where Construction Contractor puts forward a plan and schedule pursuant to Section 34.4(a)(i) and Construction Contractor fails to perform its obligations thereunder necessary to achieve all elements of such plan and schedule in accordance with its terms within the time for the performance of its obligations,

then Project Co may terminate the Design and Construction Contract in its entirety by written notice with immediate effect, such notice to be given to Construction Contractor.

- (d) Notwithstanding that Project Co may give the notice referred to in Section 34.4(a), and without prejudice to the other rights of Project Co in this Section 34.4, at any time during which a Construction Contractor Event of Default is continuing, Project Co may, at Construction Contractor's risk and expense, take such steps as Project Co considers appropriate, either itself or by engaging others (including a third party) to take such steps, to perform or obtain the performance of Construction Contractor's obligations under the Design and Construction Contract or to remedy such Construction Contractor Event of Default.
- (e) Upon the occurrence of a Construction Contractor Event of Default that Construction Contractor has remedied pursuant to this Section 34.4, such occurrence of a Construction Contractor Event of Default shall thereafter cease to be a Construction Contractor Event of Default and Project Co shall not be entitled to terminate the Design and Construction Contract for that occurrence of a Construction Contractor Event of Default.

34.5 Project Co's Costs

- (a) Construction Contractor shall reimburse Project Co for all reasonable costs (including all applicable Taxes and all legal or professional services, legal costs being on a full indemnity basis) properly incurred by Project Co in exercising its rights under this Section 34, including any relevant increased administrative expenses. Project Co shall take commercially reasonable steps to mitigate such costs.

34.6 No Other Rights to Terminate

- (a) Project Co shall have no right or entitlement to terminate the Design and Construction Contract, or to accept any repudiation of the Design and Construction Contract, and shall not purport to exercise any such right or entitlement except as set forth in Sections 34 and 36.

35. PROJECT CO DEFAULT

35.1 Project Co Events of Default

- (a) For the purposes of the Design and Construction Contract, “**Project Co Event of Default**” means any one or more of the following events or circumstances:
- (i) Project Co failing to pay any sum or sums due to Construction Contractor under the Design and Construction Contract, where such failure by Project Co to make payment is not a direct result of any failure on the part of SMH to make payment to Project Co, and which sum or sums are not being disputed by Project Co in accordance with Schedule 27 – Dispute Resolution Procedure, and which sum or sums, either singly or in aggregate, exceed(s) \$250,000 (index linked), and:
 - (A) in respect of any payment due and payable by Project Co to Construction Contractor under the Design and Construction Contract, such failure continues for a period of 90 days,

in any such case, from receipt by Project Co of a notice of non-payment from or on behalf of Construction Contractor;
 - (ii) SMH committing a material breach of its obligations under Section 16 of the Project Agreement (other than as a consequence of a breach by Construction Contractor of its obligations under the Design and Construction Contract), which breach materially adversely affects the ability of Construction Contractor to perform its obligations under the Design and Construction Contract for a continuous period of not less than 60 days, the Construction Contractor to obtain the consent of Project Co prior to terminating the Design and Construction Contract as a result of SMH breaching its obligations under Section 16 of the Project Agreement; or
 - (iii) an act of any Governmental Authority which renders it impossible for Construction Contractor to perform all or substantially all of its obligations under the Design and Construction Contract (other than as a consequence of a breach by Construction Contractor of its obligations under the Design and Construction Contract) for a continuous period of not less than 60 days, provided that, for greater certainty, the non-issuance of, or the imposition of any conditions or limitations in, any of the Construction Contractor Permits, Licences, Approvals and Agreements shall not constitute an “act of any Governmental Authority”.

35.2 Construction Contractor’s Options

- (a) On the occurrence of a Project Co Event of Default and while the same is continuing, Construction Contractor may give notice to Project Co of the occurrence of such Project Co Event of Default, which notice will specify the details thereof, and, at Construction Contractor’s option and without prejudice to its other rights and remedies under the Design and Construction Contract, may:
- (i) suspend performance of the Design and Construction Work until such time as Project Co has remedied such Project Co Event of Default; or

- (ii) if such Project Co Event of Default has not been remedied within 30 days of receipt by Project Co of notice of the occurrence of such Project Co Event of Default, terminate the Design and Construction Contract in its entirety by notice in writing having immediate effect except for a Project Co Event of Default set out in Section 35.1(a)(ii); or
- (iii) if such Project Co Event of Default has not been remedied within 30 days of receipt by Project Co of notice of occurrence of such Project Co Event of Default and such Project Co Event of Default is set out in Section 35.1(a)(ii), request that Project Co terminate the Project Agreement due to the occurrence of such event, provided that Construction Contractor acknowledges that Project Co may not agree to such termination unless the Lenders elect to terminate pursuant to the Lending Agreements or otherwise consent to such termination in accordance with the Lending Agreements, and in such instance, Construction Contractor shall terminate the Design and Construction Contract by notice in writing having immediate effect.

35.3 Construction Contractor's Costs

- (a) Project Co shall reimburse Construction Contractor for all reasonable costs (including all applicable Taxes and all legal or professional services, legal costs being on a full indemnity basis) properly incurred by Construction Contractor in exercising its rights under this Section 35, including any relevant increased administrative expenses. Construction Contractor shall take commercially reasonable steps to mitigate such costs.

35.4 No Other Rights to Terminate

- (a) Construction Contractor shall have no right or entitlement to terminate the Design and Construction Contract, nor to accept any repudiation of the Design and Construction Contract, and shall not exercise, nor purport to exercise, any such right or entitlement except as expressly set forth in the Design and Construction Contract.

36. RELIEF EVENT AND NON DEFAULT TERMINATION

36.1 Termination for Relief Event

- (a) Project Co shall be entitled to terminate this Design and Construction Contract, concurrently with the termination of the Project Agreement, pursuant to Section 36.1 of the Project Agreement.
- (b) Construction Contractor may request that, pursuant to Section 36.1 of the Project Agreement, Project Co terminate the Project Agreement and the Design and Construction Contract due to the occurrence or continuance of a Relief Event for a continuous period of 180 days from the date on which the Party affected gives notice and acknowledges that Project Co may not agree to such termination unless the Lenders elect to terminate pursuant to the Lending Agreements or otherwise consent to such termination in accordance with the Lending Agreements.

36.2 Termination for Force Majeure

- (a) Project Co shall be entitled to terminate this Design and Construction Contract, concurrently with termination of the Project Agreement, pursuant to Section 36.2 of the Project Agreement.
- (b) Construction Contractor may request that, pursuant to Section 36.2 of the Project Agreement, Project Co terminate the Project Agreement and the Design and Construction Contract due to the occurrence or continuance of an event of Force Majeure for a continuous period of 180 days from the date on which the Party affected gives notice and acknowledges that Project Co may not agree to such termination unless the Lenders elect to terminate pursuant to the Lending Agreements or otherwise consent to such termination in accordance with the Lending Agreements.

36.3 Termination for Convenience

- (a) Project Co shall, in its sole discretion and for any reason whatsoever, be entitled to terminate the Design and Construction Contract at any time on 180 days written notice to Construction Contractor. Such written notice shall include confirmation that SMH has terminated the Project Agreement in accordance with Section 36.3 thereunder.
- (b) In the event of notice being given by Project Co in accordance with this Section 36.3, Project Co shall, at any time before the expiration of such notice, be entitled to direct Construction Contractor to refrain from commencing, or allowing any third party to commence, the Design and Construction Work, or any part or parts of the Design and Construction Work where such Design and Construction Work have not yet been commenced.

36.4 Automatic Expiry on Expiry Date

- (a) The Design and Construction Contract shall terminate automatically on the Expiry Date.
- (b) Construction Contractor shall not be entitled to any compensation due to termination of the Design and Construction Contract on expiry of the Project Term on the Expiry Date.

37. EFFECT OF TERMINATION

37.1 Termination

- (a) Notwithstanding any provision of the Design and Construction Contract, upon the service of a notice of termination or termination on the Expiry Date pursuant to Section 36.4, this Section 37 shall apply in respect of such termination.

37.2 Continued Effect – No Waiver

- (a) Notwithstanding any breach of the Design and Construction Contract by a Party, the other Party may elect to continue to treat the Design and Construction Contract as being in full force and effect and to enforce its rights under the Design and Construction

Contract 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 the Design and Construction Contract, including any right to terminate the Design and Construction Contract and any right to claim damages, shall not be deemed to be a waiver of such right for any continuing or subsequent breach.

37.3 Continuing Performance

- (a) Subject to any exercise by Project Co of its rights to perform, or to seek, pursuant to the Design and Construction Contract, a third party to perform, the obligations of Construction Contractor, the Parties shall continue to perform their obligations under the Design and Construction Contract (including, if applicable, pursuant to Schedule 23 – Compensation on Termination) notwithstanding the giving of any notice of default or notice of termination, until the termination of the Design and Construction Contract becomes effective in accordance with this Section 37.

37.4 Effect of Notice of Termination

- (a) On the service of a notice of termination, or termination on the Expiry Date pursuant to Section 36.4:
- (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 SMH as shall not already have been transferred to SMH pursuant to Section 43.1, Construction Contractor shall transfer to, and there shall vest in, SMH, free from all Encumbrances (other than the Title Encumbrances and any Encumbrances derived through SMH), such part of the Design and Construction Work and Facility as shall have been constructed and such items of the Plant and equipment, including Equipment as shall have been procured by Construction Contractor, and, if Project Co so elects:
- (A) all plant, equipment and materials (other than those referred to in Section 37.4(a)(i)(B)) on or near to the Site shall remain available to Project Co or SMH for the purposes of completing the Design and Construction Work; and
- (B) all construction plant and equipment shall remain available to Project Co or SMH for the purposes of completing the Design and Construction Work, subject to payment by Project Co or SMH of the Construction Contractor's reasonable charges;
- (ii) if termination is prior to the Substantial Completion Date, Construction Contractor shall deliver to Project Co or SMH (to the extent such items have not already been delivered to Project Co or SMH) one complete set of all Project Data and Intellectual Property relating to the design, construction and completion of the Design and Construction Work and the Facility;

- (iii) in so far as title shall not have already passed to SMH pursuant to Section 43.1 or Section 37.4(a)(i) of this Appendix A – General Conditions of the Design and Construction Contract, Construction Contractor shall hand over to, and there shall vest in, Project Co or SMH, as identified by Project Co, free from all Encumbrances (other than the Title Encumbrances and any Encumbrances derived through SMH), the Facility together with all other assets and rights capable of being transferred that are necessary for the performance of the Project and the Design and Construction Work and all facilities and equipment, including the Equipment, and to the extent that any such assets or rights are not capable of being transferred by Construction Contractor to Project Co or SMH, as applicable, Construction Contractor shall enter into agreements or make other arrangements in order to permit the use of the assets or rights by Project Co or SMH, as applicable, in order to enable it, or its designated agents or subcontractors, to continue to perform the activities which would have otherwise been performed by Construction Contractor if the Design and Construction Contract had not been terminated;
- (iv) if Project Co or SMH so elects, Construction Contractor shall ensure that any of the Subcontracts between Construction Contractor and a Subcontractor, any other instrument entered into between any such Subcontractor and Construction Contractor for securing the performance by such Subcontractor of its obligations in respect of the Design and Construction Work or to protect the interests of Construction Contractor, shall be novated or assigned to Project Co or SMH or its respective nominee, provided that where termination occurs other than as a result of a Construction Contractor Event of Default, the consent of the relevant Subcontractor shall be required, and further provided that any such novation or assignment of the Subcontracts with the Construction Contractor may be made pursuant to, and subject to, the terms of the Subcontractor's Direct Agreement;
- (v) Construction Contractor shall, or shall ensure that any Construction Contractor Party shall, offer to sell (and if Project Co or SMH so elects, execute such sale) to Project Co or SMH at a fair value (determined as between a willing vendor and willing purchaser, with any Disputes as to such fair value being resolved in accordance with Schedule 27 – Dispute Resolution Procedure), free from all Encumbrances (other than the Title Encumbrances and any Encumbrances derived through SMH), all or any part of the stocks of material and other assets, road vehicles, spare parts and other moveable property owned by Construction Contractor or any Construction Contractor Parties and dedicated to or predominantly used in respect of the Facility, and reasonably required by Project Co or SMH in connection with the operation of the Facility;
- (vi) Construction Contractor shall use commercially reasonable efforts to assign, or otherwise transfer, to Project Co or SMH, as identified by Project Co, free from all Encumbrances (other than the Title Encumbrances and any Encumbrances derived through SMH), 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 Construction Contractor under the Design and Construction Contract and included in the Facility; and

- (vii) Construction Contractor shall deliver to Project Co or SMH, as identified by Project Co, all information, reports, documents, records and the like referred to in Section 26, including as referred to in Schedule 26 – Record Provisions, except where such are required by Applicable Law to be retained by Construction Contractor or the Construction Contractor Parties (in which case complete copies shall be delivered to Project Co or SMH, as identified by Project Co).

37.5 Ownership of Information

- (a) Subject to Section 39, all information obtained by Construction Contractor, including the As Built Drawings and other technical drawings and data, supplier agreements and contracts, utilities consumption information, environmental and technical reports, static building information, lease, licence and subletting data and contracts, asset condition data, standard operating procedures, processes and manuals and all other information directly related to the Design and Construction Work accumulated over the course of the Project Term shall be the property of SMH or Project Co, as identified by Project Co, and upon termination of the Design and Construction Contract shall be provided or returned to SMH or Project Co, as the case may be, and directed by Project Co, in electronic format acceptable to SMH or Project Co as the case may be, acting reasonably, where it exists in electronic format, and in its original format, when not in electronic format.

37.6 Provision in Subcontracts

- (a) Construction Contractor shall make provision in all Subcontracts to which it is a party (including requiring the relevant Construction Contractor Parties to make such provision and to require other Construction Contractor Parties to make such provision) to ensure that Project Co and SMH shall be in a position to exercise its rights, and Construction Contractor shall be in a position to perform its obligations, under this Section 37.

37.7 Transitional Arrangements

- (a) On the termination of the Design and Construction Contract for any reason, for a reasonable period both before and after any such termination, Construction Contractor shall:
 - (i) as soon as practicable remove from the Site all property belonging to Construction Contractor or any Construction Contractor Party that is not acquired by Project Co or SMH pursuant to Section 37.4 or otherwise, and, if Construction Contractor has not done so within 60 days after any notice from Project Co requiring it to do so, Project Co may, without being responsible for any loss, damage, costs or expenses, remove and sell any such property and shall hold any proceeds, less all costs incurred to the credit of Construction Contractor;
 - (ii) forthwith deliver to the SMH Representative:

- (A) all keys to, and any pass cards and other devices used to gain access to any part of the Facility; and
- (B) to the extent transferable and without prejudice to Project Co's or SMH's rights pursuant to Section 39, any copyright licences for any computer programs, or licences to use the same, used in connection with the operation of the Facility; and
- (iii) as soon as practicable vacate the Site and shall leave the Site and the Facility in a safe, clean and orderly condition.

37.8 Termination upon Aforesaid Transfer

- (a) On completion of Construction Contractor's obligations pursuant to this Section 37, the Design and Construction Contract shall terminate and, except as provided in Section 37.9, all rights and obligations of Project Co and Construction Contractor under the Design and Construction Contract shall cease and be of no further force and effect.

37.9 Survival

- (a) Except as otherwise provided in the Design and Construction Contract, termination of the Design and Construction Contract shall be without prejudice to, and shall not affect:
 - (i) all representations, warranties and indemnities under the Design and Construction Contract; and
 - (ii) Sections 8, 10.1, 10.9, 10.13, 10.14, 10.15, 10.16 and 10.17 of the body of the Design and Construction Contract, Sections 1.2, 4, 7, 8, 11.15, 11.16, 17.2, 18.1, 18.2(a), 18.3(a), 23.6, 24.13, 26, 34.5, 35.3, 36.4, 37, 38, 39 (with the exception of 39.4(b)), 40, 41, 43, 44, 46, and 48.3 of Appendix A – General Conditions of the Design and Construction Contract, Schedule 14 – Outline Commissioning Program, Schedule 23 – Compensation on Termination, Sections 1.2 to 1.8 of Schedule 26 – Record Provisions, Schedule 27 – Dispute Resolution Procedure and any other provisions of the Design and Construction Contract which are expressed to survive termination or which are required to give effect to such provisions which survive termination or to such termination or the consequences of such termination,

all of which shall survive the termination of the Design and Construction Contract, including for termination on the Expiry Date pursuant to Section 36.4.

38. COMPENSATION ON TERMINATION

38.1 Compensation on Termination

- (a) If the Design and Construction Contract is terminated in accordance with the terms hereof, then Schedule 23 – Compensation on Termination shall apply and Project Co shall pay Construction Contractor any applicable compensation on termination.

38.2 Full and Final Settlement

- (a) Except as otherwise provided in Section 38.2(b), any compensation paid pursuant to this Section 38, including pursuant to Schedule 23 - Compensation on Termination in the total amount owing thereunder, shall be in full and final settlement of any claims, demands and proceedings of Construction Contractor and Project Co, and each shall be released from all liability to the other in relation to any breaches or other events leading to such termination of the Design and Construction Contract, and the circumstances leading to such breach or termination, and Construction Contractor and Project Co shall be precluded from exercising all other rights and remedies in respect of any such breach or termination whether in contract, tort, restitution, statute, at common law or otherwise.
- (b) Section 38.2(a) shall be without prejudice to:
 - (i) any liability of either Party to the other, including under the indemnities contained in the Design and Construction Contract, that arose prior to the Termination Date (but not from the termination itself or the events leading to such termination) to the extent such liability has not already been set off pursuant to Section 4.12 or taken into account pursuant to Schedule 23 - Compensation on Termination in determining or agreeing upon Construction Contractor Default Termination Sum, Project Co Default Termination Sum or any other termination sum, as the case may be; and
 - (ii) any liabilities arising under or in respect of any breach by either Party of their obligations under Section 37.9 of the Design and Construction Contract, or the Sections referred to therein, which did not lead to such termination and which arises or continues after the Termination Date.

39. INTELLECTUAL PROPERTY

39.1 Representation and Warranty

- (a) Construction Contractor represents, warrants and covenants to Project Co and agrees that:
 - (i) Construction Contractor is and shall be the sole and exclusive owner of the Project Data and the Intellectual Property Rights or has and shall have the right to provide the licences granted to Project Co and SMH herein;
 - (ii) Construction Contractor has and shall have the right to provide the assignments granted to Project Co and SMH herein; and
 - (iii) the Project Data and the Intellectual Property Rights and their use by Project Co, Project Co Parties and SMH and SMH Parties do not and shall not infringe, and are not and shall not be a misappropriation of, any third party Intellectual Property Rights, and, as of the date of the Design and Construction Contract, Construction Contractor has not received any alleged infringement or misappropriation notices from third parties regarding the Project Data or the Intellectual Property Rights.

39.2 Delivery of Project Data and Intellectual Property Rights

- (a) Construction Contractor shall make all Project Data and Intellectual Property Rights available to, and upon request shall deliver to, Project Co and SMH free of charge all Project Data, and shall obtain all necessary licences, permissions and consents to ensure that Construction Contractor shall make the Project Data and Intellectual Property Rights available to and deliver the Project Data to Project Co and SMH on the aforesaid terms of this Section 39.2(a), for any and all of the Approved Purposes.

39.3 Licence of Project Data and Intellectual Property Rights

- (a) Construction Contractor:
- (i) hereby grants to Project Co and SMH an irrevocable, worldwide, royalty free, perpetual, non-exclusive and transferable licence, including the right to grant sub-licences, to use the Project Data and the Intellectual Property Rights for any and all of the Approved Purposes;
 - (ii) shall, at Construction Contractor's cost, where any Intellectual Property Rights are or become vested in any Subcontractor, obtain the grant of an equivalent licence to that referred to in Section 39.3(a)(i), provided that such licence may, in respect of the Subcontractor's Intellectual Property Rights that are proprietary and subject to trademark or copyright, be limited to the term of the Design and Construction Contract; and
 - (iii) shall, at Construction Contractor's cost, where any Intellectual Property Rights are or become vested in a third party (other than the Construction Contractor), obtain the grant of an equivalent licence to that referred to in Section 39.3(a)(i), provided that Construction Contractor is able to obtain such licence from such third party on reasonable commercial terms and conditions.
- (b) In this Section 39.3 and 39.5(a), "use" includes any and all acts of copying, modifying, adapting, translating, incorporating with other materials, creating derivative works and otherwise using the Project Data and Intellectual Property Rights.

39.4 Jointly Developed Materials

- (a) To the extent any data, documents, drawings, reports, plans, software, formulae, calculations or designs or any other materials are developed jointly by Construction Contractor and one or both of, Project Co and SMH pursuant to the Design and Construction Contract or in relation to the Facility, the Site or Design and Construction Work (the "**Jointly Developed Materials**"), then the Parties hereby acknowledge and agree that Project Co, or a party expressly designated by Project Co (the "**Jointly Developed Materials Owner**"), shall be the sole and exclusive owner of all right, title and interest in and to the Jointly Developed Materials, any Intellectual Property associated therewith and any and all improvements, modifications and enhancements thereto. Construction Contractor shall, at the request of Project Co, execute such further agreements and cause the Construction Contractor Parties to execute any and all

assignments, waivers of moral rights and other documents as may be reasonably required to fulfill the intent of this provision.

- (b) Project Co, or the Jointly Developed Materials Owner, as applicable, hereby grants Construction Contractor a royalty free, non-exclusive and non-transferable licence, with a right to grant sub-licences to each Subcontractor, to use the Jointly Developed Materials during the Project Term for the sole purposes of Construction Contractor or any Subcontractor performing its obligations under the Design and Construction Contract or its Subcontract, as applicable.
- (c) Upon termination of the Design and Construction Contract, all rights and licences whatsoever granted to Construction Contractor in the Jointly Developed Materials shall automatically terminate, and Construction Contractor shall return any and all Jointly Developed Materials in the custody or possession of Construction Contractor to Project Co or the Jointly Developed Materials Owner, as applicable,

39.5 Maintenance of Data

- (a) To the extent that any of the data, materials and documents referred to in this Section 39 are generated by, or maintained on, a computer or similar system, Construction Contractor shall procure for the benefit of Project Co and SMH, either at no charge or at the lowest reasonable fee, the grant of a licence or sub-licence for any relevant software to enable Project Co and SMH or its nominee to access and otherwise use (as such term is defined in Section 39.3(b), subject to the payment by Project Co of any relevant fee) such data, materials and documents for the Approved Purposes.
- (b) Without limiting the obligations of Construction Contractor under Section 39.5(a), Construction Contractor shall ensure the back up and storage in safe custody of the data, materials and documents referred to in this Section 39 in accordance with Good Industry Practice. Construction Contractor shall submit to the SMH Representative Construction Contractor's proposals for the back up and storage in safe custody of such data, materials and documents and Project Co and SMH shall be entitled to object if the same is not in accordance with Good Industry Practice. Construction Contractor shall comply, and shall cause all Construction Contractor Parties to comply, with all procedures to which the SMH Representative has not objected. Construction Contractor may vary its procedures for such back up and storage subject to submitting its proposals for change to the SMH Representative, who shall be entitled to object on the basis set out above. Any Disputes in connection with the provisions of this Section 39.5(b) may be referred for resolution in accordance with Schedule 27 – Dispute Resolution Procedure with reference to Good Industry Practice.

39.6 Claims

- (a) Where a demand, claim, action or proceeding is made or brought against Project Co, any Project Co Party, SMH, or any SMH Party which arises out of the alleged infringement or misappropriation of any rights in or to any Project Data or Intellectual Property Rights or the use thereof by Project Co, any Project Co Party, SMH, or any SMH Party because

the use of any materials, machinery or equipment in connection with the Design and Construction Work infringes any rights in or to any Intellectual Property of a third party then, unless such infringement has arisen out of the use of any Project Data or Intellectual Property Rights by Project Co or SMH otherwise than in accordance with the terms of the Design and Construction Contract, Construction Contractor shall indemnify, defend and hold harmless Project Co and each Project Co Party, from and against all such demands, claims, actions and proceedings (including the amounts which Project Co must indemnify SMH and each of SMH Parties under Section 39.6 of the Project Agreement) and Section 44.3 shall apply.

39.7 Trade-Marks

- (a) Construction Contractor shall not use any Project Co Trade-Marks without obtaining a trade-mark licence on terms and conditions satisfactory to Project Co, in its sole discretion.
- (b) Construction Contractor shall not use any SMH Trade-Marks or the Trade-Marks of a Government Entity without obtaining a trade-mark licence on terms and conditions satisfactory to SMH or the relevant Government Entity, as applicable, in their sole discretion.

39.8 Confidential Information

- (a) It is expressly acknowledged and agreed that nothing in this Section 39 shall be deemed to create or convey to a Party any right, title, or interest in and/or to the Confidential Information of the other Party.

39.9 Government Use of Documents

- (a) The Parties hereby disclaim any right, title or interest of any nature whatsoever they each may have in or to the Design and Construction Contract that might prohibit or otherwise interfere with MEDEI's, IO's, MOHLTC's or the Province's ability to use the Design and Construction Contract in any manner desired by MEDEI, IO, MOHLTC or the Province.
- (b) Each of the Parties hereby consents to the use by each MEDEI, IO, MOHLTC and/or the Province of the Design and Construction Contract, and any portion thereof, subject to compliance with FIPPA and to the removal by SMH (in consultation with Project Co) of any information supplied in confidence to Project Co, SMH or MEDEI, IO, MOHLTC and/or the Province by the Construction Contractor or Project Co in circumstances where disclosure may be refused under section 17(1) of FIPPA.

40. CONFIDENTIALITY

40.1 Disclosure

- (a) Subject to Sections 40.1(b), 40.1(c) and 40.2, but notwithstanding anything else in the Design and Construction Contract to the contrary, Construction Contractor acknowledges and agrees that, in accordance with the transparency and accountability principles of the

IPFP Framework, SMH and Project Co have a right to disclose or publish (including on websites) the Project Agreement, the Design and Construction Contract, and any or all terms thereof, including any or all contractual submissions and other records kept in accordance with the Project Agreement, the Design and Construction Contract, any information related to the performance of Construction Contractor (or any Construction Contractor Party) or any information derived from the Project Agreement, the Design and Construction Contract or the information related to the performance of Construction Contractor (or any Construction Contractor Party) as SMH and Project Co, in their sole discretion, may consider appropriate. In exercising its discretion, SMH and Project Co will be guided by the principles set out in Sections 40.1(b) and 40.1(c).

- (b) Pursuant to the Project Agreement, SMH will not disclose portions of the Project Agreement, the Design and Construction Contract and any terms hereof, including any contractual submissions or other records kept in accordance with the Project Agreement, the Design and Construction Contract, any information related to the performance of Construction Contractor (or any Construction Contractor Party) or any information derived from the Project Agreement, the Design and Construction Contract or the information related to the performance of Construction Contractor (or any Construction Contractor Party) which would be exempt from disclosure under section 17(1) of FIPPA.
- (c) Notwithstanding Section 40.1(b), but subject to Section 40.2, 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 Construction Contractor (or any Construction Contractor Party), SMH may disclose such information.

40.2 Redaction

- (a) Prior to disclosing or publishing the Project Agreement, any terms hereof, including any contractual submissions or other records kept in accordance with the Project Agreement, any information related to the performance of Construction Contractor (or any Construction Contractor Party) or any information derived from the Project Agreement or the information related to the performance of Construction Contractor (or any Construction Contractor Party), SMH, shall provide to Project Co, pursuant to the Project Agreement, a redacted version of the 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 40.1(b). The Parties acknowledge and agree that the Guaranteed Price, but not any breakdown thereof, may be disclosed.
- (b) If Construction Contractor, acting in good faith, contends that any of the information not redacted constitutes information that falls within the scope of Section 40.1(b) and, accordingly, would be exempt from disclosure under FIPPA, the dispute may be referred for resolution in accordance with Schedule 27 – Dispute Resolution Procedure, and Project Co shall refer such matter to SMH under the Project Agreement. Any such determination shall be made with reference to the text and principles of FIPPA.

40.3 Disclosure to Government

- (a) Construction Contractor acknowledges and agrees that Project Co and SMH 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, each 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 such MEDEI, IO, MOHLTC and/or the Province see 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 section 17(1) of FIPPA, the Project Agreement, the Design and Construction Contract, any contractual submissions or other records kept in accordance with the Design and Construction Contract, any information related to the performance of Construction Contractor (or Construction Contractor Party) or any information derived from the Project Agreement, the Design and Construction Contract or the information related to the performance of Construction Contractor (or any Construction Contractor Party) are public documents and information and, as such, may be disclosed by MEDEI, IO, MOHLTC and the Province.

40.4 Freedom of Information

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

40.5 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 the other Party, provided that this Section 40 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 the Design and Construction Contract.
- (b) Construction Contractor may disclose in confidence to any Construction Contractor Party and their professional advisors, such Confidential Information as is necessary for the performance by that Construction Contractor Party of that Construction Contractor Party's obligations under the Design and Construction Contract.
- (c) Construction Contractor acknowledges that MEDEI, IO, MOHLTC and/or the Province may use the Confidential Information of Construction Contractor 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 Construction Contractor 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 the Design and Construction Contract, as permitted by the Design and Construction Contract 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.
- (f) Construction Contractor hereby acknowledges that Project Co may:
 - (i) disclose in confidence to the Lenders and prospective Lenders, including any trustee or agent of the Lenders and the Lenders' Agent, and their respective professional advisors such Confidential Information as is reasonably required by the Lenders in connection with the raising or syndication of the financing or any sub-participation in the financing of the Works 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 that Project Co Party of that Project Co Party's obligations under the Project Agreement or otherwise.

40.6 Exceptions

- (a) Information of a Party (the "Proprietor"), other than Personal Information, 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") that the information is not required to be treated as Confidential Information;
 - (ii) the information is as of the date of the Design and Construction Contract, 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 the Design and Construction Contract;
 - (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 the Proprietor with reasonable notification and an opportunity to contest such requirement prior to disclosure;
- (viii) the information is disclosed to Project Co upon a termination of the Design and Construction Contract, pursuant to Section 36 of this Appendix A – General Conditions of the Design and Construction Contract or is otherwise required by Project Co or SMH for the purposes of performing (or having performed) the Works, including the design or construction of the Facility, or any other operations or services the same as, or similar to, the Works; or
- (ix) the information would not be exempt from disclosure under FIPPA.

40.7 Survival of Confidentiality

- (a) The obligations in Section 40.1 to Section 40.6 will cease on the date that is three years after the Termination Date and accordingly shall survive the termination of the Design and Construction Contract.

41. PERSONAL INFORMATION

41.1 General

- (a) Construction Contractor acknowledges the importance of maintaining the confidentiality and privacy of Personal Information.
- (b) Construction Contractor shall, and shall require each Construction Contractor Party to, only collect, hold, process, use, store and disclose Personal Information with the prior consent of Project Co and SMH and only to the extent necessary to perform Construction Contractor's obligations under the Design and Construction Contract.
- (c) Construction Contractor shall, and shall require each Construction Contractor Party to, at all times treat Personal Information as strictly confidential and shall comply with all applicable requirements of the Output Specifications and the requirements of Applicable Law, including FIPPA and the *Personal Health Information Protection Act* (Ontario), 2004.
- (d) Construction Contractor shall take all necessary and appropriate action, and shall require each Construction Contractor Party to take all necessary and appropriate action, against any person who fails to comply with this Section 41.
- (e) Construction Contractor shall allow Project Co and SMH on reasonable notice to inspect the measures of Construction Contractor and each Construction Contractor Party to protect Personal Information.

41.2 Protection of Patient Information

- (a) Construction Contractor shall take all necessary steps, including the appropriate technical and organizational and physical security measures, and shall require each Construction Contractor Party to take all necessary steps and to include provisions in Subcontracts to require each Construction Contractor Party and other Construction Contractor Parties to take all necessary steps, such that Construction Contractor, the Construction Contractor Parties, and its and their staff shall protect, secure and keep confidential any Patient Information.
- (b) Construction Contractor shall keep confidential, and shall require each Construction Contractor Party to keep confidential and to include provisions in all Subcontracts to require all Construction Contractor Parties to keep confidential, all Patient Information that any of them may encounter or obtain during the course of their duties.
- (c) SMH or Project Co may from time to time require that Construction Contractor or any Construction Contractor Party execute and deliver within 2 Business Days of such request an agreement satisfactory to SMH or Project Co, acting reasonably, requiring such person to keep Patient Information confidential.
- (d) This Section 41.2 shall not limit Section 41.1.

41.3 Survival

- (a) The obligations in this Section 41 shall survive the termination of the Design and Construction Contract.

42. INSURANCE AND PERFORMANCE SECURITY

42.1 General Requirements

- (a) Construction Contractor and Project Co shall comply with the provisions of Schedule 25 – Insurance and Performance Security Requirements.

42.2 No Relief from Liabilities and Obligations

- (a) Neither compliance nor failure to comply with the insurance provisions of the Design and Construction Contract shall relieve Construction Contractor or Project Co of their respective liabilities and obligations under the Design and Construction Contract.

43. TITLE

43.1 Title

- (a) Title to each item and part of the Facility and the Equipment, including any materials, supplies, equipment, facilities, parts and any other deliverable or component items, but not the risk of loss or damage or destruction thereto or thereof, shall pass to SMH (or as SMH may direct) upon the receipt of such item on the Site, provided however that title to

items of tangible personal property (personal property that can be seen, weighed, measured, felt or touched or that is in any way perceptible to the senses and includes computer programs, natural gas and manufactured gas) that comprise the Facility or are to be affixed or attached to the Facility prior to Substantial Completion shall pass to SMH (or as SMH may direct) at the time that such items are included in the Facility or affixed or attached to the Facility.

44. INDEMNITIES

44.1 Construction Contractor Indemnities

- (a) Construction Contractor shall indemnify and save harmless Project Co and each Project Co Party and their respective directors, officers, employees, agents and representatives from and against any and all Direct Losses which may be suffered, sustained, incurred or brought against them as a result of, in respect of, or arising out of any one or more of the following:
- (i) a failure by Construction Contractor to achieve a Phase Completion by the applicable Scheduled Phase Completion Date;
 - (ii) a failure by Construction Contractor to achieve Tower Interim Completion by the Scheduled Tower Interim Completion Date;
 - (iii) a failure by Construction Contractor to achieve Substantial Completion by the Scheduled Substantial Completion Date;
 - (iv) any physical loss of or damage to all or any part of the Site, the Facility and the Existing Facilities, or to any equipment, assets or other property related thereto;
 - (v) the death or personal injury of any person;
 - (vi) any physical loss of or damage to property or assets of any third party;
 - (vii) any other loss or damage of any third party;
 - (viii) any fines or penalties levied or imposed under Applicable Law with respect to privacy; or
 - (ix) any costs incurred in connection with any notifications required under Applicable Law with respect to privacy or ordered by a privacy commissioner with applicable jurisdiction,

in each case, arising, directly or indirectly, out of, or in consequence of, or involving or relating to, the performance or any breach of the Design and Construction Contract by Construction Contractor or any act or omission of Construction Contractor or any Construction Contractor Party, except to the extent caused, or contributed to, by:

- (x) the breach of the Design and Construction Contract by Project Co; or

- (xi) in respect of Section 44.1(a)(i), Section 44.1(a)(ii) or Section 44.1(a)(iii), any deliberate or negligent act or omission of Project Co, or any Project Co Party; or
 - (xii) in respect of Sections 44.1(a)(iv), 44.1(a)(v), 44.1(a)(vi), 44.1(a)(vii), 44.1(a)(viii) or 44.1(a)(ix), any act or omission of Project Co or any Project Co Party.
- (b) Construction Contractor shall indemnify and save harmless Project Co and its directors, officers, employees, agents and representatives from and against any and all Direct Losses which may be suffered, sustained, incurred or brought against them as a result of, in respect of, or arising out of any breach of a representation or warranty by Construction Contractor and any Direct Losses (as defined in the Project Agreement) which Project Co is required to provide indemnification for pursuant to Section 44.1 of the Project Agreement.
- (c) Construction Contractor shall indemnify and save harmless Project Co and its directors, officers, employees, agents and representatives from and against any and all Direct Losses which may be suffered, sustained, incurred or brought against them as a result of, in respect of, arising out of, or involving or relating to any one or more of the following:
- (i) the performance by Construction Contractor of the Design and Construction Contract not in accordance with or in breach of the requirements of any Permits, Licences, Approvals and Agreements, Applicable Law or requirements of Governmental Authorities, or the failure of Construction Contractor to obtain all necessary Construction Contractor Permits, Licences, Approvals and Agreements in accordance with the Design and Construction Contract; or
 - (ii) any Contamination on, in or under, or migrating to or from, the Site, except for Contamination for which SMH, is responsible as described in Section 18.2(a);
- except to the extent that such Direct Losses are caused, or contributed to, by the breach of the Design and Construction Contract by Project Co or by any act or omission of Project Co or any Project Co Party.
- (d) Without prejudice to SMH's rights under Section 34 of the Project Agreement and any other rights under the Project Agreement, if SMH exercises its step-in rights under the Construction Contractor's Direct Agreement, Construction Contractor's indemnity of Project Co shall include all amounts which Project Co must indemnify SMH under Section 44.1(d) of the Project Agreement.
- (e) Construction Contractor shall indemnify Project Co for damages suffered or incurred on account of (i) any payment not duly made by Construction Contractor pursuant to the terms of the Design and Construction Contract on the due date; (ii) any overpayment to or underpayment by Construction Contractor; or (iii) an amount determined as payable by Construction Contractor to Project Co under Schedule 27 – Dispute Resolution Procedure, by payment of an amount equal to the Payment Compensation Amount calculated from day to day at a rate per annum 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 Construction

Contractor to Project Co under Schedule 27 – Dispute Resolution Procedure, up to and including the date of payment.

44.2 Project Co Indemnities

- (a) Project Co shall, subject to Section 14 of the body of the Design and Construction Contract, indemnify and save harmless Construction Contractor and the Construction Contractor Parties and each of their respective directors, officers, employees, agents and representatives from and against any and all Direct Losses which may be suffered, sustained, incurred or brought against them as a result of, in respect of, or arising out of any one or more of the following:
- (i) the death or personal injury of any person arising, directly or indirectly, out of, or in consequence of, or involving or relating to, the performance or breach of the Design and Construction Contract by Project Co or any act or omission of Project Co or any Project Co Party, except to the extent caused, or contributed to, by the breach of the Design and Construction Contract by Construction Contractor or by any act or omission of Construction Contractor or any Construction Contractor Party;
 - (ii) any physical loss of or damage to all or any part of any property or assets of Construction Contractor or any Construction Contractor Party, arising, directly or indirectly, out of, or in consequence of, or involving or relating to, breach of the Design and Construction Contract by Project Co or any deliberate or negligent act or omission of Project Co or any Project Co Party, except to the extent caused, or contributed to, by the breach of the Design and Construction Contract by Construction Contractor or by any act or omission of Construction Contractor or any Construction Contractor Party; and
 - (iii) any physical loss of or damage to property or assets of any third party, or any other loss or damage of any third party, arising, directly or indirectly, out of, or in consequence of, or involving or relating to, breach of the Design and Construction Contract by Project Co or any deliberate or negligent act or omission of Project Co or any Project Co Party, except to the extent caused, or contributed to, by the breach of the Design and Construction Contract by Construction Contractor or by any act or omission of Construction Contractor or any Construction Contractor Party,

provided that there shall be excluded from the indemnity given by Project Co any liability for the occurrence of risks against which Construction Contractor is required to insure under the Design and Construction Contract to the extent of the proceeds available or that should have been available but for a failure by Construction Contractor to comply with its obligations to properly insure under the Design and Construction Contract.

- (b) Not Used.
- (c) Project Co shall, subject to Section 14 of the body of the Design and Construction Contract, indemnify Construction Contractor for damages suffered or incurred on account

of (i) any payment not duly made by Project Co pursuant to the terms of the Design and Construction Contract on the due date (other than as a result of a failure by SMH to make such payment to Project Co under the Project Agreement); (ii) any overpayment to or underpayment by Project Co (other than as a result of a failure by SMH to make such payment to Project Co under the Project Agreement); or (iii) an amount determined as payable by Project Co to Construction Contractor under Schedule 27 – Dispute Resolution Procedure, by payment of an amount equal to the Payment Compensation Amount calculated from day to day at a rate per annum from the day after the date on which payment was due, the day on which overpayment was made by Construction Contractor, or from the date identified (if any) applicable to an amount determined as payable by Project Co to Construction Contractor under Schedule 27 – Dispute Resolution Procedure, up to and including the date of payment.

44.3 Conduct of Claims

- (a) This Section 44.3 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 the Design and Construction Contract. 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 44, the Beneficiary shall give written notice to the Indemnifier as soon as reasonably practicable and in any event within ten 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 44.3(d), 44.3(e) and 44.3(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 44.3 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 the Design and Construction Contract if:
- (i) the Indemnifier is not entitled to take conduct of the claim in accordance with Section 44.3(c);
 - (ii) the Indemnifier fails to notify the Beneficiary of its intention to take conduct of the relevant claim as soon as reasonably practicable and in any event within 10 Business Days of the notice from the Beneficiary under Section 44.3(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 44.3(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 44.3(c) applies. For greater certainty, Construction Contractor acknowledges and agrees that where Project Co is the Beneficiary, Project Co or SMH, as applicable, may retain or take over such conduct in any matter involving Personal Information 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 44.3(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 44.3 shall comply with the requirements of any insurer who may have an obligation to provide an indemnity in respect of any liability arising under the Design and Construction Contract.

44.4 Mitigation – Indemnity Claims

(a) For greater certainty, Section 10.9 of the body of the Design and Construction Contract applies to any indemnity given under the Design and Construction Contract and any such indemnity shall not extend to Direct Losses which could have been reduced or avoided by the Beneficiary complying with such Section.

45. NOT USED

46. DISPUTE RESOLUTION PROCEDURE

(a) All Disputes shall be resolved in accordance with, and the Parties shall comply with, Schedule 27 – Dispute Resolution Procedure.

47. ASSIGNMENT, SUBCONTRACTING AND CHANGES IN CONTROL

47.1 Construction Contractor Assignment

(a) Construction Contractor 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 the Design and Construction Contract or any Ancillary Document without the prior written consent of Project Co, which consent may be withheld in the sole discretion of Project Co, provided however that no assignment, transfer, charge, disposition or other alienation shall be permitted to a person where that person or its Affiliates is a Restricted

Person or a person whose standing or activities are inconsistent with SMH's role as a hospital, or may compromise SMH's reputation or integrity or the nature of the Province's health care system, so as to affect public confidence in that system.

- (b) Section 47.1(a) shall not apply to any Subcontract or sub-subcontract entered into by Construction Contractor, the Construction Contractor Parties or any sub-subcontractor in connection with the Project.

47.2 Project Co Assignment

- (a) Project Co may assign, transfer, dispose of or otherwise alienate any interest in the Design and Construction Contract to the Lenders' Agent and the Lenders as security for Project Co's liabilities and obligations under the Lending Agreements and otherwise in accordance with the Construction Contractor's Direct Agreement.
- (b) Project Co shall not be released of any of its obligations under the Design and Construction Contract except upon an assignment, transfer, disposition or other alienation of its interest in the Design and Construction Contract in accordance with this Section 47.2.

47.3 Subcontracting

- (a) Construction Contractor shall not subcontract any interest in the Design and Construction Contract, to a Restricted Person, or any Affiliate thereof, or a person whose standing or activities are inconsistent with SMH's role as a hospital, or may compromise SMH's reputation, integrity or the nature of the Province's health care system, so as to affect public confidence in that system.
- (b) Construction Contractor shall not terminate, agree to the termination of or replace the Subcontractors unless Construction Contractor has complied with Sections 8.2(a) of Appendix A – General Conditions of the Design and Construction Contract or received the prior written consent of Project Co, not to be unreasonably withheld or delayed.

47.4 Changes in Ownership and Control

- (a) No Change in Ownership of Construction Contractor, or any person owning, directly or indirectly, beneficially or otherwise, any of the shares or units of or any other ownership interest in Construction Contractor or any such person, shall be permitted:
 - (i) where the person acquiring the ownership interest is a Restricted Person or a person whose standing or activities are inconsistent with SMH's role as a hospital, or may compromise SMH's reputation or 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 Design and Construction Work.

- (b) Subject to Section 47.4(a), no Change in Control of Construction Contractor, or any person owning, directly or indirectly, beneficially or otherwise, any of the shares or units or any other ownership interest in Construction Contractor or any such person, shall be permitted without the prior written consent of Project Co, not to be unreasonably withheld or delayed.
- (c) This Section 47.4 shall not apply to a Change in Ownership or Change in Control of person whose equity securities or ownership units or any other ownership interests are listed on a recognized stock exchange.
- (d) Whether or not Construction Contractor is required to obtain Project Co's consent to a Change in Ownership or Change in Control pursuant to this Section 47.4, Construction Contractor shall provide timely notice to Project Co of any proposed Change in Ownership or Change in Control of Construction Contractor, or any person owning, directly or indirectly, beneficially or otherwise, any of the shares or units or any other ownership interest in Construction Contractor or any such person, 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 all such owners and their respective holdings of such ownership interests of Construction Contractor, prior to and following any such Change in Ownership or Change in Control any person with an ownership interest, as the case may be.
- (e) No Restricted Person or a person whose standing or activities are inconsistent with SMH's role as a hospital, or may compromise SMH's reputation or integrity or the nature of the Province's health care system shall be permitted to have at any time or acquire, Direct or Indirect Power or Control over any member of the Construction Contractor Group in relation to the decisions, management, actions or policies of Construction Contractor or in relation to the operation, management and ownership of the Project.

47.5 SMH Due Diligence

- (a) Construction Contractor shall promptly reimburse Project Co for Project Co's and SMH's reasonable due diligence costs (including fees of professional advisors) in connection with any consent required of Project Co pursuant to, or Project Co's determination of Construction Contractor's compliance with Section 47.1, 47.3 or 47.4 whether or not such consent is granted.

48. PROHIBITED ACTS

48.1 Definition

(a) The term "**Prohibited Act**" means:

- (i) offering, giving or agreeing to give to SMH, Project Co 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 the Design and Construction Contract or any other agreement with SMH, Project Co 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 the Design and Construction Contract or any other agreement with Project Co or any public body in connection with the Project,

provided that this Section 48.1(a)(i) shall not apply to SMH, Construction Contractor or any Construction Contractor Party (or anyone employed by or acting on their behalf) providing consideration to SMH, Project Co or any public body in the ordinary course, or as reasonably necessary, to fulfill or comply with the obligations and liabilities of Construction Contractor under the Design and Construction Contract or any other agreement with SMH, Project Co or any public body in connection with the Project;

- (ii) entering into the Design and Construction Contract or any other agreement with SMH, Project Co or any public body in connection with the Project if a commission or a fee has been paid or has been agreed to be paid by Construction Contractor, or on its behalf or to its knowledge, SMH, Project Co 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 SMH and Project Co, provided that this Section 48.1(a)(ii) shall not apply to a fee or commission paid by Construction Contractor or any Construction Contractor Party (or anyone employed by or acting on their behalf) to SMH, Project Co 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 Construction Contractor under the Design and Construction Contract or any other agreement with SMH, Project Co or any public body in connection with the Project without contravening the intent of this Section 48;
- (iii) breaching or committing any offence under Applicable Law in respect of corrupt or fraudulent acts in relation to the Design and Construction Contract or any other agreement with SMH, Project Co or any public body in connection with the Project; or

- (iv) defrauding or attempting to defraud or conspiring to defraud SMH, Project Co or any other public body.

48.2 Remedies

- (a) If Construction Contractor or any Construction Contractor Party (or anyone employed by or acting on their behalf) commits any Prohibited Act, then Project Co shall be entitled to act in accordance with the following:
 - (i) if the Prohibited Act is committed by Construction Contractor or by an employee acting under the direction of a director or officer of Construction Contractor, then Project Co may give written notice to Construction Contractor and Section 34 shall apply;
 - (ii) if the Prohibited Act is committed by an employee of Construction Contractor acting independently of a direction of a director or officer of Construction Contractor, then Project Co may give written notice to Construction Contractor and Section 34 shall apply, unless, within 30 days of receipt of such notice, Construction Contractor terminates the employee's employment and ensures that the relevant part of the Design and Construction Work shall be performed by another person;
 - (iii) if a Prohibited Act is committed by a Construction Contractor Party or by an employee of that Construction Contractor Party not acting independently of a direction of a director or officer of that Construction Contractor Party, then Project Co may give written notice to Construction Contractor and Section 34 shall apply, unless, within 30 days of receipt of such notice, Construction Contractor terminates the relevant Subcontract and ensures that the relevant part of the Design and Construction Work shall be performed by another person, where relevant, in accordance with Section 47.3;
 - (iv) if the Prohibited Act is committed by an employee of a Construction Contractor Party acting independently of a direction of a director or officer of that Construction Contractor Party, then Project Co may give notice to Construction Contractor and Section 34 shall apply, unless, within 30 days of receipt of such notice, Construction Contractor causes the termination of the employee's employment and ensures that the relevant part of the Design and Construction Work shall be performed by another person; and
 - (v) if the Prohibited Act is committed on behalf of Construction Contractor or a Construction Contractor Party by a person not specified in Sections 48.2(a)(i) to 48.2(a)(iv), then Project Co may give notice to Construction Contractor and Section 34 shall apply, unless, within 30 days of receipt of such notice, Construction Contractor causes the termination of such person's employment or the appointment of their employer and, if necessary, ensures that the relevant part of the Design and Construction Work shall be performed by another person.
- (b) Any notice of termination under this Section 48.2 shall specify:

- (i) the nature of the Prohibited Act;
 - (ii) the identity of the person whom Project Co believes has committed the Prohibited Act; and
 - (iii) the date of termination in accordance with the applicable provisions of the Design and Construction Contract.
- (c) Without prejudice to its other rights or remedies under this Section 48.2, Project Co shall be entitled to recover from Construction Contractor any Direct Loss sustained in consequence of any breach of this Section 48.
- (d) Construction Contractor acknowledges that where SMH exercises any remedy pursuant to Section 48.2 of the Project Agreement in respect of a Prohibited Act committed by any of the persons identified in Section 48.2(a), Project Co shall be entitled to exercise its remedies hereunder as against Construction Contractor in the same manner and to the same extent as exercised by SMH under the Project Agreement.

48.3 Permitted Payments

- (a) Nothing contained in this Section 48 shall prevent Construction Contractor 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.

48.4 Notification

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

48.5 Replacement of Construction Contractor Party

- (a) Where Construction Contractor is required to replace any Construction Contractor Party pursuant to this Section 48, the party replacing such Construction Contractor Party shall from the time of the replacement be deemed to be a Construction Contractor Party and the provisions of the Design and Construction Contract shall be construed accordingly.

SCHEDULE 1

DEFINITIONS AND INTERPRETATION

1. **Definitions.** In the Design and Construction Contract, unless the context otherwise requires:
 - 1.1 **"Account Trustee"** has the meaning given in Schedule 30 - Insurance Trust Agreement.
 - 1.2 **"Additional Contractors"** means any independent contractor (not being, for the avoidance of doubt, the Construction Contractor or Project Co) or SMH's own forces, engaged by SMH to carry out the Additional Works.
 - 1.3 **"Additional In-Contract Equipment and Works"** has the meaning given in Section 21.3(c) of Appendix A – General Conditions of the Design and Construction Contract.
 - 1.4 **"Additional Works"** means those works (i) in relation to the Facility; or (ii) are being carried out in the Site or Existing Facilities which are not Works and which are to be carried out by an Additional Contractor.
 - 1.5 **"Adjudicator"** has the meaning given in Section 6.1 of Schedule 27 – Dispute Resolution Procedure.
 - 1.6 **"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 or the Construction Contractor, shall include each of the unitholders, shareholders, partners or owners of Project Co or the Construction Contractor, as applicable, and any person or entity controlling, controlled by or under common control with Project Co or Construction Contractor where "control" of any person or entity shall mean the ownership, directly or indirectly, of securities of such person or entity having the power to elect a majority of directors or similar authority or to otherwise control the decisions made on behalf of such person or entity.
 - 1.7 **"Ancillary Documents"** means Construction Contractor Support Agreement and the Bonds.
 - 1.8 **"Anticipated Final Completion Date"** has the meaning given in Section 24.11(a) of Appendix A – General Conditions of the Design and Construction Contract.
 - 1.9 **"Anticipated Phase Completion Date"** has the meaning given in Section 23A.7(a) of Appendix A – General Conditions of the Design and Construction Contract.
 - 1.10 **"Anticipated Substantial Completion Date"** has the meaning given in Section 24.7(a) of Appendix A – General Conditions of the Design and Construction Contract.
 - 1.11 **"Anticipated Tower Interim Completion Date"** has the meaning given in Section 23B.7(a) of Appendix A – General Conditions of the Design and Construction Contract.

- 1.12 **“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 SMH, any SMH Party, Project Co, any Project Co Party, the Construction Contractor or any Construction Contractor Party and, in particular, shall include the *Public Hospitals Act* (Ontario).
- 1.13 **“Apprenticeship Plan”** has the meaning given in Section 11.21(a) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.14 **“Approved Purposes”** means:
- (a) SMH and the SMH Parties performing the SMH Activities (and their operations relating to the performance of the SMH Activities), their obligations under the Project Agreement and/or any other activities in connection with the Facility and the Site;
 - (b) following termination of the Design and Construction Contract, the design, construction and/or maintenance of the Facility, and/or the performance of any other operations the same as, or similar to, the Design and Construction Work; and
 - (c) the development by MOHLTC and/or the Province of best practices for healthcare facilities in Ontario.
- 1.15 **“As Built Drawings”** means drawings prepared by Construction Contractor in a format and with content and details that SMH, acting reasonably, considers appropriate.
- 1.16 **“Associated Liabilities”** has the meaning given in Section 4.20(b) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.17 **“ATI”** means the *Access to Information Act* (Canada).
- 1.18 **“Authority Requirements”** means any order, direction, directive, request for information, policy, administrative interpretation, guideline or rule of or by any Governmental Authority.
- 1.19 **“Background Information”** means any and all drawings, reports (including the Environmental Reports, the Geotechnical Reports, the Hazardous Materials Survey Reports and any other report given or otherwise referred to in the Output Specifications), studies, data, documents, or other information, given or made available to Construction

Contractor or any Construction Contractor Party by Project Co, any Project Co Party, SMH or any SMH Party, or which was obtained from or through any other sources prior to the date of Appendix A – General Conditions of the Design and Construction Contract.

- 1.20 **"Bank"** has the meaning given in Schedule 30 – Insurance Trust Agreement.
- 1.21 **"Base Progress Payments"** means base progress payments made in accordance with the Design and Construction Contract in respect of the applications for payment referred to in Section 4.4(c) of the body of the Design and Construction Contract.
- 1.22 **"Beneficiary"** has the meaning given in Section 44.3(a) of the Appendix A – General Conditions of the Design and Construction Contract.
- 1.23 **"Bonds"** means any one or more of the Performance Bond (which, for greater clarity, includes the Multiple Obligee Rider to the Performance Bond) and Labour and Material Payment Bond (which, for greater clarity, includes the Multiple Obligee Rider to the 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 25 – Insurance and Performance Security Requirements.
- 1.24 **"Building"** means a building as defined in the Building Code Act, 1992 (Ontario).
- 1.25 **"Building Code"** means Ontario Regulation 332/12 made under the Building Code Act, 1992 (Ontario).
- 1.26 **"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 Toronto, Ontario.
- 1.27 **"CaGBC"** means the Canadian Green Building Council.
- 1.28 **"Canadian and Industry Standards"** means, at the applicable time, those standards, practices, methods and procedures applicable to Good Industry Practice.
- 1.29 **"Canadian GAAP"** shall be deemed to be the generally accepted accounting principles from time to time approved by the Canadian Institute of Chartered Accountants, or any successor institute, applicable as at the date on which such calculation is made or required to be made in accordance with generally accepted accounting principles, as such principles may be amended or varied by International Financial Reporting Standards then in effect in Canada, in any case consistently applied from one period to the next.
- 1.30 **"Capital Expenditure"** means capital expenditure as interpreted in accordance with Canadian GAAP.
- 1.31 **"Cash Allowance Account"** means Account No. 0002 1904-682 at Bank of Montreal located at 100 King Street West, Toronto, Ontario M5X 1A3.

- 1.32 **“Cash Allowance Amounts”** means, collectively, the aggregate value of the following amounts:
- (a) \$ 6,000,000 for information, communication and technology equipment;
 - (b) \$ 7,600,000 for environmental and security controls;
 - (c) \$ 1,200,000 for service connections;
 - (d) \$ 2,150,000 for pneumatic tubing;
 - (e) \$ 5,700,000 for articulating arms, surgical lights, casework as noted in the In-Contract Equipment list in Part 4 of Schedule 15 – Output Specifications;
 - (f) the Discretionary SMH Cash Allowance Amount; and
 - (g) the Discretionary SMH Additional In-Contract Equipment and Works Amount,
- and each of the foregoing amounts is a **“Cash Allowance Amount”**.
- 1.33 **“Cash Allowance Amount Shortfall”** has the meaning given in Section 3.2(b) of the body of the Design and Construction Contract.
- 1.34 **“Cash Allowance Items”** means, collectively, cash allowances in respect of:
- (a) information, communication and technology equipment in accordance with the cash allowance descriptions in Parts 3.7 and 3.6 of Schedule 15 – Output Specifications;
 - (b) environmental and security controls in accordance with the cash allowance descriptions in Parts 3.5 and 3.8 of Schedule 15 – Output Specifications;
 - (c) service connections in accordance with the cash allowance descriptions in Parts 3.5.4, 3.6.3 and 3.7.1 of Schedule 15 – Output Specifications;
 - (d) pneumatic tubing in accordance with the cash allowance description in Part 3.5.12 of Schedule 15 – Output Specifications;
 - (e) articulating arms, surgical lights and casework as set out in the In-Contract Equipment list in Part 4 of the Output Specifications and in accordance with the cash allowance description in Part 4.1 of Schedule 15 – Output Specifications;
 - (f) the Discretionary SMH Cash Allowance Items; and
 - (g) the Discretionary SMH Additional In-Contract Equipment and Works Items.

and any item noted in the provisions above, any Discretionary SMH Cash Allowance Item or any Discretionary SMH Additional In-Contract Equipment and Works Item is a "Cash Allowance Item".

- 1.35 "Cash Allowance Monthly Deposit Amount" has the meaning given in Section 3.2(a) of the body of the Design and Construction Contract.
- 1.36 "Cash Allowance Monthly Deposit Amount Reconciliation" has the meaning given in Section 3.2(a) of the body of the Design and Construction Contract.
- 1.37 "Certification Services" has the meaning given in Schedule 6 – Independent Certifier Agreement.
- 1.38 "Certification Services Variation" has the meaning given in Schedule 6 – Independent Certifier Agreement.
- 1.39 "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.
- 1.40 "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 Design and Construction Contract.
- 1.41 "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.
- 1.42 "CLA" means the *Construction Lien Act*, R.S.O. 1990, c.C.30.
- 1.43 "Clinical Functionality" means the ability of the Facility to enable SMH to carry out the Clinical Services in a manner that meets SMH's operating requirements as set out in the functional program represented in the Output Specifications approved by MOHLTC.

- 1.44 **"Clinical Functionality Report"** has the meaning given in Section 11.4(b) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.45 **"Clinical Services"** means the direct and/or indirect provision of medical and healthcare services at the Facility and the Existing Facilities to or for the benefit of persons requesting or requiring such services, including but, not limited to, all management and administrative operations in support thereof.
- 1.46 **"CMMS"** means SMH's computerized maintenance management system.
- 1.47 **"Commercial Close"** means the date of the Project Agreement.
- 1.48 **"Commissioning Team"** has the meaning given in Section 4.1 of Schedule 14 – Outline Commissioning Program.
- 1.49 **"Commissioning Tests"** means all commissioning tests:
- (a) described in Schedule 14 - Outline Commissioning Program;
 - (b) required by Applicable Law, Canadian and Industry Standards or CSA Standards;
 - (c) recommended by the manufacturer of any part of the Plant or equipment;
 - (d) required to be included in each Phase Commissioning Program by the Independent Certifier, the SMH Commissioning Consultant or the SMH Representative during its development pursuant to Section 23A.2 of Appendix A – General Conditions of the Design and Construction Contract;
 - (e) required to be included in the Tower Interim Completion Commissioning Program by the Independent Certifier, the SMH Commissioning Consultant or the SMH Representative during its development pursuant to Section 23B.2 of Appendix A – General Conditions of the Design and Construction Contract; and
 - (f) required to be included in the Final Commissioning Program by the Independent Certifier, SMH Commissioning Consultant or SMH Representative during its development pursuant to Section 24.2 of Appendix A – General Conditions of the Design and Construction Contract.
- 1.50 **"Compensation Event"** has the meaning given in Section 31.1(a) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.51 **"Compensation Payment"** means the Project Co Default Termination Sum or the Construction Contractor Default Termination Sum.
- 1.52 **"Completion Holdback"** has the meaning given in Section 24.8 of Appendix A – General Conditions of the Design and Construction Contract.
- 1.53 **"Completion Holdback Shortfall"** is to be calculated according to the below formula:

$$\text{CHS} = \text{CH} - [\text{CDCW} - \text{APCC} - \text{LH}]$$

where:	
CHS	Completion Holdback Shortfall
CH	Completion Holdback
CDCW	Cost of the Design and Construction Work required to complete (1) the Remainder Design and Construction Works and (2) Phases of the Works which have achieved Phase Completion after the Tower Interim Completion Notice is given
APCC	amounts paid to the Construction Contractor pursuant to the Design and Construction Contract on account of the performance of the Design and Construction Work completed as of the Substantial Completion Date in respect of (1) the Remainder Design and Construction Works and (2) Phases of the Works which have achieved Phase Completion after the Tower Interim Completion Notice is given
LH	Legislative Holdback under the Project Agreement as of the Substantial Completion Date in respect of (1) the Remainder Design and Construction Works and (2) Phases of the Works which have achieved Phase Completion after the Tower Interim Completion Notice is given

- 1.54 “**Complex Structure**” means any post-tensioned or pre-tensioned Structure that has undergone significant structural alteration making it difficult for personnel at the Site to predict the direction of forces or likely collapse mechanism to be experienced by such Structure in connection with any Demolition of all or any part of such Structure.
- 1.55 “**Complex Structure Demolition**” means any Demolition where:
- (a) significant structural elements, such as girders, columns, shearwalls or slabs, or Complex Structures are being removed, de-stressed, altered or removed;
 - (b) large penetrations are being created through slabs;
 - (c) any Demolition may cause the collapse of any Building or Structure (or any portion thereof) and such collapse may directly impact adjacent occupied areas of a Building or Structure and potentially jeopardize the safety of workers, staff or the general public using such Building or Structure; and
 - (d) the Demolition of any Building or Structure (or any portion thereof) has the potential to result in any materials collapsing onto or interfering with any pedestrian right-of-way or into an occupied part of any Building or Structure.
- 1.56 “**Confidant**” has the meaning given in Section 40.6(a)(i) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.57 “**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 Appendix A –

General Conditions of the Design and Construction Contract, but excluding Patient Information.

- 1.58 **"Construction Contractor"** means Bondfield Construction Company Limited, engaged by Project Co to perform the Design and Construction Work.
- 1.59 **"Construction Contractor Amount"** has the meaning given in Schedule 23 – Compensation on Termination.
- 1.60 **"Construction Contractor Commissioning"** means the commissioning activities to be carried out by Construction Contractor prior to the issuance of the Substantial Completion Certificate in accordance with the Final Commissioning Program.
- 1.61 **"Construction Contractor Commissioning Authority"** has the meaning given in Section 2 of Schedule 14 – Outline Commissioning Program.
- 1.62 **"Construction Contractor Commissioning Tests"** means all Commissioning Tests required to be performed by Construction Contractor pursuant to the Final Commissioning Program.
- 1.63 **"Construction Contractor Default Termination Sum"** has the meaning given in Schedule 23 – Compensation on Termination.
- 1.64 **"Construction Contractor's Direct Agreement"** means the agreement to be entered into between SMH, Project Co and the Construction Contractor in the form set out in Schedule 5 – Construction Contractor's Direct Agreement.
- 1.65 **"Construction Contractor Event of Default"** has the meaning given in Section 34.1(a) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.66 **"Construction Contractor Group"** means Construction Contractor together with any person or group of persons, who, either individually or collectively, have Direct or Indirect Power or Control of Construction Contractor.
- 1.67 **"Construction Contractor Party"** means:
- (a) any person engaged by the Construction Contractor, from time to time, as may be permitted by the Design and Construction Contract to procure or manage the provision of the Design and Construction Work (or any part thereof); and
 - (b) in respect of each of the above, their Subcontractors or Suppliers of any tier, agents, employees, officers and directors,

and **"Construction Contractor Parties"** shall be construed accordingly

- 1.68 **"Construction Contractor Permits, Licences, Approvals and Agreements"** means all permissions, consents, approvals, certificates, permits, licenses, agreements and authorizations to be obtained by the Construction Contractor in accordance with the

Design and Construction Contract and as required by Applicable Law, and all necessary consents and agreements from any third parties (including all Development Approvals and the approval of the Fire Marshal of Ontario), needed to perform the Design and Construction Work in accordance with the Design and Construction Contract, and including those permits, licenses, and agreements which are the responsibility of the Construction Contractor to obtain as set out in Appendix "A" – to this Schedule 1 – Definitions and Interpretation and those permits, licenses, approvals and agreements which are the responsibility of Construction Contractor to obtain as set out in the Output Specifications, but other than any SMH Permits, Licenses, Approvals and Agreements.

- 1.69 **"Construction Contractor Proposal Extracts"** means the documents attached as Schedule 13 – Construction Contractor Proposal Extracts.
- 1.70 **"Construction Contractor Representative"** means the person designated as such by the Construction Contractor on or prior to the date of the Design and Construction Contract and any permitted replacement.
- 1.71 **"Construction Contractor Support Agreement"** means the contractor support agreement between Project Co and the Construction Contractor dated the date of the Project Agreement.
- 1.72 **"Construction Contractor Variation Notice"** has the meaning given in Schedule 22 – Variation Procedure.
- 1.73 **"Construction Defect"** means any deficiency, defect or error in the Design and Construction Work or failure of the Design and Construction Work to conform to the Design and Construction Contract, including, for clarity, any deficiency, defect or error in relation to any Product or item of In-Contract Equipment.
- 1.74 **"Construction Document Submittals"** has the meaning given in Section 11.1(c)(ii) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.75 **"Construction Guarantor"** means Bondfield Construction Company Limited.
- 1.76 **"Construction Latent Defect"** has the meaning given in Section 11.15(c) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.77 **"Construction Quality Plan"** means the construction quality plan included in Schedule 11 - Design Quality Plan and Construction Quality Plan.
- 1.78 **"Construction Safety Plan"** has the meaning given in Schedule 13 – Construction Contractor Proposal Extracts.
- 1.79 **"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 Laws. 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 to be Contamination for the purposes of the Design and Construction Contract.

- 1.80 "Corporations Act" means the *Corporations Act*, R.S.O. 1990, c. C.38, as amended.
- 1.81 "Cost of the Financing" means all costs and expenses incurred in connection with the Financing pursuant to the Lending Agreements, including all interest, fees, expense reimbursements, pre-payment and breakage costs and all other costs and expenses, as set out in Schedule 24 – Financial Model of the Project Agreement.
- 1.82 "Cost of the Design and Construction Work" means the cost to Construction Contractor of performing the Design and Construction Work as set out in Schedule 24 – Financial Model of the Project Agreement and shall include all amounts to be included in the Cost of the Design and Construction Work set out in the Design and Construction Contract.
- 1.83 "Countdown Notice" has the meaning given in Section 24.7(a) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.84 "CPI" means, as at the date of the Design and Construction Contract, CPI XFET and, thereafter, the latest available Consumer Price Index Canada (all items) as published by Statistics Canada from time to time (whether preliminary or final), or failing such publication, such other index as the Parties may agree, or as may be determined in accordance with Schedule 27 - Dispute Resolution Procedure, most closely resembles such index.
- 1.85 "CPI_o" is the value of CPI at Financial Close, to be determined by reference to the relevant index in the month immediately preceding Financial Close.
- 1.86 "CPI_n" is the value of CPI on April 1 of the relevant year, to be determined by reference to the relevant index in the month of February most recently preceding the indexation date.
- 1.87 "CPI XFET" means the Consumer Price Index excluding food, energy and the effect of changes in indirect taxes.
- 1.88 "CPM" has the meaning given in Section 4.1 of Schedule 3 – Design and Construction Work Scheduling Requirements.
- 1.89 "CSA Standards" means, at the applicable time, the Canadian Standards Association standards.
- 1.90 "Delay Event" has the meaning given in Section 30.1(a) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.91 "Demolition" means the removal of a building or structure, as the case may be, or of any material part of a Building or Structure.

- 1.92 **“Demolition Default Event”** has the meaning given in Section 11.23(b) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.93 **“Demolition Guidelines”** means those guidelines set forth in the document entitled “Professional Engineers Providing Services for Demolition of Buildings and other Structures” published by the Professional Standards Committee established by the Professional Engineers of Ontario and having a publication date of April, 2011.
- 1.94 **“Demolition Plan”** means a plan or other document prepared by a professional engineer, limited licence holder or provisional licence holder in accordance with subsection (3) of the Performance Standards Regulation with respect to the Demolition of a building or structure, and includes any changes to the plan or other document that are made by a professional engineer, limited licence holder or provisional licence holder.
- 1.95 **“Demolition Requirements”** has the meaning given in Section 11.23(a) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.96 **“Demolition Specifications”** means those specifications relating to any Demolition prepared by Project Co in accordance with Section 11.23(a)(iv)(A) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.97 **“Demolition Supervisor”** has the meaning given in Section 11.23(a)(ii) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.98 **“Design and Bid Fee”** has the meaning given in the Request for Proposals.
- 1.99 **“Design and Construction Contract”** means the design and construction contract between Project Co and the Construction Contractor dated on or about the date of Financial Close.
- 1.100 **“Design and Construction Work”** means the design, construction, installation, testing, commissioning and completion of the Facility, including the Phases of the Works, the Tower Interim Completion Works, the Remainder Design and Construction Work and the rectification of any Phase Minor Deficiencies, Tower Interim Completion Minor Deficiencies and Minor Deficiencies and the performance of all other obligations of the Construction Contractor under the Design and Construction Contract.
- 1.101 **“Design and Construction Work Change in Law”** means any Change in Law that:
- (a) is not a Relevant Change in Law;
 - (b) occurs after the date of the Design and Construction Contract;
 - (c) requires Construction Contractor to perform any work of alteration, addition, Demolition, extension or variation in the quality or function of the Facility which is not Design and Construction Work or capital replacement work which Construction Contractor would otherwise be required to perform in order to comply with its obligations under the Design and Construction Contract; and

- (d) was not reasonably foreseeable at the date of the Design and Construction Contract by an experienced contractor carrying out activities and/or performing design and/or other operations similar to those to be carried out and/or performed by any Construction Contractor Party in relation to the Project
- 1.102 **"Design and Construction Work Milestone"** has the meaning given in Schedule 3 – Design and Construction Work Scheduling Requirements.
- 1.103 **"Design and Construction Work Report"** has the meaning given in Section 13.6 of Appendix A – General Conditions of the Design and Construction Contract.
- 1.104 **"Design and Construction Work Schedule"** means the design and construction work schedule developed pursuant to and in accordance with Section 13.2(a) of Appendix A – General Conditions of the Design and Construction Contract and Schedule 3 – Design and Construction Work Scheduling Requirements.
- 1.105 **"Design and Construction Work Submittal"** has the meaning given in Schedule 10 – Review Procedure of the Design and Construction Contract.
- 1.106 **"Design Data"** means all drawings, reports, documents, plans, software, formulae, calculations, and other data prepared by Construction Contractor relating to the design, construction or testing of the Facility, but excluding Intellectual Property Rights of third parties, such as CAD software, that is used only in the process of design and construction.
- 1.107 **"Design Development Submittals"** has the meaning given in Section 11.1(c)(i) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.108 **"Design Quality Plan"** means the design quality plan included in Schedule 11 - Design Quality Plan and Construction Quality Plan.
- 1.109 **"Design Team"** means NORR Architects engaged by Construction Contractor to design the Facility and any substitute design team engaged by Construction Contractor as may be permitted by the Design and Construction Contract.
- 1.110 **"Design Workshops"** has the meaning given in Section 11.3(a) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.111 **"Development Approvals"** means development permits, building permits, zoning approvals and any other planning or development permit, consent or applicable Permits, Licences, Approvals and Agreements required from time to time for construction of the Facility.
- 1.112 **"Direct Cost"** has the meaning given in Schedule 22 -Variation Procedure.
- 1.113 **"Direct Losses"** means all damage, losses, liabilities, penalties, fines, assessments, claims, actions, costs, expenses (including the cost of legal or professional services, legal costs being on a substantial indemnity basis), proceedings, demands and charges whether arising under statute, contract or at common law, except Indirect Losses.

- 1.114 **“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 greater than five (5%) percent 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 where an individual's ownership, beneficial or otherwise, is equal to or exceeds five (5%) percent of the voting securities, units or equity interests of such 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.
- 1.115 **“Discretionary SMH Additional In-Contract Equipment and Works Amount”** means an aggregate amount of \$94,919.58 for Discretionary SMH Additional In-Contract Equipment and Works Items.
- 1.116 **“Discretionary SMH Cash Allowance Amount”** means an aggregate amount of \$4,900,000 to be allocated in accordance with Section 3.2(h) of the Design and Construction Contract and as follows:
- (a) \$1,500,000 for building conditions;
 - (b) \$1,100,000 for Contamination which, for clarity, is the responsibility of SMH pursuant to Section 18.2 of the Project Agreement;
 - (c) \$1,400,000 for mechanical systems integrity; and
 - (d) \$900,000 for the integration of building systems.
- 1.117 **“Discretionary SMH Cash Allowance Items”** means, collectively, the following items:
- (a) building conditions;
 - (b) Contamination which, for clarity, is the responsibility of SMH pursuant to Section 18.2 of the Project Agreement;
 - (c) mechanical systems integrity; and
 - (d) the integration of building systems;

and any item noted in the provisions above is a “**Discretionary SMH Cash Allowance Item**”.

- 1.118 “**Discretionary SMH Additional In-Contract Equipment and Works Items**” means, collectively, all Additional In-Contract Equipment and Works identified by SMH pursuant to Section 21.3(c) of the Project Agreement; and any one of the foregoing is a “**Discretionary SMH Additional In-Contract Equipment and Works Item**”
- 1.119 “**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 design, 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 in Ontario;
 - (c) Project Co in relation to other persons; or
 - (d) persons undertaking projects for design, 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.
- 1.120 “**Dispute**” has the meaning given in Schedule 27 - Dispute Resolution Procedure.
- 1.121 “**Dispute Resolution Procedure**” has the meaning given in Schedule 27 – Dispute Resolution Procedure.
- 1.122 “**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, but excluding wages, salaries or other employment-related benefits.
- 1.123 “**Emergency**” means any situation, event, occurrence, or multiple occurrences:
- (a) that:

- (i) constitutes or may constitute a hazard to or jeopardizes or may jeopardize the health and/or safety of any persons or any part 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, the conduct of the Design and Construction Work and/or the conduct of the SMH Activities;
- and which, in the opinion of SMH, 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.
- 1.124 **"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.
- 1.125 **"Environmental Reports"** means, collectively, the following reports:
- (a) the report entitled "Phase One Environmental Site Assessment" dated July 19, 2013 prepared for SMH by exp Services Inc. (Project Number BRM-00603268-A0);
 - (b) the report entitled "Phase Two Environmental Site Assessment" dated July 19, 2013 prepared for SMH by exp Services Inc. (Project Number BRM-00603268-A0); and
 - (c) the report entitled "Phase One Environmental Site Assessment" dated April 30, 2014 prepared for SMH by exp Services Inc. (Project Number BRM-00603268-CO).
- 1.126 **"Environmental Report (Phase Two Environmental Site Assessment)"** – means the report entitled "Phase Two Environmental Site Assessment" dated July 19, 2013 prepared for SMH by exp Services Inc. (Project Number BRM-00603268-A0).
- 1.127 **"Equipment"** means the Not-In-Contract Equipment (including, but not limited to, furniture) and the In-Contract Equipment (including, but not limited to, casework) and, for clarity, does not include the Existing Equipment.
- 1.128 **"Equipment List"** means the equipment list set out in Part 4 of Schedule 15 – Output Specifications.

- 1.129 **"Equipment Steering Committee"** has the meaning given in Section 21.1(a) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.130 **"Equipment Sub-Plan"** has the meaning given to it in Schedule 13 – Construction Contractor Proposal Extracts.
- 1.131 **"Estimate"** has the meaning given in Schedule 22 - Variation Procedure.
- 1.132 **"Existing Equipment"** means the equipment designated as "Existing Equipment"/ transferrable equipment in Part 4 of Schedule 15 – Output Specifications.
- 1.133 **"Existing Facilities"** means the existing buildings of SMH within parts of which and adjoining which the Design and Construction Work will occur.
- 1.134 **"Expert"** has the meaning given in Schedule 27 - Dispute Resolution Procedure.
- 1.135 **"Expiry Date"** means the first anniversary of the Final Completion Date.
- 1.136 **"Facility"** means:
- (a) all buildings, facilities and other structures;
 - (b) the Plant;
 - (c) all site services, utilities, roadways and parking area required to support such buildings, facilities and structures;
 - (d) all supporting systems, infrastructure and improvements;
 - (e) all In-Contract Equipment;
 - (f) all Products; and
 - (g) all other works, improvements and Demolition to occur on the Site,
- in each case required to meet the Output Specifications and the requirements under the Permits, Licences, Approvals and Agreements and whether or not in the course of design, construction, installation or completion.
- 1.137 **"Final Commissioning Program"** means the program to be jointly developed and agreed by SMH and Project Co as described in Section 24.2 of Appendix A – General Conditions of the Design and Construction Contract.
- 1.138 **"Final Completion"** means the completion of the Works in accordance with the Project Agreement, including completion of all Minor Deficiencies (as defined in the Project Agreement).

- 1.139 **"Final Completion Certificate"** means the certificate to be issued by the Independent Certifier as described in Section 24.12 of Appendix A – General Conditions of the Design and Construction Contract.
- 1.140 **"Final Completion Countdown Notice"** has the meaning given in Section 24.11(a) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.141 **"Final Completion Date"** means the date on which Final Completion is achieved as evidenced by the Final Completion Certificate, as such date shall be stated therein.
- 1.142 **"Final Completion Notice"** has the meaning given in Section 24.12(b) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.143 **"Financial Close"** means the first date that funding is available under the Lending Agreements.
- 1.144 **"Financial Close Target Date"** has the meaning given in the Project Agreement.
- 1.145 **"Financial Model"** means the computer spreadsheet model included in Schedule 24 – Financial Model of the Project Agreement for the Project incorporating statements of Project Co's cashflows including all expenditure, revenues, financing and taxation of the Works together with, if applicable, the profit and loss accounts and balance sheets for Project Co throughout the Project Term accompanied by details of all assumptions, calculations and methodology used in their compilation and any other documentation necessary or desirable to operate the model.
- 1.146 **"Financial Obligations"** means the obligation to pay any application fees, third party fees, costs or charges (including all applicable Taxes thereon), the provision of any letters of credit, instruments of guarantee, bonds or security deposits, or any other financial security obligations.
- 1.147 **"Financing"** means the financing with the Lenders, that is consistent in all material respects with Schedule 24 - Financial Model of the Project Agreement and the Project Agreement, to finance the Project.
- 1.148 **"FIPPA"** means the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (Ontario).
- 1.149 **"Force Majeure"** has the meaning given in Section 33.1(a) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.150 **Geotechnical Reports"** means the reports entitled:
- (a) "Geotechnical Investigation – St. Michael's Hospital Redevelopment Toronto, Ontario" dated March 22, 2013 prepared for SMH by Exp Services Inc. (Project Number BRM-00603268-A0); and

- (b) "Summary of Water Level – St. Michael's Hospital Redevelopment" dated February 24, 2014 prepared for SMH by Exp Services Inc. (Project No. BRM-00603268-BO).
- 1.151 "Good Industry Practice" means using standards, practices, methods and procedures to a good commercial standard, conforming to Applicable Law and exercising that degree of skill and care, diligence, prudence and foresight which would reasonably and ordinarily be expected from a qualified, skilled and experienced person engaged in a similar type of undertaking under the same or similar circumstances.
- 1.152 "Governmental Authority" means MOHLTC, the Local Health Integration Network 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 SMH, any aspect of the performance of the Design and Construction Contract or the operation of the Facility, or the SMH Activities, in each case to the extent it has or performs legislative, judicial, regulatory, administrative or other functions within its jurisdiction.
- 1.153 "Government Entity" means any one or more of the Province, IO, MEDEI and the MOHLTC.
- 1.154 "Guaranteed Price" is the amount referred to in Section 3.1(a) of the body of the Design and Construction Contract.
- 1.155 "Hazardous Materials Survey Reports" means, collectively, the reports entitled:
- (a) "Hazardous Building Materials Assessment Part of St. Michael's Hospital 30 Bond Street Toronto, Ontario" dated March 4, 2013 prepared for SMH by Pinchin Environmental Ltd. (Pinchin File 78809);
 - (b) "Hazardous Building Materials Summary St. Michael's Hospital 30 Bond Street Toronto, Ontario" dated May 31, 2013 prepared for SMH by Pinchin Environmental Ltd. (Pinchin File 78809.001);
 - (c) "Review of Foamglas in Cardinal Carter Air Intake Plenum 30 Bond Street, Toronto Ontario" dated November 28, 2013 addressed to St. Michael's Hospital and prepared by Pinchin Environmental Ltd. (Pinchin File 78809.001);
 - (d) "Donnelly Wing Elevator Upgrade Project 30 Bond Street, Toronto Ontario" dated November 22, 2013 addressed to St. Michael's Hospital and prepared by Pinchin Environmental Ltd. (Pinchin File 78809.001);
 - (e) "Hazardous Building Materials Assessment Shuter Wing of St. Michael's Hospital 30 Bond Street Toronto, Ontario FINAL" dated March 10, 2014

addressed to St. Michael's Hospital and prepared by Pinchin Environmental Ltd. (Pinchin File 90154); and

- (f) "Assessment of Mould Growth St. Michael's Hospital 30 Bond Street Toronto, Ontario" dated March 12, 2014 addressed to St. Michael's Hospital and prepared by Pinchin Environmental Ltd. (Pinchin File 78809.003).

- 1.156 "**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 in or identified pursuant to any Applicable Law.
- 1.157 "**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.
- 1.158 "**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.
- 1.159 "**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.
- 1.160 "**Heritage Guidelines and Protocols**" means those heritage guidelines and protocols mandated by Applicable Laws.
- 1.161 "**HST**" means the value-added tax imposed pursuant to Part IX of the *Excise Tax Act* (Canada), and any successor legislation thereto.
- 1.162 "**Human Rights Policies**" means the following policies of SMH provided to Project Co as Background Information, as amended, supplemented or replaced from time to time:
- (a) St. Michael's Hospital Code of Conduct effective May 1, 2010;
 - (b) Criminal Activity effective January 1, 2013;
 - (c) Code of Business Conduct effective April 1, 2011;
 - (d) Management of Violence in the Workplace effective February 12, 2013; and
 - (e) Workplace Harassment and Discrimination effective May 1, 2011.
- 1.163 "**ICT**" means information and communications technology.
- 1.164 "**Improvements**" means structures, buildings, installations, fixtures, services and other such improvements.

- 1.165 **"In-Contract Equipment"** means all Equipment in respect to which Construction Contractor is to be the purchaser as specified in Part 4 of Schedule 15 – Output Specifications and, for clarity, includes the SMH Early Procured In-Contract Equipment as of Financial Close pursuant to the terms and conditions of the SMH Early Procured In-Contract Equipment Assumption but does not include any Not-In-Contract Equipment or Existing Equipment.
- 1.166 **"Indemnifiable Taxes"** has the meaning given in Section 4.20(b) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.167 **"Indemnifier"** has the meaning given in Section 44.3(a) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.168 **"Independent Certifier"** means the person appointed as the Independent Certifier pursuant to the Independent Certifier Agreement and as may be permitted pursuant to the Project Agreement.
- 1.169 **"Independent Certifier Agreement"** means the contract entered into between Project Co, SMH and the Independent Certifier in substantially the form attached hereto as Schedule 6 – Independent Certifier Agreement.
- 1.170 **"Indirect Losses"** has the meaning given in Section 8.1(a) of the body of the Design and Construction Contract.
- 1.171 **"Innovation Proposal"** has the meaning given in Section 29.2(b) Appendix A – General Conditions of the Design and Construction Contract.
- 1.172 **"Insurance"** means the insurance contemplated in Schedule 25 – Insurance and Performance Security Requirements.
- 1.173 **"Insurance Trust Agreement"** means the insurance trust agreement to be entered into between SMH, the Lenders' Agent, Project Co and the Account Trustee in the form set out in Schedule 30 - Insurance Trust Agreement of the Project Agreement.
- 1.174 **"Intellectual Property"** means in connection with a specified subject matter, on a worldwide basis, all registered or unregistered Trade-Marks, trade names, patents, copyrights, trade secrets, designs, rights of publicity, mask work rights, utility models and other industrial or intangible property rights of a similar nature, all grants and registrations worldwide in connection with the foregoing and all other rights with respect thereto existing other than pursuant to grant or registration; all applications for any such grant or registration, all rights of priority under international conventions to make such applications and the right to control their prosecution, and all amendments, continuations, divisions and continuations-in-part of such applications; and all corrections, reissues, patents of addition, extensions and renewals of any such grant, registration or right.
- 1.175 **"Intellectual Property Rights"** means all Intellectual Property in or associated with the Project Data and all Intellectual Property which, or the subject matter of which, is at any

time before or after the date of the Design and Construction Contract, created, brought into existence, acquired, used or intended to be used by Construction Contractor, any Construction Contractor Party or by other third parties (for such third parties' use by or on behalf of or for the benefit of Construction Contractor) for any or all of the purposes of:

- (a) the Design and Construction Work, including the design and construction of the Facility (excluding Intellectual Property Rights of third parties, such as CAD software, that is used only in the process of design and construction); or
- (b) the Design and Construction Contract.

- 1.176 "**IO**" means Ontario Infrastructure and Lands Corporation, a non-share capital corporation continued and amalgamated under the *Ontario Infrastructure and Lands Corporation Act, 2011*, S.O. 2011, c. 9, Schedule 32, as amended, and includes any successors thereto or persons exercising delegated power and the Minister's authority, as agent for Her Majesty the Queen in Right of Ontario, as represented by the Minister of Economic Development, Employment and Infrastructure.
- 1.177 "**IPFP Framework**" has the meaning given in the recitals to the Project Agreement.
- 1.178 "**Jointly Developed Materials**" has the meaning given in Section 39.4(a) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.179 "**Jointly Developed Materials Owner**" has the meaning given in Section 39.4(a) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.180 "**Junior Lenders**" for the purpose of the Project Agreement and the Design and Construction Contract, there are no Junior Lenders and any reference to "Junior Lenders" in the Project Agreement the Design and Construction Contract shall have no force and effect whatsoever.
- 1.181 "**Key Individuals**" has the meaning given in Schedule 9 – Key Individuals.
- 1.182 "**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 25 – Insurance and Performance Security Requirements.
- 1.183 "**LEED**" means Leadership in Energy & Environmental Design.
- 1.184 "**LEED Rating System**" means CaGBC's Leadership in Energy & Environmental Design (LEED) Green Building Rating System for New Construction and Major Renovations, LEED – NC Version 1.0, including any addenda or update thereto issued prior to the date of the Design and Construction Contract.
- 1.185 "**LEED Silver Rating**" means the achievement of a 'Silver' rating from the CaGBC, with respect to the LEED Rating System.

- 1.186 **"Legislative Holdback"** means the holdback(s) to be maintained under Part IV of the CLA.
- 1.187 **"Lenders"** means any or all of the persons acting arm's length to Project Co and each Project Co Party (as defined in the Project Agreement) who provide the Financing, and for greater clarity, excludes the Hedge Provider(s) or any other hedge providers and their respective permitted successors and assigns and any Affiliate of Project Co or a Project Co Party (as defined in the Project Agreement);
- 1.188 **"Lenders' Agent"** has the meaning given in Schedule 4 - Lenders' Direct Agreement of the Project Agreement.
- 1.189 **"Lenders' Consultant"** means any consultant appointed from time to time by the Lenders. Nothing contained in the Project Documents or the Design and Construction Contract and no action taken by the Lenders' Consultant in connection with the Design and Construction Work or the Project Documents shall constitute direction and/or control by SMH, Project Co or the Lenders.
- 1.190 **"Lenders' Direct Agreement"** has the meaning given in Schedule 1 – Definitions and Interpretations of the Project Agreement.
- 1.191 **"Lending Agreements"** means any or all of the agreements or instruments to be entered into by Project Co or any of its Affiliates relating to the Financing, including, for greater certainty, the Security Documents and the Hedging Agreements.
- 1.192 **"Load-Path Diagram"** means a graphically illustrated diagram that indicates in all relevant detail (including by use of colour-coded arrows indicating the directions of forces caused by dead loads, live loads, vertical loads and lateral loads) how the structural loads are transferred throughout a Building or Structure that is to be the subject of a Demolition.
- 1.193 **"Local Health Integration Network"** means the Central Local Health Integration Network.
- 1.194 **"Longstop Date"** has the meaning given in Section 34.1(a)(ii) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.195 **"Maintenance Instructions"** means the maintenance data prepared and delivered by Construction Contractor to SMH pursuant to Sections 23A.5A, 23B.5A and 24.5A of Appendix A – General Conditions of the Design and Construction Contract.
- 1.196 **"Make Good", "Made Good", "Making Good"** and derivatives thereof, means, as applicable, repairing, restoring, refurbishing, rehabilitating, removing and replacing, or performing filling operation on (a) the Design and Construction Work as required under the Design and Construction Contract or (b) any existing components disturbed due to the Design and Construction Work, to at least the condition existing at the commencement of the Design and Construction 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.

- 1.197 “**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.
- 1.198 “**Minor Deficiencies**” means any defects, deficiencies and items of outstanding work (including in relation to seasonal work) arising from or related to the work required to achieve Substantial Completion and that would not materially impair SMH’s use and enjoyment of the Facility (including SMH Commissioning) or the performance of the SMH Activities.
- 1.199 “**Minor Deficiencies List**” has the meaning given in Section 24.8(a) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.200 “**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 the Minister’s authority.
- 1.201 “**Multiple Obligee Rider to Labour and Material Payment Bond**” means the Multiple Obligee Rider amending the Labour and Material Payment Bond to add SMH and Lenders as additional named Obligees, in the form attached as Exhibit 1 to Appendix C of Schedule 25 – Insurance and Performance Security Requirements.
- 1.202 “**Multiple Obligee Rider to Performance Bond**” means the Multiple Obligee Rider amending the Performance Bond to add SMH and Lender as additional named Obligees, in the form attached as Exhibit 1 to Appendix B of Schedule 25 – Insurance and Performance Security Requirements.
- 1.203 “**New Shuter Wing**” has the meaning given in Section 1.0.3 of Part 1 of Schedule 15 – Output Specifications.
- 1.204 “**New Shuter Wing Lands**” means the lands depicted as the Study Area (Phase One Property) on the site plan for the report entitled the report entitled “Phase One Environmental Site Assessment” dated April 30, 2014 prepared for SMH by exp Services Inc. (Project Number BRM-00603268-CO).
- 1.205 “**NOAC**” has the meaning given in Appendix A to Schedule 1 – Permits, Licences, Approvals and Agreements.
- 1.206 “**No Default Payment Compensation Amount**” means, with respect to an amount and a specified period of time, such amount multiplied by (i) such period of time in days divided by the actual number of days in the current year multiplied by (ii) the rate of interest per annum in effect on each such day quoted by National Bank of Canada 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 by it from time to time.

- 1.207 "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).
- 1.208 "Non-Shuter Design and Construction Work" has the meaning given in Appendix A to Schedule 1 – Permits, Licences, Approvals and Agreements.
- 1.209 "Not-In-Contract Equipment" means all Equipment in respect to which SMH is to procure and be the purchaser as specified in Part 4 of Schedule 15 – Output Specifications.
- 1.210 "Not-In-Contract Equipment Fee" means \$350,000.00.
- 1.211 "Notice" has the meaning given in Section 10.1 of the body of the Design and Construction Contract.
- 1.212 "Notice of Project" means a notice of project filed with the Ministry of Labour in compliance with O. Reg 213/91 under the *Occupational Health and Safety Act* (Ontario).
- 1.213 "OCPM" has the meaning given in Section 13.6(b) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.214 "Occupancy Permit" means all Permits, Licences, Approvals and Agreements required for the occupancy of the Facility as a health care facility in compliance with Applicable Law.
- 1.215 "Order" has the meaning given in Schedule 30 - Insurance Trust Agreement.
- 1.216 "Outline Commissioning Program" means the schedule setting out the standards, specifications, procedures and other requirements for the performance and completion of the commissioning activities of the Parties and SMH as outlined in Schedule 14 - Outline Commissioning Program.
- 1.217 "Output Specifications" means Schedule 15 – Output Specifications.
- 1.218 "Parallel Issue" has the meaning as set out in Section 15(a) of the body of the Design and Construction Contract.
- 1.219 "Party" means either the Construction Contractor or Project Co, and "Parties" means both the Project Co and Construction Contractor, but, for greater certainty, such definitions do not include IO, SMH, MOHLTC or MEDEI.
- 1.220 "Patient Information" means Personal Information of patients, clients, and other users and recipients of the Hospital Activities and, for clarity, includes all "personal health information" of such persons (as such term is defined in the *Personal Health Information Protection Act, 2004*).

- 1.221 **“Payment Compensation Amount”** means, with respect to an amount and a specified period of time, (i) such amount multiplied by (ii) such period of time in days divided by the actual number of days in the current year multiplied by (iii) the rate of interest per annum in effect on each such day equal to 2% over the rate of interest per annum quoted by National Bank of Canada 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 by it from time to time.
- 1.222 **“PDC Team”** means the team of consultants led by Diamond Schmitt Architects.
- 1.223 **“Performance Bond”** means collectively, the Performance Bond and the Multiple Obligee Rider to the Performance Bond in the form attached as Appendix B to Schedule 25 – Insurance and Performance Security Requirements.
- 1.224 **“Performance Guarantee of Construction Guarantor”** means a performance guarantee given by the Construction Guarantor in the form set out in Schedule 12 – Performance Guarantee of the Construction Guarantor of the Project Agreement.
- 1.225 **“Performance Standards Regulation”** means Ontario Regulation 260/08 made under the *Professional Engineers Act* (Ontario).
- 1.226 **“Permits, Licences, Approvals and Agreements”** means SMH Permits, Licences, Approvals and Agreements and the Construction Contractor Permits, Licences, Approvals and Agreements.
- 1.227 **“Personal Information”** means all personal information (as the term “personal information” is defined in section 2(1) of FIPPA) in the custody or control of Construction Contractor or a Construction Contractor Party other than personal information of the employees of Construction Contractor or a Construction Contractor Party and other than personal information that is wholly unrelated to the Design and Construction Work and not derived directly or indirectly from SMH in respect of the Project.
- 1.228 **“Phase Commissioning Program”** means each program to be jointly developed and agreed by Project Co and Construction Contractor in accordance with Section 23A.2 of Appendix A – General Conditions of the Design and Construction Contract.
- 1.229 **“Phase Completion”** means the point at which (i) a Phase of the Works has been completed in accordance with the Project Agreement; (ii) a Phase Occupancy Permit has been issued; and (iii) all requirements for a Phase Completion described in the applicable Phase Commissioning Program, other than in respect of Phase Minor Deficiencies, have been satisfied.
- 1.230 **“Phase Completion Certificate”** means the certificate to be issued by the Independent Certifier in accordance with Section 23A.4(d) of Appendix A – General Conditions of the Design and Construction Contract.

- 1.231 **"Phase Completion Date"** means the date on which each Phase Completion is achieved as evidenced by the applicable Phase Completion Certificate, as such date shall be stated therein.
- 1.232 **"Phase Completion Notice"** has the meaning given in Section 23A.4(b) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.233 **"Phase Construction Contractor Commissioning"** means the commissioning activities to be carried out by Construction Contractor prior to the issuance of a Phase Completion Certificate in accordance with each Phase Commissioning Program.
- 1.234 **"Phase Construction Contractor Commissioning Tests"** means all Commissioning Tests required to be performed by Construction Contractor pursuant to each Phase Commissioning Program.
- 1.235 **"Phase Countdown Notice"** has the meaning given in Section 23A.7(a) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.236 **"Phase of the Works"** means each phase of the Works identified in Section 3.9.2 of Part 3 of Schedule 15 - Output Specifications; and **"Phases of the Works"** means greater than one Phase of the Works.
- 1.237 **"Phase Minor Deficiencies"** means any defects, deficiencies and items of outstanding work (including in relation to seasonal work) arising from or related to the work required to achieve an applicable Phase Completion and which would not materially impair SMH's use and enjoyment of the applicable Phase of the Works (including the applicable Phase SMH Commissioning) or the performance of the applicable the SMH Activities.
- 1.238 **"Phase Minor Deficiencies List"** has the meaning given in Section 23A.8(a) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.239 **"Phase Occupancy Permit"** means all Permits, Licences, Approvals and Agreements required for the occupancy of a Phase of the Works as a health care facility in compliance with Applicable Law.
- 1.240 **"Phase SMH Commissioning"** means the commissioning activities to be carried out by SMH in accordance with each Phase Commissioning Program.
- 1.241 **"Phase SMH Commissioning Period"** means each period during which SMH is performing Phase SMH Commissioning.
- 1.242 **"Phase SMH Commissioning Tests"** means all Commissioning Tests required to be performed by SMH pursuant to each Phase Commissioning Program.
- 1.243 **"Phasing Requirements"** means the requirements for the phasing and sequencing of the Design and Construction Work set out in Section 3.9 of Part 3 of the Output Specifications.

- 1.244 **"Plant"** means all buildings, building services, infrastructure, building fabric, and mechanical and electrical services, which are required to meet the operational needs of SMH as defined in Schedule 15 – Output Specifications.
- 1.245 **"Procurement Monitoring and Implementation Plan"** has the meaning given in Section 11.22(a) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.246 **"Product"** means or **"Products"** mean material, machinery, equipment and fixtures forming the Design and Construction Work but does not include Equipment or machinery and equipment used to prepare, fabricate, convey or erect the Design and Construction Work, which is referred to as construction machinery and equipment.
- 1.247 **"Prohibited Act"** has the meaning given in Section 48.1(a) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.248 **"Project"** has the meaning given in the recitals to the Project Agreement.
- 1.249 **"Project Agreement"** has the meaning given in the body of the Design and Construction Contract.
- 1.250 **"Project Co"** has the meaning given in the introductory paragraph of the body of the Design and Construction Contract.
- 1.251 **"Project Co Commissioning"** has the meaning given in Schedule 1 – Definitions and Interpretations of the Project Agreement.
- 1.252 **"Project Co Construction Event of Default"** has the meaning given in Schedule 1 – Definitions and Interpretations of the Project Agreement.
- 1.253 **"Project Co Default Termination Sum"** has the meaning given in Schedule 23 – Compensation on Termination of the Design and Construction Contract.
- 1.254 **"Project Co Event of Default"** has the meaning given in Section 35.1(a) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.255 **"Project Co Party"** means any of Project Co's agents, contractors and subcontractors of any tier and its or their directors, officers and employees, and other persons engaged in respect of the Design and Construction Work, but excluding Construction Contractor, any Construction Contractor Party, the Independent Certifier and Lenders' Consultant, and the term **"Project Co Parties"** shall be construed accordingly and **"Project Co Parties"** shall be construed accordingly.
- 1.256 **"Project Co Representative"** means the person designated as such by Project Co under the Project Agreement.
- 1.257 **"Project Co Trade-Marks"** means any and all Trade-Marks used by Project Co in any manner whatsoever.

1.258 **"Project Data"** means:

- (a) all Design Data; and
- (b) any other materials, documents and or data acquired, brought into existence or used in relation to the Design and Construction Work or the Design and Construction Contract

other than the Jointly Developed Materials and Background Information and other than Intellectual Property Rights of third parties, such as CAD software, that is used only in the process of design and construction.

1.259 **"Project Debt Interest Cost"** means the budgeted amount of aggregate interest charges in respect of the Senior Debt Amount used to calculate the Cost of the Financing portion of the Guaranteed Price.

1.260 **"Project Documents"** means the Ancillary Documents and the Lending Agreements.

1.261 **"Project Term"** means the period commencing on the date of the Design and Construction Contract and expiring at midnight on the Termination Date.

1.262 **"Proprietor"** has the meaning given in Section 40.6(a) of Appendix A – General Conditions of the Design and Construction Contract.

1.263 **"Province"** means Her Majesty the Queen in Right of Ontario.

1.264 **"Quality Plans"** has the meaning given in Section 15.1(a) of Appendix A – General Conditions of the Design and Construction Contract.

1.265 **"Recovery Amount"** has the meaning given in Section 44.3(g) of Appendix A – General Conditions of the Design and Construction Contract.

1.266 **"Reimbursement Event"** has the meaning given in Section 25A.5(a) of Appendix A – General Conditions of the Design and Construction Contract.

1.267 **"Relevant Change in Law"** means a Discriminatory Change in Law or a Health Specific Change in Law.

1.268 **"Relevant Conviction"** means a conviction under the *Criminal Code* (Canada) for which no pardon has been granted.

1.269 **"Relief Event"** has the meaning given in Section 32.1(a) of Appendix A – General Conditions of the Design and Construction Contract.

1.270 **"Remainder Design and Construction Work"** means all Design and Construction Work other than Phases of the Works and Tower Interim Completion Works which are identified in Section 3.9 of Part 3 of Schedule 15 – Output Specifications.

- 1.271 **“Remaining Cash Allowance Amount”** has the meaning given in Section 3.2(b) of the body of the Design and Construction Contract.
- 1.272 **“Request for Payment Approval”** has the meaning given in Section 3.2(d) of the body of the Design and Construction Contract.
- 1.273 **“Request for Proposals”** or **“RFP”** means the request for proposals issued in respect of the Project on August 2, 2013.
- 1.274 **“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 SMH 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 SMH’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.
- 1.275 **“Review Procedure”** means the procedure set out in Schedule 10 - Review Procedure.
- 1.276 **“RFP Submission Deadline”** means May 21, 2014.
- 1.277 **“Schedule 33 of the PA”** has the meaning given in Section 2.3 of the body of the Design and Construction Contract.

- 1.278 **"Schedule Cushion"** means a schedule contingency added to the last activity on the critical path of the Design and Construction Work Schedule and consisting of a 30 day duration. The Schedule Cushion shall be included in the Design and Construction Work Schedule and, for greater certainty, the Schedule Cushion shall not extend the time for achieving any Phase Completion, Tower Interim Completion and/or Substantial Completion of the Design and Construction Work in any manner whatsoever. As between the Project Co and Construction Contractor, Project Co has ownership of the Schedule Cushion and can elect to use it at any time in respect of a Variation, or upon the occurrence of a Delay Event which would otherwise grant to Construction Contractor an extension of any Scheduled Phase Completion Date, the Scheduled Tower Interim Completion Date and/or the Scheduled Substantial Completion Date, provided any portion of the Schedule Cushion which has not been used by Project Co prior to the Substantial Completion Date will be given to Construction Contractor.
- 1.279 **"Scheduled Final Completion Date"** means 90 days following Substantial Completion.
- 1.280 **"Scheduled Phase Completion Date"** means each Scheduled Phase Completion Date set out in the Design and Construction Work Schedule, as such date may be extended pursuant to Section 30 of Appendix A – General Conditions of the Design and Construction Contract. For clarity, any change to a Scheduled Phase Completion Date initiated by Construction Contractor other than an extension to such date pursuant to Section 30 of Appendix A – General Conditions of the Design and Construction Contract must be approved in writing by Project Co and, subject to the terms of Schedule 22 – Variation Procedure, any Project Co approval of any such change does not entitle Construction Contractor to a Variation, an extension of time or an addition to the Guaranteed Price.
- 1.281 **"Scheduled Substantial Completion Date"** means September 27, 2019, as such date may be extended pursuant to Section 30 of Appendix A – General Conditions of the Design and Construction Contract.
- 1.282 **"Scheduled Tower Interim Completion Date"** means November 27, 2017, as such date may be extended pursuant to Section 30 of Appendix A – General Conditions of the Design and Construction Contract.
- 1.283 **"Security Documents"** has the meaning given in Schedule 1 – Definitions and Interpretations of the Project Agreement.
- 1.284 **"Senior Debt Amount"** has the meaning given in Schedule 23 – Compensation on Termination.
- 1.285 **"Senior Lenders"** means Bank of Montreal, The Toronto-Dominion Bank, Caisse centrale Desjardins, and National Bank of Canada and their respective permitted successors and assigns, and for greater clarity, excludes (i) the Hedge Provider(s) or any other hedge providers and their respective permitted successors and assigns and (ii) any Affiliate of Project Co or a Project Co Party.

- 1.286 "**Sensitive Information**" means financial or commercial information which would, if disclosed to a competitor of the Construction Contractor or any Construction Contractor Party, give that competitor a competitive advantage over Construction Contractor or such Construction Contractor Party and thereby prejudice the business of Construction Contractor or such Construction Contractor Party.
- 1.287 "**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.
- 1.288 "**Shop Drawings**" means drawings, diagrams, illustrations, schedules, performance charts, brochures and other data which are to be provided by Construction Contractor to illustrate details of a portion of the Design and Construction Work, indicating materials, methods of construction and attachment or anchorage, erection diagrams, connections, explanatory notes and other information necessary for completion of the Design and Construction Work.
- 1.289 "**Site**" means the lands, including all Improvements thereon and therein, legally described as PIN 21098-0100 (LT), being lots 48 to 56 (both inclusive) on the east side of Victoria Street on Plan 22A; unnumbered lots also known as lots 2 to 8 (both inclusive) on the north side of Queen Street formerly lot street on Plan 22A; lots 2 to 10 (both inclusive) on the west side of Bond Street; and part of an unnamed lane on Plan 22A between Victoria Street and Bond Street, south of Shuter Street closed by EP120456 and EP3407 as in EP122030 and EP10533; City of Toronto.
- 1.290 "**Site Conditions**" means the condition of the Site, including the physical, geophysical, climatic, ecological, environmental, geotechnical and archaeological conditions.
- 1.291 "**SMH**" means St. Michael's Hospital.
- 1.292 "**SMH Activities**" includes (i) the Clinical Services and (ii) all facilities management services at the Facility and the Existing Facilities, including, but not limited to, select general management services, select help desk services, food services (patient), clinical engineering services, environmental services (including housekeeping, waste management and laundry/linen), materials management services (including purchasing, stores, distribution, portering, transportation and central processing), protection services, parking services, information management services, learning centre services, main public facilities services, site administration services, staff facilities services and volunteer/auxiliary services.
- 1.293 "**SMH Commissioning**" means the commissioning activities to be carried out by SMH in accordance with the Final Commissioning Program.

- 1.294 **"SMH Commissioning Consultant"** means the person appointed by SMH as its commissioning consultant.
- 1.295 **"SMH Commissioning Period"** means the period during which SMH is performing SMH Commissioning.
- 1.296 **"SMH Commissioning Tests"** means all commissioning tests required to be performed by SMH pursuant to the Final Commissioning Program.
- 1.297 **"SMH Design Team"** means any of SMH, its agents, contractors and subcontractors of any tier and its or their governors, directors, officers and employees, and other persons engaged in respect of design reviews, design evaluation, or design consultation processes with respect to the Facility on behalf of SMH, but excluding Project Co and any Project Co Party (as defined in the Project Agreement).
- 1.298 **"SMH Early Procured In-Contract Equipment"** means the In-Contract Equipment designated as "SMH Early Procured In-Contract Equipment" in Part 4 of Schedule 15 – Output Specifications.
- 1.299 **"SMH Early Procured In-Contract Equipment Assignment"** has the meaning given in Section 21.3(a) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.300 **"SMH Early Procured In-Contract Equipment Reimbursement Amount"** has the meaning given in Schedule 1 – Definitions and Interpretations of the Project Agreement.
- 1.301 **"SMH Mortgages"** means, collectively, the Sisters First Mortgage and the Sisters Second Mortgage, which are both defined and described in Schedule 16 – Title Encumbrances;
- 1.302 **"SMH Party"** means any of SMH and its respective agents, contractors and subcontractors of any tier and its or their directors, officers and employees, and other persons engaged by any of the foregoing in respect of the SMH Activities, but excluding Project Co and any Project Co Party (as defined in the Project Agreement), and the **"SMH Parties"** shall be construed accordingly.
- 1.303 **"SMH Permits, Licences, Approvals and Agreements"** means only those SMH permits, licences, approvals and agreements which are the responsibility of SMH, pursuant to the Project Agreement, to obtain as set out in Appendix "A" to this Schedule 1 - Definitions and Interpretation.
- 1.304 **"SMH Representative"** means the person designated as such by SMH on or prior to the date of the Project Agreement and any permitted replacement.
- 1.305 **"SMH Trade-Marks"** means any and all Trade-Marks used by SMH in any manner whatsoever.

- 1.306 **"Start-Up Meeting"** has the meaning given in Section 11.2(a) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.307 **"Structure"** means any permanent structure other than a building, including a bridge, dam or lock.
- 1.308 **"Subcontractor"** means any subcontractor of the Construction Contractor engaged by or through Construction Contractor to perform any of the Design and Construction Work, including any Supplier or consultant, and any subcontractor of any other subcontractor at any tier.
- 1.309 **"Subcontractor's Direct Agreement"** means the agreement to be entered into among SMH, Project Co, the Construction Contractor and certain Subcontractors determined in accordance with the terms of the Project Agreement and the Design and Construction Contract in the form set out in Schedule 7 – Subcontractor's Direct Agreement.
- 1.310 **"Subcontracts"** means the contracts entered into by or between Construction Contractor and any Subcontractor or between any Subcontractor at any tier, and any other Subcontractor at any tier in relation to any aspect of the Design and Construction Work.
- 1.311 **"Substantial Completion"** means the point at which (i) the Facility has been completed in accordance with the Project Agreement; (ii) the Occupancy Permit has been issued; (iii) a professional architect of the Design Team has certified the substantial performance of the Design and Construction Contract and the related certificate of substantial performance has been published, each in accordance with the CLA; and (iv) all requirements for Substantial Completion described in the Final Commissioning Program, other than in respect of Minor Deficiencies, have been satisfied.
- 1.312 **"Substantial Completion Certificate"** means the certificate to be issued by the Independent Certifier as described in Section 24.4(d) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.313 **"Substantial Completion Date"** means the date on which Substantial Completion is achieved as evidenced by the Substantial Completion Certificate, as such date shall be stated therein.
- 1.314 **"Substantial Completion Notice"** has the meaning given in Section 24.4(b) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.315 **"Substantial Completion Payment Date"** means the date that is 2 Business Days after the Substantial Completion Date.
- 1.316 **"Supplier"** means a person who supplies to Construction Contractor, or to any Subcontractor, any equipment, materials, supplies or services as part of, or for, the Design and Construction Work.
- 1.317 **"Surety"** means the person issuing the Bonds.

- 1.318 **"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.
- 1.319 **"Technical Reports"** means the Environmental Reports, the Geotechnical Reports and the Hazardous Materials Survey Reports.
- 1.320 **"Termination Date"** means the earlier of the Expiry Date and such earlier date, if any, on which termination of the Design and Construction Contract takes effect in accordance with its terms.
- 1.321 **"Third Party Beneficiaries"** has the meaning given at Section 10.22 of the body of the Design and Construction Contract.
- 1.322 **"Title Encumbrances"** means the Encumbrances listed in Schedule 16 - Title Encumbrances and any other Encumbrance consented to by SMH and reasonably required in connection with the development of the Facility and the Design and Construction Work.
- 1.323 **"Tower"** means the "Patient Care Tower" described in Section 1.03 of Part 1 of Schedule 15 – Output Specifications.
- 1.324 **"Tower Interim Completion"** means the point at which (i) the Tower has been completed in accordance with the Project Agreement; (ii) the Tower Occupancy Permit has been issued; and (iii) all requirements for Tower Interim Completion described in the Tower Interim Completion Commissioning Program, other than in respect of Tower Interim Completion Minor Deficiencies, have been satisfied.
- 1.325 **"Tower Interim Completion Certificate"** means the certificate to be issued by the Independent Certifier in accordance with Section 23B.4(d) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.326 **"Tower Interim Completion Commissioning Program"** means the program to be jointly developed and agreed to by SMH and Project Co in accordance with Section 23B.2 of Appendix A – General Conditions of the Design and Construction Contract.
- 1.327 **"Tower Interim Completion Construction Contractor Commissioning"** means the commissioning activities to be carried out by Construction Contractor prior to the issuance of the Tower Interim Completion Certificate in accordance with the Tower Interim Completion Commissioning Program.
- 1.328 **"Tower Interim Completion Construction Contractor Commissioning Tests"** means all commissioning tests required to be performed by Construction Contractor pursuant to the Tower Interim Completion Commissioning Program.

- 1.329 "Tower Interim Completion Countdown Notice" has the meaning given in Section 23B.7(a) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.330 "Tower Interim Completion Date" means the date on which Tower Interim Completion is achieved as evidenced by the Tower Interim Completion Certificate, as such date shall be stated therein.
- 1.331 "Tower Interim Completion Holdback" has the meaning given in Section 23B.8 of Appendix A – General Conditions of the Design and Construction Contract.
- 1.332 "Tower Interim Completion Holdback Shortfall" is to be calculated according to the below formula:

$$\text{TCHS} = \text{TCH} - [\text{TCDCW} - \text{TAPCC} - \text{TLH}]$$

where:	
TCHS	Tower Interim Completion Holdback Shortfall
TCH	Tower Interim Completion Holdback
TCDCW	Cost of the Design and Construction Work required to complete (1) the Tower Interim Completion Works and (2) the Phases of the Works which have achieved Phase Completion when the Tower Interim Completion Notice is given
TAPCC	amounts paid to the Construction Contractor pursuant to the Design and Construction Contract on account of the performance of the Design and Construction Work completed as of the Tower Interim Completion Date in respect of (1) the Tower Interim Completion Works and (2) the Phases of the Works which have achieved Phase Completion when the Tower Interim Completion Notice is given
TLH	Legislative Holdback under the Project Agreement as of the Tower Interim Completion Date in respect of (1) the Tower Interim Completion Works and (2) the Phases of the Works which have achieved Phase Completion when the Tower Interim Completion Notice is given

- 1.333 "Tower Interim Completion Minor Deficiencies" means any defects, deficiencies and items of outstanding work (including in relation to seasonal work) arising from or related to the work required to achieve Tower Interim Completion.
- 1.334 "Tower Interim Completion Minor Deficiencies List" has the meaning given in Section 23B.8(a) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.335 "Tower Interim Completion Notice" has the meaning given in Section 23B.4(b) of Appendix A – General Conditions of the Design and Construction Contract.
- 1.336 "Tower Interim Completion Payment" has the meaning given in Schedule 1 – Definitions and Interpretations of the Project Agreement.