

**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

**MOTION RECORD OF UNITY HEALTH TORONTO**

**(for the motion returnable on December 20, 2019)**

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

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**TAB 1**

**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 MOTION**

Unity Health Toronto will make a motion to a Judge of the Commercial List (the “**Court**”) on Friday, December 20, 2019 at 12:00 p.m. or as soon after that time as the motion can be heard at 330 University Avenue, Toronto, Ontario.

**PROPOSED METHOD OF HEARING:** The motion is to be heard orally.

**THE MOTION IS FOR AN ORDER:**

1. Abridging the time for service of the Notice of Motion and Motion Record, and dispensing with service thereof on any party other than the parties served;
2. An Order in substantially the form set out at Schedule “A”:

a. Lifting the stay of proceedings against 2442931 Ontario Inc. (“**ProjectCo**”) pursuant to the order of the Honourable Mr. Justice Hainey dated December 21, 2018 (the “**Receivership Order**”) appointing Alvarez & Marsal Canada Inc. (“**A&M**”) as receiver (in such capacity, the “**Receiver**”) without security, of all of the assets, undertakings and properties of ProjectCo acquired for, or used in relation to a business carried on by ProjectCo, for the purpose of permitting Unity Health Toronto, formerly St. Michael’s Hospital (“**Unity**”), to exercise the remedy pursuant to Section 34.4(d) of the Project Agreement to engage and directly make payment to, at ProjectCo’s risk and expense, and by taking commercially reasonable steps to mitigate such costs:

- i. Ellis Don Ltd. (“**Ellis Don**” or the “**Construction Manager**”) to take steps to perform ProjectCo’s obligations under the agreement made as of January 27, 2015 between St. Michael’s Hospital (now Unity Health Toronto) and ProjectCo (the “**Project Agreement**”);
- ii. NORR Architects (“**NORR**” or the “**Payment Certifier**”) to provide payment certification services;
- iii. NORR Architects and an engineering firm, if required, to provide design services (collectively the “**Designers**”); and
- iv. Any other suppliers of labour, services or materials (“**Trades**”), as are required to achieve Tower Interim Completion and to continue the on-going design, construction, infrastructure improvement and renovation works

commenced prior to Tower Interim Completion, and being performed concurrent with works to achieve Towner Interim Completion.

- b. That Unity shall incur no liability or obligation as a result of carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or failure to take commercially reasonable steps to mitigate costs, including, without limitation, it shall (subject only to the *Construction Act* (Ontario)) have no liability or obligation as a result of carrying out the provisions of this Order: (i) in respect of any of ProjectCo's, the Construction Manager's, or NORR's obligations; or, (ii) to ProjectCo, the Lenders, Bondfield, or Zurich Insurance Company Limited ("**Zurich**"); or (iii) in respect of the Design and Construction Contract; or, (iv) in respect of any pre-existing claims, demands, or liabilities by or to ProjectCo, Bondfield Construction Company Limited ("**BCCL**"), or any of their respective subcontractors and suppliers retained prior to the date of this Order for the performance of the Design and Construction Contract;
- c. Declaring that the demand on the Performance Bond in the amount \$156,325,362.60 (the "**Performance Bond**") by the Receiver dated December 21, 2018 is valid, and that Zurich has elected and is bound by Option 2.4 of the Performance Bond, and that Zurich shall pay the Performance Bond Option 2.4 Payment Amount to the Receiver to be held in trust until further Order of the Court, upon receipt of a reasonable estimate of the Cost to Complete the Bonded Obligations, to be provided by Unity and the Administrative Agent to Zurich, or as otherwise directed by this Court;

- d. That the Construction Manager shall, effective on the date that it delivers a Notice of Project to the Ministry of Labour, be the “Constructor” under the *Occupational Health and Safety Act (Ontario)*, in respect of all works from the date of the Notice of Project until Tower Interim Completion;
- e. That all Trades providing labour, services or materials to the Project, including BCCL and subcontractors to BCCL, take instructions from and report to the Construction Manager notwithstanding any agreement or arrangement to the contrary;
- f. All other terms of the requested Order; and
- g. Such further and other relief as may be requested and this Court deems appropriate.

**THE GROUNDS FOR THE MOTION ARE:**

**Overview**

1. This matter relates to the St. Michael's Hospital Redevelopment Project (the “**Project**”). The Project involves the construction of the redevelopment of St. Michael’s Hospital and consists of building, in four phases, a new 17-storey patient care tower at the corner of Queen Street and Victoria Street, Toronto, construction of the new Shuter Wing, and renovations of existing space in the Donnelly Wing, the Cardinal Carter Wing and the Bond Wing.
2. The Project is structured as a P3 (Public Private Partnership) on a Design-Build-Finance model, and was awarded to ProjectCo by St. Michael’s Hospital acting with the assistance of Infrastructure Ontario (“**IO**”).

3. ProjectCo and BCCL entered into a Design and Construction Contract (the “**Construction Contract**”) for the design and build of the Project for a guaranteed fixed price of \$301,189,863.
4. Pursuant to a Credit Agreement made as of January 27, 2015 between ProjectCo as borrower, and the financial institutions and other entities from time to time parties thereto, (the “**Lenders**”), and the Agent (the “**Credit Agreement**”), the Lenders provided a credit facility to ProjectCo to finance the design and construction of the Project (the “**Credit Facility**”).
5. A milestone referred to as Tower Interim Completion (“**Tower Interim Completion**”), was to occur on November 27, 2017. Tower Interim Completion has been significantly delayed due to various defaults by and the financial distress of BCCL and ProjectCo.
6. Zurich issued two bonds in respect of the Project as required by the Credit Agreement:
  - i. the Performance Bond; and
  - ii. a Labour and Material Payment Payment Bond in the amount of \$142,113,966 (the “**L&M Bond**”).
7. On November 2, 2018, Unity issued ProjectCo a Default Notice alleging various defaults by ProjectCo and declaring ProjectCo to be in default under the Project Agreement.
8. On December 21, 2018, on application by the Agent, the Receiver was appointed pursuant to the Receivership Order.

9. Paragraph 28 of the Receivership Order specifically directed the Receiver to make a demand under the Performance Bond on behalf of ProjectCo. Demand was made on December 21, 2018.

#### **Zurich's Involvement in the Project**

10. Zurich has provided some financing and management of the Project in support of its Principal Bondfield. For example, Zurich retained Perini Management Services to oversee the Project as its agent, and contracted with EllisDon, a construction and building services company, to assist Bondfield.
11. In addition, Zurich has made payments to Bondfield's sub-contractors under the L&M Bond to address those sub-contractors' outstanding accounts.
12. Throughout its involvement, Zurich attended weekly construction update meetings and provided updates to the Unity Board's sub-committee overseeing the Project. Zurich also engaged EllisDon to prepare a bid for the completion of the Project as a whole.
13. From December 2018 to August 2019, Zurich was engaged in these activities to support Bondfield, and was advancing payments to Bondfield, EllisDon, Perini, and subcontractors.

#### **The Transition Framework and Construction Management/Payment Certifier Agreements**

14. The Performance Bond provides in Section 2 thereof that whenever the Principal (BCCL) is declared to be in default under the Construction Contract, Zurich shall within 21 days of its receipt of the declaration of default elect one of 4 options, including:

- 2.4 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.

15. The terms of the Performance Bond expressly require Zurich to elect one of the 4 options within 21 days of its receipt of the declaration of default. There was no waiver or extension of this obligation.
16. On August 22, 2019, counsel for Zurich wrote to the Receiver advising that it wished to elect to pay the remaining balance of the Bond Amount and cease its involvement in the Project.
17. Despite certain disputes between the parties, the parties have developed a transition framework in order to allow Zurich to pay the remaining amounts owing under the Performance Bond and cease its involvement in the Project, in a manner that does not lead to interruption to the Project.
18. Under the section 34.4(d) of the Project Agreement, in the event of a default by ProjectCo, without prejudice to Unity's rights under the agreement, Unity may, at ProjectCo's risk and expense, take such steps as Unity considers appropriate, either itself or by engaging others (including a third party or third parties) to take such steps, to perform or obtain the performance of ProjectCo's obligations under the Project Agreement.
19. In order to provide for an orderly transition of the Project from Zurich, and to obtain the performance of ProjectCo's obligations under the Project Agreement as contemplated by the remedy provided for under section 34.4(d) of the Project Agreement, it is necessary that the following experienced entities be retained:

- i. A qualified construction manager;
- ii. A payment certifier to oversee the progress of the works and certify payments for works provided in furtherance of Tower Interim Completion;
- iii. An architect and engineering firm to complete certain outstanding design works for the remainder of the Project;
- iv. New retainers and/or additional retainers of trades whose services are required to achieve Tower Interim completion and continue the on-going design, construction and renovation works commenced prior to Tower Interim Completion.

20. EllisDon has been identified as an appropriate entity to take on the role of construction manager through to Tower Interim Completion, given its expertise and familiarity with the Project based on the works it performed under its contract with Zurich. Similarly, NORR has been identified as an appropriate entity to take on the role of Payment Certifier. NORR too is familiar with the Project as it is the Project architect.

21. Further, to facilitate and ensure efficient project and construction management, a reporting structure is required which confirms that all Trades report to and take instruction from EllisDon in its new role as construction manager.

22. Similarly, to ensure compliance with all health and safety regulations, it is appropriate that EllisDon be the Constructor under the *Ontario Health and Safety Act*, in place of BCCL. Given its current financial circumstances, BCCL has limited resources at its disposal to carry out its statutory obligations under the *Ontario Health and Safety Act*. EllisDon is committed

to achieving a safe work environment, and is better positioned than BCCL to safeguard the health safety of the Project workers.

**Statutory and Other Grounds**

23. Rule 3, 37 and Rule 57 of the *Rules of Civil Procedure*;

24. Section 101 of the *Courts of Justice Act*;

25. Such further and other grounds as counsel may advise and this Honourable Court permits.

**THE FOLLOWING EVIDENCE WILL BE USED AT THE HEARING OF THE MOTION:**

- a) The Affidavit of Michael Keen, sworn December 19, 2019;
- b) Such further and other evidence as counsel may advise and this Court may permit.

December 19, 2019

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Lawyers for Unity Health Toronto

**TAB A**

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

THE HONOURABLE ) FRIDAY, THE 20<sup>TH</sup>  
 )  
JUSTICE ) DAY OF DECEMBER, 2019  
 )

**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

**ORDER**

**THIS MOTION**, made by the Unity for, *inter alia*, an Order lifting the stay of proceedings granted pursuant to the Receivership Order, to allow Unity to exercise certain remedial rights under the Project Agreement, on an interim basis, to facilitate the orderly continuation of the St. Michael's Hospital Redevelopment Project, in circumstances where the Cost to Complete the Bonded Obligations has not yet been determined, was heard this day at 330 University Ave in Toronto, Ontario.

**ON READING** the Affidavit of Michael Keen, sworn December 19, 2019 and on being advised of the consent of the Administrative Agent, Receiver, Zurich, BCCL, and Infrastructure Ontario, and on hearing the submissions of counsel for the parties:

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Affidavit of Michael Keen, sworn December 19, 2019, is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that in this Order the following terms have the following meanings:

- (a) “Administrative Agent” means Bank of Montreal.
- (b) “Construction Manager” means EllisDon Ltd. and any successor.
- (c) “Construction Management Contract” means the Construction Management Contract to be entered into between Unity and the Construction Manager, under which the Construction Manager shall oversee and perform or obtain the performance, by the Construction Manager and/or the Trades, of all remaining work under the Project Agreement, up to and until Tower Interim Completion, and the on-going design, construction, infrastructure improvement and renovation works commenced prior to Tower Interim Completion, and being performed concurrent with works to achieve Towner Interim Completion;
- (d) “Court” means the Ontario Superior Court of Justice (Commercial List);
- (e) “Cost to Complete the Bonded Obligations” means sum of (i) all amounts reasonably incurred to achieve Tower Interim Completion pursuant to this order; and (ii) the Obligees’ reasonable estimate of the Cost to complete the Bonded Obligations in addition to Tower Interim Completion, to be obtained prior to Tower Interim Completion.
- (f) “Credit Agreement” means the Credit Agreement made as of January 27, 2015 between ProjectCo, the Lenders, and the Administrative Agent, and includes without limitation the Security Documents as defined therein.

- (g) “Design Agreements” means the design agreement to be entered into, if required, between Unity and NORR, and the design agreement to be entered into, if required, between Unity and an engineering firm, concerning the completion, revision, and finalization of all designs contemplated by the Project Agreement.
- (h) “Design and Construction Contract” means the Design and Construction Contract made as of January 27, 2015, between ProjectCo and BCCL.
- (i) “Lenders” means the syndicate of Lenders financing the Project and represented by the Administrative Agent.
- (j) “Lenders’ Direct Agreement” means the Lenders’ Direct Agreement made as of the day of January 27, 2015, between St. Michael’s Hospital (now Unity), the Administrative Agent, and Project Co.
- (k) “NORR” means NORR Architects and Engineers Ltd., and any successor.
- (l) “Obligees” means the Obligees under the Performance Bond including ProjectCo as the original Obligee, and Administrative Agent and Unity as additional Obligees.
- (m) “Payment Certifier Agreement” means the Payment Certifier Agreement to be entered into between Unity and NORR concerning the certification of all payments to be made to the Trades and to the Construction Manager for self-performed works, up to and until Tower Interim Completion.
- (n) “Performance Bond” means the Public Private Partnership Performance Bond No. 6343517 with Multiple Obligee Rider issued by Zurich.
- (o) “Performance Bond Amount” means CDN \$156,325,362,60.
- (p) “Performance Bond Option 2.4 Payment Amount” means the lesser of the Performance Bond Remainder Payment Amount and the Cost to Complete the Bonded Obligations;

- (q) “Performance Bond Remainder Payment Amount” means the amount calculated by subtracting from the Performance Bond Amount all payments which have been made by Zurich pursuant to and in accordance with the Performance Bond at the time the Performance Bond Remainder Amount is determined.
- (r) “Project” means the St. Michael’s Hospital Redevelopment Project;
- (s) “Project Agreement” means the Project Agreement made as of January 27, 2015, between Unity and ProjectCo.
- (t) “ProjectCo” means 2442931 Ontario Inc.
- (u) “Receiver” means Alvarez & Marsal Canada Inc., solely in its capacity as court appointed receiver of ProjectCo, and not in its personal or corporate capacity.
- (v) “Receivership Order” means the order of the Court dated December 21, 2018 appointing the Receiver, as may be amended from time to time.
- (w) “Redevelopment Project Agreements” means the Project Agreement, the Credit Agreement, and the Lenders’ Direct Agreement.
- (x) “Supplemental Agreements” means, collectively, the Payment Certifier Agreement, the Construction Management Contract, the Design Agreements, the Trade Agreements, as such agreements may be amended or supplemented from time to time.
- (y) “Tower Interim Completion” has the meaning specified in the Project Agreement.
- (z) “Trade Agreements” means any agreement entered into by Unity with a Trade to provide labour, services, or materials to the Project from and after the date hereof to Tower Interim Completion.

- (aa) “Trades” means suppliers of labour, services, or materials to the Project from and after the date hereof to Tower Interim Completion, and may include BCCL where it enters into a Trade Agreement to provide labour, services, or materials to the Project from and after the date hereof to Tower Interim Completion and any other trades, subcontractors, or suppliers retained by Unity or the Construction Manager to provide labour, services or materials to the Project from and after the date hereof to Tower Interim Completion.
- (bb) “Unity” means Unity Health Toronto, formerly St. Michael’s Hospital.
- (cc) “Zurich” means Zurich Insurance Company Limited.

3. **THIS COURT ORDERS** that the stay of proceedings against ProjectCo, granted pursuant to the Receivership Order, is hereby lifted for the purpose of permitting Unity to exercise the remedy pursuant to Section 34.4(d) of the Project Agreement to engage and directly make payment to, at ProjectCo’s risk and expense, and by taking commercially reasonable steps to mitigate such costs: (i) the Construction Manager, pursuant to and in accordance with the Construction Management Contract; (ii) NORR, pursuant to and in accordance with the Payment Certifier Agreement; (iii) NORR and/or an engineering firm pursuant to and in accordance with Design Agreements; and (iv) Trades, pursuant to and in accordance with any Trade Agreement which may be necessary to enter into to achieve Tower Interim Completion and to continue the on-going design, construction, infrastructure improvement and renovation works commenced prior to Tower Interim Completion, and being performed concurrent with works to achieve Tower Interim Completion.

4. **THIS COURT ORDERS** that Unity shall incur no liability or obligation as a result of carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or failure to take commercially reasonable steps to mitigate costs, including, without limitation, it shall (subject only to the *Construction Act* (Ontario)) have no liability or obligation as a result of carrying out the provisions of this Order: (i) in respect of any of ProjectCo’s, the Construction Manager’s, NORR’s, counter-

parties to the Design Agreements, or Trades' obligations; or, (ii) in respect of the Design and Construction Contract; or, (iii) in respect of any pre-existing claims, demands, or liabilities by or to ProjectCo, BCCL, or any of their respective subcontractors and suppliers retained prior to the date of this Order for the performance of the Design and Construction Contract.

5. **THIS COURT DECLARES** that the demand on the Performance Bond by the Receiver dated December 21, 2018 is valid, and that Zurich has elected and is bound by Option 2.4 of the Performance Bond, and that Zurich shall within 30 calendar days upon receipt of a reasonable estimate of the Cost to Complete the Bonded Obligations, to be obtained and provided by Unity and the Administrative Agent to Zurich, pay the Performance Bond Option 2.4 Payment Amount in accordance with the terms of the Performance Bond, to the Receiver to be held in trust and not used or disbursed until further Order of this Court, provided that the protections and limitations of liability in favour of the Receiver provided for in the Receivership Order shall continue to apply.

6. **THIS COURT ORDERS** that the Performance Bond Option 2.4 Payment Amount shall be subject only to calculation in accordance with the terms of the Performance Bond, being (a) the reasonable estimate of the Cost to Complete the Bonded Obligations, and (b) the quantum of all payments determined to be properly made by Zurich in accordance and pursuant to the Performance Bond prior to the date hereof (the "**Potential Disputed Matters**"), which if not agreed to by Zurich, Unity and the Administrative Agent, will be subject to resolution by further Order of Court.

7. **THIS COURT ORDERS** that the procedure for determining any issues relating to the Potential Disputed Matters shall be determined at a case conference to be scheduled before the Court.

8. **THIS COURT ORDERS** that subject to paragraphs 4 and 5, all payments made by Unity in respect of the Supplemental Agreements and any other payments for labour, services, materials, or expenses incurred, to achieve Tower Interim Completion and to continue the on-going design, construction, infrastructure improvement and renovation works commenced prior to Tower Interim Completion, and being performed concurrent

with works to achieve Towner Interim Completion, shall first be reimbursed from the Performance Bond Option 2.4 Payment Amount, failing which it shall be set off by Unity against the Tower Interim Completion Payment (as defined in the Project Agreement), pursuant and subject to the terms of the Project Agreement.

9. **THIS COURT ORDERS** that the Construction Manager shall, effective on the date that it delivers a Notice of Project to the Ministry of Labour, be the “Constructor” under the *Occupational Health and Safety Act (Ontario)*, in respect of all works from the date of the Notice of Project until Tower Interim Completion.

10. **THIS COURT ORDERS** that all Trades providing services or materials to the Project under a Trade Agreement shall not take instructions or report to Zurich, BCCL, ProjectCo, or the Lenders, but shall take instructions from and report to the Construction Manager notwithstanding any agreement or arrangement to the contrary.

11. **THIS COURT ORDERS** that nothing in this Order shall amend Unity’s rights of set-off under the Project Agreement, the Lenders security in the Performance Bond and the proceeds thereof, or the rights of the Obligees in the Performance Bond or the proceeds thereof.

12. **THIS COURT ORDERS THAT** this Order is made on an interim basis, subject to further Order of the Court, and is without prejudice to the right of any party to apply to the Court for further or other directions or relief, which application may include to exercise any rights or remedies under any of the Redevelopment Project Agreements, and including, without limitation, Unity’s right to apply to the Court to exercise its right to terminate the Project Agreement.

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BANK OF MONTREAL, AS ADMINISTRATIVE AGENT

and

2442931 ONTARIO INC.

Applicant


Respondent

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

***ONTARIO***  
**SUPERIOR COURT OF JUSTICE**  
**(Commercial List)**

Proceeding commenced at Toronto

**O R D E R**

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**TAB 2**

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

**IN THE MATTER OF THE RECEIVERSHIP OF  
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- and -

**2442931 ONTARIO INC.**

Respondent

**AFFIDAVIT OF MICHAEL KEEN**

(Sworn the 19<sup>th</sup> day of December, 2019)

I, Michael Keen, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am Vice-President, Planning & Facilities and Chief Planning Officer for Unity Health Toronto. Unity Health Toronto is a network of health care facilities, comprising of St. Michael's Hospital ("SMH"), Providence Healthcare and St. Joseph's Health Centre. I have held this position since 2019. Prior to that, I was the Executive Director, Planning at SMH since 2017. In my capacity as Vice-President, Planning & Facilities and Chief Planning Officer, I have been and am responsible for overseeing the St. Michael's Hospital re-development project (the "**Project**").

2. I have knowledge of the matters to which I hereinafter depose, except where I indicate that such information has been obtained from other sources or documents, in which case I believe such information to be true.

### **The Parties**

3. Unity Health Toronto operates St. Michael's Hospital in Toronto, Ontario. St. Michael's Hospital provides care to patients in downtown Toronto, and the city's surrounding communities. It also provides medical education to future health care professionals in 27 academic disciplines. Critical care and trauma, heart disease, neurosurgery, diabetes, cancer care, care of the homeless, pediatrics (including neonatal intensive care) and global health are among the hospital's recognized areas of expertise.

4. SMH, with the assistance of Infrastructure Ontario, initiated the Project, which is structured as a Design-Build-Finance model.

5. Pursuant to a public procurement process, the Project was awarded to 2442931 Ontario Inc. ("**Project Co**"), a special purpose entity incorporated and wholly owned by Bondfield Construction Company Limited ("**Bondfield**") for the purposes of bidding on and completing the Project. Bondfield is the construction contractor on the Project.

6. To finance the Project, Project Co entered into a Credit Agreement with a number of financial institutions (the "**Lenders**"), represented by the Bank of Montreal ("**BMO**") as the Administrative Agent on behalf of the Lenders.

7. Bondfield became financially distressed in the Fall of 2018. Ultimately, Alvarez & Marsal Canada Inc. ("**A&M**" or the "**Receiver**") was appointed as a receiver of Project Co by Court Order

dated December 21, 2018. The central purpose of the appointment was to allow Project Co via the Receiver to make a demand on the Performance Bond (as described further below).

### **Overview of the Project**

8. The Project includes, among other things, the design and construction of a 17-storey patient care tower at the corner of Queen and Victoria Streets in Toronto, Ontario, which is named the Peter Gilgan Patient Care Tower (the “**Tower**”).

9. The Tower will connect the existing hospital wings, creating a unified and more efficient hospital campus. It will also provide state-of-the-art facilities for programs now significantly challenged by older, obsolete, and legacy spaces, including respirology, orthopedics, oncology and critical care, which are no longer adequate to optimally service the hospital’s community.

10. The Project also includes creating a new ambulatory centre on three floors of an adjacent wing to house programs including Neurophysiology, Perioperative, Multiple Sclerosis, Vascular and Ophthalmology clinics. Additional Project deliverables include:

- (a) New operating rooms, each big enough to include imaging equipment such as Magnetic Resonance Imaging (MRI) or Computed Tomography (CT) scans, which are an essential element of modern surgery.
- (b) Enlarged, state-of-the art facilities for orthopedics, coronary care and respirology, and the medical/surgical intensive care unit.
- (c) All in-patient rooms in the new tower will be private, meaning more privacy and better infection control, with space for families, leading to better outcomes.

- (d) An expanded best-in-class Emergency Department that will be better able to serve the growing volume of patients in downtown Toronto and surrounding areas, in the most efficient and up-to-date manner, improving care and reducing wait times. Currently, SMH experiences 80,000 visits per year in a space designed to accommodate 45,000, with volumes continuing to grow.
  - (e) A new, main door to the hospital at the corner of Queen and Victoria Streets. The Tower will tie into adjacent buildings, and its lobby will connect on the first floor to a pedestrian highway running through the entire hospital to improve patient and visitor flow.
11. The goal of the Project is for St. Michael's Hospital to be Canada's premier critical care hospital and to improve and provide state of the art patient care and services, reduce wait times, and provide patients with more privacy and comfort during admissions.
12. However, and regrettably, the Project has experienced significant delays, and Project Co and Bondfield committed numerous and continuing defaults under their respective agreements, including by failing to achieve a critical Project milestone, Tower Interim Completion by the Scheduled Tower Interim Completion Date. The achievement of Tower Interim Completion will mean the Tower will be ready for use for patient care.
13. The continued delays in completing the construction of the Project exponentially undermines the ability of SMH to provide necessary services to its patient community. Until the Project is complete, SMH will be forced to continue to rely on legacy facilities, outdated for their useful purpose, that continue to age, which increases the risk as time goes by of the ability to service SMH's patient population.

14. This strain placed on SMH's legacy facilities becomes greater with each passing day, both in the respect of patients' ability to access care and infection containment/control (which becomes particularly concerning during Toronto's lengthy flu-season). Until the Project is complete, SMH will be unable to provide optimal care to members of the community.

#### **The Agreements Relating to the Project**

15. SMH and Project Co entered into a **Project Agreement** for the design, build, and financing of the Project. The Project Agreement provides for a guaranteed fixed price of \$301,189,863. Attached as **Exhibit "A"** is a copy of the Project Agreement, excluding Schedules, other than Schedule 1.

16. Project Co and Bondfield entered into a Design and Construction Contract (the "**Construction Contract**"). Attached as **Exhibit "B"** is a copy of the Construction Contract, excluding Schedules.

17. In addition, Zurich Insurance Company Limited ("**Zurich**") issued a P3 Performance Bond, with multiple obligee rider, in the amount of \$156,325,362.60. Zurich is the Surety on the Performance Bond, Bondfield is the principal, Project Co is the obligee, and SMH and BMO, as the Administrative Agent for the Lenders, are both additional obligees under the Performance Bond. Attached as **Exhibit "C"** is a copy of the Performance Bond, together with the multiple obligee rider.

18. Zurich also issued a Labour and Materials Payment Bond in the amount of \$142,113,966 (the "**L&M Bond**"). As with the Performance Bond, Bondfield is the Principal and Zurich is the Surety. SMH and BMO are Obligees pursuant to a Multiple Obligee Rider which is attached to

and forms a part of the L&M Bond. Attached as **Exhibit “D”** is a copy of the L&M Bond with the Multiple Obligee Rider.

**The Appointment of the Receiver for Project Co**

19. As referred to above, the Project has unfortunately experience significant delays, and both Project Co and Bondfield committed defaults under their respective Project contracts, which are continuing. On November 2, 2018, SMH issued a Default Notice to Project Co pursuant to the Project Agreement. Attached as **Exhibit “E”** is a copy of the Default Notice.

20. On December 21, 2018, BMO, as the Administrative Agent for the Lenders, brought an Application to this Court for a stay of proceedings, including under the Project Agreement, and the appointment of a Receiver to make a demand on the Performance Bond and facilitate the prompt resumption of the construction work and the completion of the Project.

21. Further to that Application, A&M was appointed as a receiver of Project Co by Court Order dated December 21, 2018 (the “**Receivership Order**”). Attached as **Exhibit “F”** is a copy of the Receivership Order.

22. The Receiver thus became authorized to call on the Performance Bond on behalf of Project Co. The Receivership Order also created a stay of the exercise of any rights against Project Co, save for certain limited exceptions.

23. On December 21, 2018, the Receiver made a demand on the Performance Bond. Attached as **Exhibit “G”** is a copy of the Receiver’s demand on the Performance Bond.

### **Zurich's Involvement in the Project**

24. Zurich has provided some financing and management of the Project in support of its Principal Bondfield. For example, Zurich retained Perini Management Services to oversee the Project as its agent, and contracted with EllisDon, a construction and building services company, to assist Bondfield.

25. In addition, Zurich has made payments to Bondfield's sub-contractors under the L&M Bond to address those sub-contractors' outstanding accounts.

26. Throughout its involvement, Zurich attended weekly construction update meetings and provided updates to the SMH Board's sub-committee overseeing the Project. Zurich also engaged EllisDon to prepare a bid for the completion of the Project as a whole.

27. From December 2018 to August 2019, Zurich was engaged in these activities to support Bondfield, and was advancing payments to Bondfield, EllisDon, Perini, and subcontractors.

### **The Transition Framework and Construction Management/Payment Certifier Agreements**

28. On August 22, 2019, counsel for Zurich wrote to the Receiver advising that it wished to elect Option 2.4 under the Performance Bond to pay the remaining balance of the Bond Amount and cease performing under the Performance Bond. Attached at **Exhibit "H"** is a copy of Zurich's August 22, 2019 letter.

29. Despite certain disputes between the parties, they have nevertheless been working to develop a transition framework in order to allow Zurich to pay the remaining amounts owing under

the Performance Bond and cease its involvement in the Project, in a manner that does not lead to interruption to the Project.

30. Under the section 34.4(d) of the Project Agreement, in the event of a default by Project Co, without prejudice to SMH's rights under the Project Agreement, SMH may, at Project Co's risk and expense, take such steps as SMH considers appropriate, either itself or by engaging others (including a third party or third parties) to take such steps, to perform or obtain the performance of Project Co's obligations under the Project Agreement.

31. In order to provide for an orderly transition of the Project from Zurich, and to obtain the performance of Project Co's obligations under the Project Agreement as contemplated by the remedy provided for under section 34.4(d) of the Project Agreement, it is necessary that the following experienced entities be retained:

- (a) A qualified construction manager;
- (b) A payment certifier to oversee the progress of the works and certify payments for works provided by trades and/or any self performed work of the construction manager in furtherance of Tower Interim Completion;
- (c) An architect and engineering firm to complete certain outstanding design works for the remainder of the Project;
- (d) New retainers and/or additional retainers of trades whose services are required to achieve Tower Interim Completion.

32. SMH is prepared to enter into such contracts, in accordance with Section 34.4(d) of the Project Agreement, at the expense and risk of Project Co, in order to facilitate the achievement of Tower Interim Completion, and avoid the significant consequences of any further delay to the Project.

33. SMH has identified EllisDon as an appropriate entity to take on the role of construction manager through to Tower Interim Completion, given its expertise and familiarity with the Project based on the works it performed under its contract with Zurich. Similarly, SMH has identified NORR Architects as an appropriate entity to take on the role of Payment Certifier. NORR too is familiar with the Project as it is the Project architect.

34. Further, because Bondfield/Project Co employees continues to remain on site, the Bondfield subcontractors require clarity as to what entity they should be reporting to and taking instruction from (i.e., either Bondfield/Project Co or EllisDon). Such clarification will avoid uncertainty and disruption to the works. It is my belief that a Court direction that the Bondfield subcontractors may enter into new contracts with SMH and then take instructions from and report to the EllisDon will clarify and facilitate EllisDon's role as Construction Manager, which will lead to more efficient project and construction management, and reduce the likelihood of further delays to the Project. Such reporting structure will also facilitate EllisDon's responsibilities for health and safety obligations, as is further particularized below.

**Occupational Health and Safety Obligations**

35. The Ontario *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 (the “**Act**”) establishes an owner’s obligations to protect workers from health and safety hazards while on the job, including construction projects.


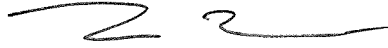
36. I understand that the Act provides for there to be a **Constructor** on a project (as defined by the Act) to ensure that the measures and procedures prescribed by this Act and the regulations are carried out on the project, that every employer and every worker performing work on the project complies with the Act and the regulations; and that the health and safety of workers on the project is protected.

37. Currently, Bondfield is the Constructor on the Project. However, given its current financial circumstances, Bondfield has limited resources at its disposal to carry out its statutory obligations under the Act. As a result, SMH is concerned that Bondfield/Project Co may be unable to effectively continue this critical role.

38. The health and safety of the workers on the Project has been and remains a significant priority for SMH. In order to ensure that workers’ health and safety is not compromised, EllisDon should replace Bondfield in its role Constructor. It is my belief that, EllisDon, a world-class construction management firm that is committed to achieving a safe work environment, is better positioned than Bondfield to safeguard the health safety of the Project workers.

39. I swear this Affidavit in support of the Unity Health’s motion and for no other or improper purpose.

AFFIRMED BEFORE ME at the City  
of Toronto, in the Province of Ontario,  
on December 19<sup>th</sup>, 2019.

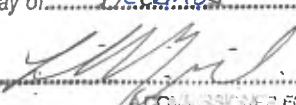
  
\_\_\_\_\_  
Commissioner for taking affidavits

Michael Keen

MT DOCS 19934060

**Laura Christine Alford, a Commissioner, etc.,  
Province of Ontario, while a Student-at-Law.  
Expires May 14, 2021.**

**TAB A**

This is Exhibit A referred to in the  
affidavit of Michael Keen  
sworn before me, this 19<sup>th</sup>  
day of December, 2019  
  
COMMISSIONER FOR TAKING AFFIDAVITS

Laura Christine Alford, a Commissioner, etc.,  
Province of Ontario, while a Student-at-Law.  
Expires May 14, 2021.

**PROJECT AGREEMENT  
(REDACTED VERSION)**

**TO DESIGN, BUILD AND FINANCE  
THE ST. MICHAEL'S HOSPITAL  
REDEVELOPMENT PROJECT**

**CONFIDENTIAL**

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**SCHEDULES**

<b>Schedule No.</b>		<b>Description</b>
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Schedule 2	-	Completion Documents
Schedule 3	-	Works Scheduling Requirements
Schedule 4	-	Lenders' Direct Agreement
Schedule 5	-	Construction Contractor's Direct Agreement
Schedule 6	-	Independent Certifier Agreement
Schedule 7	-	Subcontractor's Direct Agreement
Schedule 8	-	Project Co Parties
Schedule 9	-	Key Individuals
Schedule 10	-	Review Procedure
Schedule 11	-	Design Quality Plan and Construction Quality Plan
Schedule 12	-	Performance Guarantee of Construction Guarantor
Schedule 13	-	Project Co Proposal Extracts
Schedule 14	-	Outline Commissioning Program
Schedule 15	-	Output Specifications
Schedule 16	-	Title Encumbrances
Schedule 17	-	Works 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	-	Financial Model
Schedule 25	-	Insurance and Performance Security Requirements
Schedule 26	-	Record Provisions
Schedule 27	-	Dispute Resolution Procedure
Schedule 28	-	Standby Letter of Credit
Schedule 29	-	Refinancing
Schedule 30	-	Insurance Trust Agreement
Schedule 31	-	Project Co Information
Schedule 32	-	Trust Account Agreement
Schedule 33	-	Energy Matters

**THIS PROJECT AGREEMENT** is made as of the • day of •, 2014.

**BETWEEN:**

**ST. MICHAEL'S HOSPITAL**, a non-share capital corporation incorporated under the laws of Ontario

("SMH")

**AND:**

**2442931 ONTARIO INC., [REDACTED]**

("Project Co")

**WHEREAS:**

- A. SMH, with the assistance of Ontario Infrastructure and Lands Corporation ("IO"), wishes to procure the design, construction and financing of the Facility (the "Project").
- B. SMH and Project Co wish to enter into this project agreement (the "Project Agreement") which sets out the terms and conditions upon which Project Co shall perform the Works.
- C. The overriding priorities of SMH in entering into and implementing this Project Agreement are the health and safety of the patients of the Facility and the Existing Facilities and their healthcare needs, and the provision of first-rate healthcare services and Project Co recognizes and understands that the health and safety of the patients and staff of the Facility and the Existing Facilities are, at all times, paramount.
- D. The Project will proceed as an alternative financing and procurement project and complies with the principles set out in MEDEI's Building a Better Tomorrow: An Infrastructure Planning, Financing and Procurement Framework for Ontario's Public Sector (the "IPFP Framework").
- E. The IPFP Framework establishes 5 fundamental principles which guide the financing and procurement of public infrastructure projects in Ontario:
  - 1. The public interest is paramount.
  - 2. Value for money must be demonstrable.
  - 3. Appropriate public control/ownership must be preserved.
  - 4. Accountability must be maintained.
  - 5. All processes must be fair, transparent and efficient.

- F. The IPFP Framework states that, consistent with the principle of appropriate public ownership/control, public ownership of assets will be preserved in the hospital sector.
- G. MOHLTC is responsible for the development, coordination, maintenance and funding of health services, including a balanced and integrated system of hospitals, nursing homes, laboratories, ambulances, other health facilities and providers to meet the health needs of the people of Ontario.
- H. There are a number of statutes which govern the operation and administration of hospitals in Ontario. Under the *Public Hospitals Act* (Ontario), certain actions of hospitals can only be undertaken with the approval of the Minister of Health and Long-Term Care. Subsection 4(3) of the *Public Hospitals Act* (Ontario) states that no additional building or facilities shall be added to a hospital until the plans therefore have been approved by the Minister. Under subsection 4(2) of the *Public Hospitals Act* (Ontario), no institution, building or other premises or place shall be operated or used for the purposes of a hospital unless the Minister has approved the operation and or use of the premises or place for that purpose.
- I. The Minister of Health and Long-Term Care has powers to protect the public interest regarding matters relevant to the quality of the management and administration of a hospital, the proper management of the health care system in general, the availability of financial resources for the management and delivery of health care services, the accessibility of services in the community where the hospital is located and the quality of care and treatment of patients.
- J. Project Co 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 operational environment.
- K. With a view to ensuring that both Parties are able to properly and effectively discharge their respective duties, functions and responsibilities under Applicable Law, it is the intent that SMH and Project Co work collaboratively, responsibly and cooperatively throughout the Project Term.

**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) This Project Agreement shall be interpreted in accordance with Schedule 1 – Definitions and Interpretation.

- (b) This Project Agreement is comprised of this executed agreement and the following documents, all of which are hereby incorporated by reference into and form part of this Project Agreement:

<b>Schedule No.</b>	<b>Description</b>
Schedule 1	- Definitions and Interpretation
Schedule 2	- Completion Documents
Schedule 3	- Works Scheduling Requirements
Schedule 4	- Lenders' Direct Agreement
Schedule 5	- Construction Contractor's Direct Agreement
Schedule 6	- Independent Certifier Agreement
Schedule 7	- Subcontractor's Direct Agreement
Schedule 8	- Project Co Parties
Schedule 9	- Key Individuals
Schedule 10	- Review Procedure
Schedule 11	- Design Quality Plan and Construction Quality Plan
Schedule 12	- Performance Guarantee of Construction Guarantor
Schedule 13	- Project Co Proposal Extracts
Schedule 14	- Outline Commissioning Program
Schedule 15	- Output Specifications
Schedule 16	- Title Encumbrances
Schedule 17	- Works 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	- Financial Model
Schedule 25	- Insurance and Performance Security Requirements
Schedule 26	- Record Provisions
Schedule 27	- Dispute Resolution Procedure
Schedule 28	- Standby Letter of Credit
Schedule 29	- Refinancing
Schedule 30	- Insurance Trust Agreement
Schedule 31	- Project Co Information
Schedule 32	- Trust Account Agreement
Schedule 33	- Energy Matters

- (c) The documents comprising this Project Agreement 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.
- (d) Except for those parts of Project Co's proposal which are incorporated by reference into this Project Agreement by the Project Co Proposal Extracts, on Financial Close the

Request for Proposals and Project Co's proposal shall be superseded entirely by this Project Agreement and rendered null and void, and shall not be relied upon or used by Project Co, SMH 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 Works, any obligations or liabilities of Project Co, or anything else contained in this Project Agreement.

- (e) Unless it is specifically provided that a consent, approval or satisfaction is in the sole discretion of SMH, no consent, approval or satisfaction of SMH or the SMH Representative shall be unreasonably withheld or delayed.
- (f) 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 Project Co Representative shall be unreasonably withheld or delayed.
- (g) The organization of the Output Specifications into divisions, sections and parts shall not control Project Co in dividing the Works among the Project Co Parties or in establishing the extent of the Works 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 this Project Agreement, 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 this Project Agreement signed by the Parties and Variation Confirmations shall govern and take precedence only over those specific provisions of this Project Agreement 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 this Project Agreement;
  - (iv) Schedule 1 – Definitions and Interpretation;
  - (v) Schedule 27 – Dispute Resolution Procedure;
  - (vi) Part 4 of Schedule 15 – Output Specifications;
  - (vii) Schedule 15 – Output Specifications (excluding Part 4);
  - (viii) Schedule 25 – Insurance and Performance Security Requirements;
  - (ix) Schedule 22 – Variation Procedure;

- (x) Schedule 10 – Review Procedure;
  - (xi) Schedule 14 – Outline Commissioning Program;
  - (xii) Schedule 11 – Design Quality Plan and Construction Quality Plan;
  - (xiii) Schedule 29 – Refinancing;
  - (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); and
  - (xvii) Schedule 13 – Project Co 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 Works, the provision that applies to the specific part of the Works shall govern for that specific part of the Works.
- (c) If any ambiguity, conflict or inconsistency is not readily resolved by the foregoing provisions of this Section 1.2, then Project Co or SMH, 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) SMH and Project Co shall comply with the determination of the SMH Representative pursuant to this Section 1.2 unless SMH or Project Co 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 Conflict of Documents**

- (a) In the event of any ambiguities, conflicts or inconsistencies between this Project Agreement and the Lenders' Direct Agreement, the Lenders' Direct Agreement shall prevail. Notwithstanding the foregoing, if there is any right or remedy in favour of SMH set out in the Lenders' Direct Agreement or any part thereof which is not set out or provided for in the Project Agreement, such additional right or remedy shall not constitute an ambiguity, conflict or inconsistency.

### **1.4 Legal Requirements**

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

**2. COMMERCIAL CLOSE AND FINANCIAL CLOSE**

**2.1 Effective Date**

- (a) The provisions of Sections 1.1, 1.2, 1.4, 2.1, 2.2, 2.3, 2.4, 3.1, 4.15 to 4.20, 5 to 15, 16.5, 17 to 23, 25 to 29, and 39 to 50 and Schedules 1, 2, 8 to 13, 16, 18, 19, 22, and 24 to 28 of this Project Agreement will come into effect on the date of this Project Agreement ("**Commercial Close**"). All other provisions and schedules will come into effect only on Financial Close.

**2.2 Standby Letter of Credit**

- (a) On the date of this Project Agreement, Project Co shall deliver, or cause to be delivered, to SMH an irrevocable standby letter of credit (the "**Standby Letter of Credit**") in the amount of \$[REDACTED] substantially in the form of Schedule 28 – Standby Letter of Credit. Project Co may, with the consent of SMH, which consent may be withheld in the sole discretion of SMH, provide multiple irrevocable standby letters of credit delivered from National Bank of Canada as approved and confirmed by SMH (each a "**Letter of Credit Provider**") in an amount totalling \$[REDACTED] and each substantially in the form of Schedule 28 – Standby Letter of Credit. For the purposes of this Section 2.2, each of the multiple irrevocable standby letters of credit is referred to as a Standby Letter of Credit.
- (b) Unless a Standby Letter of Credit is drawn by SMH in accordance with the provisions of this Project Agreement, SMH shall release and deliver the Standby Letters of Credit to Project Co on Financial Close.
- (c) Project Co shall ensure that the Standby Letters of Credit (and any replacement therefor) is renewed prior to its expiry date if, as at such date, Financial Close will not, or may reasonably be expected not to, have occurred.
- (d) If Project Co delivers multiple Standby Letters of Credit from multiple Letter of Credit Providers in accordance with Section 2.2(a) with the delivery of multiple Standby Letters of Credit by Letter of Credit Providers, Project Co acknowledges and agrees that:
- (i) SMH may draw upon any Standby Letter of Credit provided by any Letter of Credit Provider in any specified rateable amount;
  - (ii) SMH may draw on any Standby Letter of Credit provided by any Letter of Credit Provider in a disproportionate amount to such Letter of Credit Providers' contribution to security;
  - (iii) SMH may draw upon any Standby Letter of Credit provided by any Letter of Credit Provider even in the event that such Letter of Credit Provider is no longer a Project Co Party; and

- (iv) The provision of multiple Standby Letters of Credit shall not in any way prejudice or adversely affect the rights of SMH to draw on the Standby Letter(s) of Credit in accordance with this Project Agreement, including in a circumstance where the default giving rise to SMH's right to draw on the Standby Letter(s) of Credit is not the result of any act or omission of the Letter of Credit Provider(s) whose Standby Letter of Credit is drawn upon.

### **2.3 Financial Close**

- (a) No later than 30 days prior to the Financial Close Target Date, Project Co will deliver to SMH drafts of all documents referred to in Section 1 of Schedule 2 - Completion Documents.
- (b) On or before the Financial Close Target Date:
  - (i) Project Co shall deliver to SMH the documents referred to in Section 1 of Schedule 2 - Completion Documents; and
  - (ii) SMH shall deliver to Project Co the documents referred to in Section 2 of Schedule 2 - Completion Documents.
- (c) If Project Co fails to deliver to SMH any of the documents referred to in Section 1 of Schedule 2 - Completion Documents by the Financial Close Target Date (other than as a direct result of a breach by SMH of its obligations under Section 2.3(b)(ii)) and SMH does not waive such requirement, SMH will be entitled to draw on the Standby Letter of Credit immediately and to retain the lesser of (A) the full amount of the Standby Letter of Credit, and (B) the difference between the Guaranteed Price and the price that SMH is able to obtain from another contractor for the Works, together with all costs reasonably incurred by SMH to enter into binding agreements with such other contractor, and to retain the proceeds thereof as liquidated damages, and may terminate this Project Agreement in its entirety by written notice having immediate effect. 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 happening of the specified event. Such payment shall constitute full and final settlement of any and all damages that may be claimed by SMH as a result of Project Co not achieving Financial Close. The Parties 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.
- (d) As contemplated under Section 10.3.2 of the Request for Proposals, Project Co shall, no later than 10 days following the receipt of written instructions from SMH given on or after Financial Close, pay the Design and Bid Fee amount plus, for clarity, any applicable HST, to each of the eligible unsuccessful Proponents (as that term is defined in the Request for Proposals) as directed by SMH. If Project Co is directed to pay the Design and Bid Fee to fewer than two Proponents, then Project Co shall revise the Financial Model prior to Financial Close to reflect such change.

- (e) If SMH fails to deliver to Project Co any of the documents referred to in Section 2 of Schedule 2 - Completion Documents by the Financial Close Target Date (other than as a direct result of a breach by Project Co of its obligations under Section 2.3(b)(i)) and Project Co does not waive such requirement, Project Co will be entitled to the return of the Standby Letter of Credit and to terminate this Project Agreement in its entirety by written notice having immediate effect.

## **2.4 Disruption in Financial Markets**

- (a) If Financial Close cannot be achieved by the Financial Close Target Date by reason solely of a Severe Market Disruption, subject to Project Co's obligation to renew the Standby Letter of Credit pursuant to Section 2.2, the Financial Close Target Date will be extended until the date falling 10 Business Days (or such other period as the Parties agree, acting reasonably) after the date on which such Severe Market Disruption ceases.
- (b) If a Severe Market Disruption exists, then, at any time before such Severe Market Disruption ceases and prior to Financial Close, SMH may in its sole discretion either:
  - (i) terminate this Project Agreement in its entirety by written notice having immediate effect; or
  - (ii) direct Project Co to assign to SMH and SMH will assume:
    - (A) the Project Agreement, and all of Project Co's right, title and interest in the Project Data, the Intellectual Property Rights and the Project Co Permits, Licences, Approvals and Agreements; and
    - (B) those contracts between Project Co and any Project Co Party which SMH elects to be assigned.
- (c) If SMH exercises its rights pursuant to Section 2.4(b), and, provided Project Co has, if directed, delivered the assignments provided for in Section 2.4(b)(ii)(A) and (B) above, Project Co will be entitled to the return of its Standby Letter of Credit and to payment of an amount equal to the Design and Bid Fee pursuant to Section 10.3.2 of the Request for Proposals plus [REDACTED] of such fee. SMH's obligation to return the Standby Letter of Credit and to pay such fee shall be contingent on the receipt of a waiver, in form and substance satisfactory to SMH, that such fee represents full and final satisfaction of any obligation or liability of SMH, IO and any other Government Entity to Project Co and any Project Co Parties in connection with the Project Agreement and the Request for Proposals process.

## **3. GUARANTEED PRICE**

### **3.1 Guaranteed Price and Adjustments**

- (a) Project Co represents and warrants that the Guaranteed Price, exclusive of HST, is **\$301,189,863**, and is equal to the sum of the Cost of the Works and the Cost of the

Financing. The Cost of the Works and the Cost of the Financing are as set out in the Financial Model.

- (b) Project Co represents and warrants that the Project Debt Interest Cost is based upon the Interest Reference Rate. The Project Debt Interest Cost will be adjusted once on, or within the 2 Business Days immediately prior to, Financial Close on the basis of the actual increase or decrease in the Project Debt Interest Cost resulting directly from any change upward or downward in the Interest Reference Rate as compared to the Interest Reference Rate as at the RFP Submission Deadline.
- (c) The Parties:
  - (i) acknowledge that the Project Debt Interest Cost is a component of the Cost of the Financing and that the Project Debt Interest Cost is subject to adjustment under Section 3.1(b) as at the date set out in Section 3.1(b); and
  - (ii) acknowledge and agree that subject to adjustments made in accordance with the provisions of this Project Agreement, the final Guaranteed Price shall be determined on the basis of such final adjusted Cost of the Financing and the final adjusted Cost of the Works as of the date of Financial Close.
- (d) Subject to the provisions of Section 3.1(c), the Parties agree that the Guaranteed Price will not be subject to adjustment despite changes in the Works, unless such changes in the Works arise pursuant to a Variation Confirmation. The Parties further agree that the Guaranteed Price will only be adjusted where the Project Agreement specifically and expressly refers to an adjustment to the Guaranteed Price, and no claim for an adjustment to the Guaranteed Price on any legal or equitable basis outside of the specific and express rights to an adjustment of the Guaranteed Price set out in the Project Agreement will be allowed. In order to be effective, any permitted adjustment to the Guaranteed Price must be provided for in a Variation Confirmation under Schedule 22 – Variation Procedure.

### **3.2 Cash Allowances**

- (a) On or before the date of this Project Agreement, Project Co shall open the Cash Allowance Account. Project Co 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 Works relating to such portion of the Cash Allowance Item as set out in the Works 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 Works 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 Works is greater or less than the Cash Allowance Monthly Deposit Amount deposited for such month, Project Co 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 Project Co shall ensure that it has sufficient funds in the Cash Allowance Account to pay the relevant vendors and Project Co 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 Works relating to the applicable Cash Allowance Item to be completed in each applicable month.

- (b) Subject to Section 3.2(c)(iv), in the event that at any time and from time to time the actual cost of the Works for a particular Cash Allowance Item (or any portion thereof) exceeds the total Cash Allowance Amount for such Cash Allowance Item, Project Co shall fund the difference between such actual cost of the Works 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 Project Co into the Cash Allowance Account (a "**Remaining Cash Allowance Amount**"). Upon Project Co 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 agree that Project Co shall manage the Cash Allowance Account and the cash flow process applicable thereto in accordance with the following:
  - (i) Project Co 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) Project Co shall provide a reconciliation of the Cash Allowance Account to SMH on a monthly basis;
  - (iv) in the event that
    - (A) Project Co 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, 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 Project Co Party invoices that have been approved by SMH pursuant to Section 3.2(f) 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 Works for all of the remaining Cash Allowance Items. 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 Project Co is required to make each of the applicable payments under each of the invoices approved by SMH pursuant to Section 3.2(f) related to such Works;

- (v) notwithstanding Section 3.2(a), on the Substantial Completion Date, 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 Works 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 Works 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 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 Project Co to SMH or as SMH directs; and
  - (vi) the Parties agree to mutually review the operation of the Cash Allowance Account on a regular basis and make any appropriate modifications to ensure its efficient operation.
- (d) 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.
- (e) In addition to the monthly reports described in Section 3.2(d), Project Co shall, 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 Project Co 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 Project Co 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 Project Co in connection with any Cash Allowance Item or portion thereof.
- (f) 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. 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 3.2 and (ii) upon the request of SMH, the Independent Certifier confirms to SMH that any of the Works claimed by Project Co 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 this Section 3.2(f) and subsequently receives the information that SMH requires, acting reasonably, to discharge its obligations under this Section 3.2, 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) If SMH approves the payment of the invoices set out in a Request for Payment Approval, Project Co shall make payment to the relevant vendors or each Project Co Party from the Cash Allowance Account.
- (h) Project Co acknowledges and agrees that:
- (i) neither it, nor any Project Co 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 Project Co in connection with 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 Project Co and shall not be charged to the Cash Allowance Account; and
  - (iv) subject to SMH's responsibilities under Section 3.2(c)(iv), 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 Works

Schedule and any costs, expenses or delays related to funding or managing the Cash Allowance Account are the responsibility of Project Co. .

- (i) Notwithstanding anything to the contrary in this Project Agreement, the approval by SMH of the commitment by 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 this 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 Project Co under this Project Agreement.

#### **4. PAYMENT**

##### **4.1 General**

- (a) Subject to the provisions of the Project Agreement (including, for clarity Section 3.1(d)) and in accordance with and subject to Applicable Law respecting holdbacks, SMH shall make the payments set out in this Article 4.
- (b) For the purpose of this Project Agreement, 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 Acknowledgement by Project Co**

- (a) Project Co acknowledges and agrees with SMH that SMH is not responsible for the payment of any base progress payments pursuant to the Design and Construction Contract nor any legislative holdbacks in respect thereof.

##### **4.3 Lump Sum Payments**

- (a) Subject to Sections 4.4(a) and 4.9, SMH covenants and agrees to pay to Project Co the Tower Interim Completion Payment and the applicable HST on the Tower Interim Completion Payment Date.
- (b) Subject to Sections 4.4(b) and 4.9, SMH covenants and agrees to pay to Project Co the Substantial Completion Payment and the applicable HST on the Substantial Completion Payment Date. Notwithstanding the foregoing, if the Warranty Letter of Credit has not been delivered to SMH by the Substantial Completion Payment Date, SMH may withhold from the Substantial Completion Payment a holdback amount of \$[REDACTED] (the "Warranty Cash Amount"). In such an event, such Warranty Cash Amount may be withheld by SMH until the date that is two Business Days following the date that the Warranty Letter of Credit has been delivered to SMH and, upon such second Business Day, the Warranty Cash Amount shall be paid by SMH to Project Co. Until receipt of the Warranty Letter of Credit, SMH may use the Warranty

Cash Amount in the place of, in the same manner as and for the same purpose as the Warranty Letter of Credit. The withholding of the Warranty Cash Amount in accordance with this Section 4.3(b) shall be SMH's sole remedy for failure on the part of Project Co to deliver the Warranty Letter of Credit by the Substantial Completion Payment Date and, for greater certainty, SMH shall not be entitled to withhold payment of the balance of the Substantial Completion Payment as a result of any such failure on the part of Project Co.

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

#### **4.4 Direction of Payments**

- (a) Project Co hereby irrevocably directs SMH to make any Tower Interim Completion Payment, together with applicable HST, to the Lenders' Agent or as the Lenders' Agent may direct, as security for the Financing. SMH shall pay the Tower Interim Completion Payment as directed by Project Co and shall not accept any redirection without the consent of the Lenders' Agent. SMH will pay the amounts that Project Co is entitled to hereunder once the conditions for payment set out in this Project Agreement, if any, have been satisfied. Project Co acknowledges and agrees that payment by SMH of the Tower Interim Completion Payment to the Lenders' Agent in accordance with this Section 4.4(a) constitutes payment by SMH to Project Co in satisfaction of SMH's obligation to pay the Tower Interim Completion Payment to Project Co under this 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.
- (b) Project Co hereby irrevocably directs SMH to make any Substantial Completion Payment, together with applicable HST, to the Lenders' Agent or as the Lenders' Agent may direct, as security for the Financing. SMH shall pay the Substantial Completion Payment as directed by Project Co and shall not accept any redirection without the consent of the Lenders' Agent. SMH will pay the amounts that Project Co is entitled to hereunder once the conditions for payment set out in this Project Agreement, if any, have been satisfied. Project Co acknowledges and agrees that payment by SMH of the Substantial Completion Payment to the Lenders' Agent in accordance with this Section 4.4(b) constitutes payment by SMH to Project Co in satisfaction of SMH's obligation to pay the Substantial Completion Payment to Project Co under this 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.

**4.5 Payment of Legislative Holdback**

- (a) Subject to Section 4.9, SMH covenants and agrees with Project Co to pay to Project Co the Legislative Holdback on the Legislative Holdback Payment Date or pay to such party as otherwise directed by Project Co and shall not accept any redirection without the consent of the person to whom payment is directed. SMH agrees to pay the Legislative Holdback as Project Co may direct in accordance with any such direction. Project Co acknowledges and agrees that payment by SMH of the Legislative Holdback in accordance with this Section 4.5 as Project Co may direct, constitutes payment by SMH to Project Co in satisfaction of SMH's obligation to pay the Legislative Holdback to Project Co under this 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.
- (b) After the issuance of the Substantial Completion Certificate under Section 24.4, Project Co 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 Works 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, Project Co 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 and the removal of claims for lien preserved or perfected pursuant to the CLA arising in relation to the performance of the Works, the Legislative Holdback amount authorized by the certificate for payment of the Legislative Holdback amount is due and payable on the second Business Day following the receipt of the certificate for payment of the Legislative Holdback amount pursuant to Section 4.5(c).

**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 Project Co, as confirmed by the Independent Certifier, in accordance with the terms and conditions of this Project Agreement. To the extent the Tower Interim Completion Holdback is reduced from time to time, Project Co hereby irrevocably 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. 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. Project Co acknowledges and agrees that payment by SMH of the Tower Interim Completion Holdback reductions in accordance with this Section 4.6(a) 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 this 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.
- (b) The Completion Holdback may be reduced from time to time as a result of such actions by Project Co, as confirmed by the Independent Certifier, in accordance with the terms and conditions of this Project Agreement. To the extent the Completion Holdback is reduced from time to time, Project Co hereby irrevocably 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. 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. Project Co acknowledges and agrees that payment by SMH of the Completion Holdback reductions in accordance with this Section 4.6(b) 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 this 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.

**4.7 Withholding of Payment**

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

**4.8 Establishment of Trust Account and Manner of Payment**

- (a) SMH agrees that it will make commercially reasonable efforts to establish the Trust Account in conjunction with Project Co on or before Financial Close, but if not so

established, then within 90 days of Financial Close. All costs and expenses associated with the establishment, maintenance and administration of the Trust Account shall be borne solely by Project Co.

**4.9 Compensation on Termination**

- (a) If this Project Agreement is terminated pursuant to Sections 34.3(a), 35.2(a)(ii), 36.1, 36.2 or 36.3, then:
  - (i) Schedule 23 - Compensation on Termination shall apply and SMH shall pay Project Co any applicable compensation on termination; and
  - (ii) the provisions of Sections 4.3 through 4.6, inclusive, shall no longer apply.
- (b) Project Co hereby irrevocably directs SMH to make any Compensation Payment to the Lenders' Agent, or as the Lenders' Agent may direct, as security for the Financing. 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. Project Co acknowledges and agrees that payment by SMH of the Compensation Payment to the Lenders' Agent in accordance with this Section 4.9 constitutes payment by SMH to Project Co in satisfaction of SMH's obligation to pay the Compensation Payment to Project Co under this 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.

**4.10 Payment Due under Insurance Policies**

- (a) 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 HST**

- (a) SMH covenants and agrees to pay to Project Co the HST that may be exigible with respect to any payments made by SMH to Project Co hereunder.

**4.12 Set-Off**

- (a) The Parties agree that their rights of set-off at law or in equity are limited to the right of:
  - (i) SMH to set off against any amounts otherwise due to Project Co pursuant to the terms of this Project Agreement, any amounts (including, without limitation, any amounts payable in accordance with Article 44) which are due to SMH by Project Co pursuant to the terms of this Project Agreement or by the Construction Guarantor pursuant to Schedule 12 - Performance Guarantee of Construction Guarantor; and

- (ii) Project Co to set off against any amounts otherwise due to SMH pursuant to the terms of this Project Agreement, any amounts (including, without limitation, any amounts payable in accordance with Article 44) which are due to Project Co by SMH pursuant to the terms of this Project Agreement.

#### **4.13 Effect of Payment**

- (a) Subject to Section 38.2, no payment hereunder shall be construed as an acceptance or approval of incomplete, defective or improper performance by Project Co of any of its obligations under this Project Agreement, nor shall it operate to relieve Project Co from the performance of any of its obligations under this Project Agreement which have not been performed.

#### **4.14 No Other Entitlement**

- (a) Project Co shall not be entitled to any payments, compensation, rights, remedies, benefits or entitlements under or in connection with this Project Agreement, except as specifically and expressly set out in this Project Agreement.

#### **4.15 Taxes**

- (a) All amounts specified in this Project Agreement, including, for clarity, any compensation payable on termination, are expressed exclusive of any Taxes payable pursuant to Applicable Law by SMH. For clarity, SMH shall not be required to pay any interest and/or penalties that are imposed on or assessed against Project Co or any Project Co Party for non-compliance with Applicable Law. If Project Co is required by Applicable Law to collect any such Taxes from SMH, SMH shall pay such Tax to Project Co simultaneously with the amount to which such applicable Tax relates or applies.
- (b) SMH shall pay, 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) SMH shall pay all applicable HST properly payable in accordance with the *Excise Tax Act* (Canada) by SMH upon and in connection with payments by SMH to Project Co under this Project Agreement.

#### **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 Project Co in connection with the performance of the Works, SMH and Project Co agree to co-operate to determine how such change affects their respective obligations under this Agreement.

**4.17 Information and Assistance Provided by Project Co**

- (a) Project Co shall, at SMH's request and cost, assist SMH in applying for and obtaining all remissions and credits of Taxes to which SMH is entitled.
- (b) 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 this Project Agreement. Project Co shall, at SMH's cost, 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) Project Co will provide SMH with any information reasonably requested by SMH from time to time in relation to any Taxes chargeable by Project Co in accordance with this Project Agreement and payable by SMH to Project Co from time to time.

**4.18 Residency – Income Tax Act (Canada)**

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

**4.19 Taxes – General**

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

**4.20 Taxes – Indemnity**

- (a) If (i) Project Co becomes a Non-Resident, or (ii) SMH is or becomes required by Applicable Law to deduct or withhold any amount in respect of Taxes on or in respect of any amounts paid or credited to Project Co or a Project Co Party by SMH under the Project Agreement or under any of the Project Documents, then SMH 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 Project Co or a Project Co Party on or after the date on which (A) Project Co or the Project Co Party becomes a Non-Resident and at all times while it remains a Non-Resident; or (B) 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 SMH under this Project Agreement or under any

other Ancillary Document to Project Co or a Project Co Party shall be paid or credited net of such deductions or withholdings.

- (b) If (i) Project Co becomes a Non-Resident, or (ii) SMH is or becomes required by Applicable Law to deduct or withhold any amount in respect of Taxes on or in respect of any amounts paid or credited to Project Co or a Project Co Party by SMH under the Project Agreement or under any of the Project Documents, Project Co shall, in each case, indemnify and hold harmless SMH for (A) the full amount of all Taxes ("**Indemnifiable Taxes**") that arise, are imposed on or are required to be paid by SMH in respect of any amounts paid or credited by SMH to Project Co or any Project Co Party under this Project Agreement or under any other Ancillary Document as a result of either of the foregoing items less any amount withheld or deducted by 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 SMH makes written demand for it. A certificate containing reasonable detail as to the amount of Indemnifiable Taxes and Associated Liabilities submitted to Project Co by SMH shall be conclusive evidence, absent manifest error, of the amount due from Project Co to SMH. SMH 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) Project Co shall undertake the Project and perform the Works in accordance with and subject to the provisions of this Project Agreement.
- (b) Project Co shall exercise its rights and perform its obligations at its own cost and risk without recourse to SMH, except as otherwise provided in this Project Agreement. Project Co shall not have recourse to any Government Entity with respect to the subject matter of this Project Agreement.

## **6. REPRESENTATIONS AND WARRANTIES**

### **6.1 Project Co Representations and Warranties**

- (a) Project Co represents and warrants to SMH that as of the date of this Project Agreement:
- (i) Project Co [REDACTED] has all the requisite corporate power and authority to own its properties and assets, to carry on its business as it is currently being conducted, and to enter into this Project Agreement and to perform its obligations hereunder;

- (ii) Project Co and the Project Co Parties, collectively, have extensive experience and are knowledgeable in the design and construction of hospital facilities and have the required ability, experience, skill and capacity to perform the Works in a timely and professional manner as set out in this Project Agreement;
- (iii) Project Co has the requisite power, authority and capacity to execute and deliver and perform this Project Agreement, and to do all acts and things, and execute, deliver and perform all other agreements, instruments, undertakings and documents as are required by this Project Agreement to be done, executed, delivered or performed;
- (iv) no steps or proceedings have been taken or are pending to supersede or amend the constating documents, articles or by-laws of Project Co in a manner that would impair or limit its ability to perform the obligations of Project Co under this Project Agreement;
- (v) this Project Agreement has been duly authorized, executed, and delivered by Project Co and constitutes a legal, valid, and binding obligation of Project Co, enforceable against Project Co in accordance with its terms, subject only to:
  - (A) limitations with respect to the enforcement of remedies by bankruptcy, insolvency, moratorium, winding-up, arrangement, reorganization, fraudulent preference and conveyance and other laws of general application affecting the enforcement of creditors' rights generally; and
  - (B) general equitable principles and the fact that the availability of equitable remedies is in the discretion of a court and that a court may stay proceedings or the execution of judgments;
- (vi) the execution, delivery, and performance by Project Co of this Project Agreement does not and will not violate or conflict with, or constitute a default under:
  - (A) its constating, formation or organizational documents, including any by-laws;
  - (B) any Applicable Law; or
  - (C) any covenant, contract, agreement, or understanding to which it is a party or by which it or any of its properties or assets is bound or affected;
- (vii) no Project Co Event of Default has occurred and is continuing;
- (viii) all of the information regarding Project Co set out in Schedule 31 – Project Co Information is true and correct in all material respects;
- (ix) there are no actions, suits, proceedings, or investigations pending or threatened against Project Co or, to Project Co's knowledge, any Project Co Party at law or

in equity before any Governmental Authority or arbitral body (whether or not covered by insurance) that individually or in the aggregate could result in any material adverse effect on the business, properties, or assets, or the condition, financial or otherwise, of Project Co or in any impairment of its ability to perform its obligations under this Project Agreement, and Project Co has no knowledge of any violation or default with respect to any order, writ, injunction, or decree of any Governmental Authority or arbitral body that could result in any such material adverse effect or impairment;

- (x) Project Co has carefully reviewed the whole of this Project Agreement, and all other documents made available to Project Co by or on behalf of SMH, and, to Project Co's knowledge, nothing contained herein or therein inhibits or prevents Project Co from completing the Works or performing the Works in accordance with this Project Agreement in a good and safe manner so as to achieve and satisfy the requirements of this Project Agreement;
- (xi) Project Co is able to meet its obligations as they generally become due;
- (xii) Project Co is registered under Division V of Part IX of the *Excise Tax Act* (Canada) and its HST registration number is [REDACTED];
- (xiii) the Scheduled Tower Interim Completion Date is a realistic date and is achievable by Project Co performing the Works in accordance with this Project Agreement;
- (xiv) the Scheduled Substantial Completion Date is a realistic date and is achievable by Project Co performing the Works in accordance with this Project Agreement;
- (xv) Project Co is not a Non-Resident;
- (xvi) Project Co has obtained all necessary Project Co Permits, Licences, Approvals and Agreements required to commence the Works;
- (xvii) the manager or supervisory personnel Project Co has assigned to the Project are highly experienced;
- (xviii) Project Co has a sufficient staff of qualified and competent personnel to replace its designated supervisors, subject to the SMH's approval, in the event of death, incapacity or resignation;
- (xix) Project Co and certain of the Project Co Parties have conducted inspections of the Site prior to Commercial Close and an investigation and examination of the Project Agreement, the Background Information and any other documents made available to Project Co by SMH so as to ascertain the nature or location of the Works and the Site, the physical conditions of the Site, the interface with the Existing Facilities and protocols, rules and regulations if any, conditions relating to the transportation, handling and storage of materials and availability of labour

and the character and availability of equipment, materials and facilities needed to perform the Works;

- (xx) Project Co has secured the Financing and is in a position to complete the Financing on or before the Financial Close Target Date, subject to the satisfaction of reasonable conditions that are customary in closing financing for projects similar to the Project;
- (xxi) No Restricted Person has Direct or Indirect Power or Control over any member of the Project Co Group in relation to the decisions, management, actions or policies of Project Co or in relation to the operation, management and ownership of the Project; and
- (xxii) To the knowledge of Project Co, no Restricted Person has directly or indirectly, an Economic Interest in Project Co or the Project.

## **6.2 SMH Representations and Warranties**

- (a) SMH represents and warrants to Project Co that as of the date of this Project Agreement:
  - (i) SMH is a non-share capital corporation incorporated and validly existing under the laws of the Province of Ontario, is in good standing with the Ministry of Government Services (Ontario) with respect to the filing of annual reports and has all the requisite corporate power and authority to own its properties and assets, to carry on its business as it is currently being conducted, and to enter into this Project Agreement and to perform its obligations hereunder;
  - (ii) SMH has the requisite power, authority and capacity to execute, deliver and perform its obligations under this Project Agreement and to do all acts and things, and execute, deliver and perform all other agreements, instruments, undertakings and documents as are required by this Project Agreement to be done, executed, delivered or performed;
  - (iii) no steps or proceedings have been taken or are pending to supersede or amend SMH's constituting documents, letters patent or by-laws in a manner that would impair or limit its ability to perform its obligations under this Project Agreement;
  - (iv) this Project Agreement has been duly authorized, executed, and delivered by SMH and constitutes a legal, valid, and binding obligation of SMH, enforceable against SMH in accordance with its terms, subject only to:
    - (A) limitations with respect to the enforcement of remedies by bankruptcy, insolvency, moratorium, winding-up, arrangement, reorganization, fraudulent preference and conveyance and other laws of general application affecting the enforcement of creditors' rights generally; and

- (B) general equitable principles and the fact that the availability of equitable remedies is in the discretion of a court and that a court may stay proceedings or the execution of judgments;
- (v) the execution, delivery, and performance by SMH of this Project Agreement does not and will not violate or conflict with, or constitute a default under:
  - (A) its constating or organizational documents;
  - (B) Applicable Law; or
  - (C) any covenant, contract, agreement, or understanding to which it is a party or by which it or any of its properties or assets is bound or affected;
- (vi) no SMH Event of Default has occurred and is continuing;
- (vii) to the knowledge of SMH, there are no actions, suits, proceedings, or investigations pending or threatened (in writing) against SMH or, to SMH's knowledge, any SMH Party at law or in equity before any Governmental Authority or arbitral body (whether or not covered by insurance) of which SMH has received written notice and that individually or in the aggregate could result in any material adverse effect on the business, properties, or assets, or the condition, financial or otherwise, of SMH or in any impairment of its ability to perform its obligations under this Project Agreement, and SMH has no knowledge of any violation or default with respect to any order, writ, injunction, or decree of any Governmental Authority or arbitral body that could result in any such material adverse effect or impairment;
- (viii) SMH is able to meet its obligations as they generally become due;
- (ix) SMH has rights of use and access to, on and over the Site and the Facility or has the requisite power to obtain such rights that are sufficient to enable SMH to grant or to cause to be granted to Project Co the licence rights contemplated in Section 16.1;
- (x) SMH is the registered owner of the Site and has good title thereto in fee simple, subject only to the Title Encumbrances; and
- (xi) subject to the limitations on this representation and warranty contained in Appendix "A" to Schedule 1 – Definitions and Interpretation, the contemplated uses of the Facility are permitted by the existing official plan, zoning and other land use restrictions.

**7. BACKGROUND INFORMATION**

**7.1 No Liability**

- (a) Except as expressly provided in Sections 7.4, 18.2 and 18.3, none of SMH, any SMH Party or any Government Entity shall be liable to Project Co or any Project Co Party for, and Project Co or any Project Co Party shall not seek to recover from SMH, 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, Project Co or any Project Co Party.

**7.2 No Warranty**

- (a) Except as expressly provided in Sections 7.4, 18.2 and 18.3:
- (i) neither SMH nor any Government Entity gives any warranty or undertaking of whatever nature in respect of the Background Information and, specifically (but without limitation), neither SMH nor 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 this Project Agreement) relevant or material to or in connection with the Project or the obligations of Project Co under this Project Agreement or under any of the Project Documents; and
  - (ii) neither SMH nor any Government Entity shall be liable to Project Co or any Project Co Party in respect of any failure, whether before, on or after the execution and delivery of this Project Agreement:
    - (A) to disclose or make available to Project Co or any Project Co Party any information, documents or data;
    - (B) to review or update the Background Information; or
    - (C) to inform Project Co or any Project Co Party of any inaccuracy, error, omission, defect or inadequacy in the Background Information.

**7.3 No Claims**

- (a) Project Co 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 this Project Agreement, 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, it shall not be entitled to and shall not, and shall ensure that no Project Co Party shall, make any claim

against 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 this Project Agreement 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 Project Co be relieved from any of its obligations under this Project Agreement on any such ground.

#### **7.4 Technical Reports**

- (a) SMH agrees that, if at the date of this Project Agreement, except as disclosed in any Background Information or as otherwise disclosed by SMH or any SMH Party or known by Project Co or any Project Co 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 Project Co's ability to perform the Works or materially adversely affects Project Co's cost of performing the Works, 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) Project Co 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 Project Co Party shall perform its obligations under, and observe all of the provisions of, each of the Project Documents to which such Project Co 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 Project Co 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 SMH.

#### **8.2 Ancillary Documents**

- (a) Project Co 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 or otherwise to prevent or cure a Project

Co Event of Default (provided that commercially reasonable alternative measures would not prevent or cure such Project Co Event of Default);

- (ii) make or agree to any amendment, restatement or other modification or waive or exercise any of its rights under any Ancillary Document that materially adversely affects Project Co's ability to perform its obligations under this Project Agreement or that has the effect of increasing any liability of 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 Project Co's ability to perform its obligations under this Project Agreement or that have the effect of increasing any liability of 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 SMH, 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 Project Co's ability to perform its obligations under this Project Agreement or have the effect of increasing any liability of 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), Project Co 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, Project Co will deliver or cause to be delivered to SMH or the SMH Representative a copy of any notices delivered or received by Project Co under any of the Ancillary Documents.

### **8.3 Changes to Lending Agreements and Refinancing**

- (a) Subject to the terms of the Lenders' Direct Agreement, Project Co shall not terminate, amend or otherwise modify the Lending Agreements, or waive or exercise any of its rights under the Lending Agreements, if at the time such action is contemplated and effected, it would materially adversely affect Project Co's ability to perform its obligations under this Project Agreement or the Project Documents or have the effect of increasing the liability of SMH whether actual or potential, unless such action is a Permitted Borrowing or a Refinancing effected in accordance with the provisions of Schedule 29 – Refinancing.

**8.4 Compliance with Lending Agreements**

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

**9. SMH RESPONSIBILITIES**

**9.1 General**

- (a) SMH shall, at its own cost and risk:
  - (i) perform all of its obligations under, and observe all provisions of, this Project Agreement in compliance with Applicable Law;
  - (ii) obtain, maintain, and, as applicable, renew SMH Permits, Licences, Approvals and Agreements which may be required for the performance of the Works;
  - (iii) comply with all Permits, Licences, Approvals and Agreements in accordance with their terms;
  - (iv) cooperate with Project Co in the fulfillment of the purposes and intent of this Project Agreement, provided, however, that SMH shall not be under any obligation to perform any of Project Co's obligations under this Project Agreement; and
  - (v) perform all of its obligations under, and observe all provisions of, the SMH Development Accountability Agreement.
- (b) SMH shall, and shall cause all SMH Parties to, take reasonable steps to minimize undue interference with the provision of the Works by Project Co or any Project Co Party.
- (c) Nothing in this Project Agreement 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 Project Co understands and agrees that nothing in this Project Agreement shall preclude SMH's board of directors from performing, discharging or exercising its duties, responsibilities, and powers under Applicable Law. Project Co further agrees that it shall comply, and shall cause all relevant Project Co Parties to comply, with all written directions issued by or on behalf of SMH's board of directors from time to time, subject to Section 29.1(b).

**10. PROJECT CO RESPONSIBILITIES – GENERAL**

**10.1 Other Business**

- (a) Project Co shall not engage in any activities which are not specifically related to, required by and conducted for the purpose of the Project without the prior written consent of SMH, in its sole discretion.

**10.2 Complete and Operational Facility**

- (a) Project Co 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 Project Co Proposal Extracts, all in accordance with and subject to the terms of this Project Agreement.

**10.3 General Responsibilities and Standards**

- (a) Project Co shall, at its own cost and risk, perform and complete the Works:
  - (i) in accordance with the Works Schedule and, in this regard, shall commence the Works no later than the day following Financial Close and, subject to adjustment as provided for in the Project Agreement, (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 this Project Agreement, in a manner which will not impair the ability of SMH, any of the SMH Parties or any Government Entity to comply with Applicable Law; and

- (ix) in accordance with all other terms of this Project Agreement.
- (b) Project Co shall cooperate with SMH in the fulfillment of the purposes and intent of this Project Agreement, provided however that Project Co shall not be under any obligation to perform any of SMH's obligations under this Project Agreement.

## **11. PROJECT CO RESPONSIBILITIES – DESIGN AND CONSTRUCTION**

### **11.1 Development of Design**

- (a) Project Co shall, at its own cost, develop and complete the design of the Facility and all Design Data in accordance with the requirements of this Project Agreement, 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 this Project Agreement.
- (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 this Project Agreement 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 this Project Agreement (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) Project Co 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 Project Co 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 this Project Agreement.
- (f) All design review meetings held by Project Co which SMH wishes to attend shall be held in Toronto, Ontario unless SMH otherwise agrees in writing.
- (g) If Project Co 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 this Project Agreement, then Project Co 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 this Project Agreement.
- (h) Subject to Section 11.4, neither SMH nor any SMH Party will have any liability:
- (i) if a document submitted by Project Co and reviewed by SMH, the SMH Representative or the SMH Design Team results in non-compliance with this Project Agreement by Project Co or a breach by Project Co of Applicable Law; or
  - (ii) for any loss or claim arising due to some defect in any documents, drawings, specifications or certificates submitted by Project Co.
- (i) Project Co and SMH will cooperate with each other in the design review process. Notwithstanding such cooperation by SMH, such review shall not, except as provided in Section 11.4, constitute acceptance of the Works, and Project Co shall remain solely responsible for compliance in full with all requirements of this Project Agreement.
- (j) Project Co 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, Project Co will cooperate with SMH and the SMH Design Team and will cause the Construction Contractor to cooperate with SMH and in particular the Construction Contractor's design and engineering consultants to:
    - (A) create as requested by SMH or 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) Project Co shall cause the Construction Contractor to 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 this Project Agreement, Project Co and the Design Team shall attend a start-up meeting (the "**Start-Up Meeting**") with SMH to set out the design development process in greater detail.
- (b) The agenda for the Start-Up Meeting shall include the following:
- (i) Project Co's plan to develop a successful partnership with SMH for the purpose of supporting SMH in achieving its vision, mission and core values;
  - (ii) Project Co's plan to ensure that the Works are completed in accordance with the requirements set forth in this Project Agreement;
  - (iii) Project Co's process to ensure optimum design quality;
  - (iv) Project Co'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 Works Submittals which is consistent with the Works Schedule and which provides for a progressive and orderly flow of Works Submittals from Project Co to the SMH Representative to allow sufficient time for review of each Works 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 Works Submittal will have a material impact on Project Co's ability to progress future anticipated Works Submittals and the Works in accordance with the Works Schedule;
  - (vi) Project Co'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 will hold user group design workshops (the "**Design Workshops**") upon the following terms:
  - (i) the Project Co 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 Works Schedule;
  - (iii) Project Co 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) Project Co shall maintain minutes of the Design Workshops, including possible design solutions and changes in design, and, within two Business Days after each Design Workshop, Project Co 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) SMH and Project Co agree that the subject matter of the Design Workshops shall not be regarded as Submittals to which Schedule 10 - Review Procedure applies, and that SMH shall not be bound by the input provided in connection with the Design Workshops;
  - (vii) Project Co 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 will hold Design Workshops with respect to the following matters and any other Design Workshops required by Project Co, 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 will hold Design Workshops with respect to the following matters and any other Design Workshops required by Project Co, acting reasonably:
- (i) all items listed in Section 11.3(b) and all items listed in Sections 1.0, 2.0 and 3.0 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 Documents Submittals, the Parties will hold Design Workshops with respect to the following matters and any other Design Workshops required by Project Co, 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) SMH confirms that, as at the date of this Project Agreement, it has reviewed the Site master plan and blocking and stacking diagrams and that, subject to any qualifications or comments noted thereon, such Works Submittals satisfy the Output Specifications in respect of Clinical Functionality, so far as can reasonably be determined given the level of detail in the Works Submittals.
- (b) With each of the Design Development Submittals, Project Co 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 Project Co 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, Project Co 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, Project Co, its consultants and the Project Co 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) Project Co shall ensure that all parts of the Works 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 Works Submittals**

- (a) Any and all items, documents and anything else required or specified by this Project Agreement in respect of the Works 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) Project Co shall keep one copy of the current digital files of the Project Agreement, Project Documents, Works Schedule, submittals, reports, Variation Confirmations, Project Co 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 SMH Representative. Project Co shall keep a daily log available to SMH, Lenders' Consultant and SMH Representative at all times.

- (b) Project Co 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 SMH Representative and Lenders' Consultant and their representatives for the duration of the Works.

#### **11.8 General Construction Obligations**

- (a) Without limiting Section 10.3:
  - (i) Project Co is solely responsible for all construction means, methods and techniques used to undertake the Works 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 Works.
  - (ii) Project Co shall in a timely and professional manner and in accordance with the requirements of this Project Agreement:
    - (A) construct the Works diligently, expeditiously and in a thorough and workman-like manner;
    - (B) ensure that no works other than the Works under this Project Agreement are constructed on the Site, the Facility or the Existing Facilities by Project Co, any Project Co Party or any person for whom Project Co is responsible at law;
    - (C) protect the Works from all of the elements, casualty and damage;
    - (D) in respect of plant, equipment, Products and materials incorporated in the Works, 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 SMH's prior written consent in accordance with Section 11.18.
  - (iii) Without limiting Project Co's obligations pursuant to Section 11.12, the Phasing Requirements or Project Co's indemnity pursuant to Section 44.1, Project Co shall, at all times throughout the progress of the Works, be responsible for maintaining and securing those portions of the Site occupied by Project Co from time to time for construction of the Works 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 Project Co pursuant to Section 16.1 shall include rights for Project Co to do so.

### **11.9 Permits, Licences, Approvals and Agreements**

- (a) Project Co shall, at its own cost and risk:
- (i) obtain, maintain, and, as applicable, renew all Project Co Permits, Licences, Approvals and Agreements which may be required for the performance of the Works;
  - (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 the 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, Project Co 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 Project Co to obtain any Permit, Licence, Approval and Agreement or for the failure of Project Co 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 this Section 11.9(b).
- (c) SMH shall 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), SMH shall: (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 the SMH Permits, Licences, Approvals and Agreements which Applicable Law dictates that only SMH can execute.

### **11.10 Protection of Works and Property**

- (a) Project Co shall protect the Works 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 Project Co's operations under this Project Agreement, 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 Project Co, in the performance of this Project Agreement, damage the Works or the property of SMH at the Site, including the property adjacent to the Site and the Existing Facilities, Project Co shall be responsible to Make Good such damage at Project Co's expense.
- (c) Should damage occur to the Works or the property of SMH at the Site, including the property adjacent to the Site and the Existing Facilities, for which Project Co is not responsible, as provided in Section 11.10(a), Project Co shall Make Good such damage to the Works and, if SMH so directs, to the property of SMH and 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) Project Co shall not undertake to repair and/or replace any damage whatsoever to adjoining property without first consulting 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 Works, either Party may, but Project Co shall, take such emergency action as is necessary to remove the danger.
- (f) If any Project Co Party has caused damage to the work of another contractor related to the Project, Project Co agrees upon due notice to settle with the other contractor by negotiation or arbitration in accordance with Section 11.13(e) and Schedule 27 – Dispute Resolution Procedure. If the other contractor makes a claim against 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) and Schedule 27 – Dispute Resolution Procedure.

#### **11.11 Liability Unaffected**

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

#### **11.12 Safety**

- (a) From Financial Close until Final Completion, Project Co shall:

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- (i) comply with the Construction Safety Plan;
  - (ii) keep the Site, the Works 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, or cause a Project Co Party to perform, all of the obligations of the "constructor", and indemnify SMH, each SMH Party and each Government Entity against any and all of the liabilities of the "constructor", under the *Occupational Health and Safety Act* (Ontario) and all regulations thereto; 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 Works are being carried out in or around the Existing Facilities Project Co shall at all times:
- (i) ensure that it complies with all safety requirements set out in the Project Agreement, 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 reserves the right to carry out Additional Works. SMH may, at any time during the performance of the Works, 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 Project Co.
- (b) In connection with the Additional Works, SMH 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), 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 this 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), 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 SMH and Project Co as additional insureds and/or loss payees) and, in any event, such insurance shall provide for commercial general liability insurance of not less than \$[REDACTED]; 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, Project Co shall during the performance of the Works:
- (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), 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 Works to be performed under this Project Agreement;
  - (iii) where all or part of the performance of the Works in accordance with the Project Agreement 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 Works. Failure by Project Co to so report shall invalidate any claims against SMH 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 Works;
  - (ii) Project Co incurs any additional costs or there is any delay in the Works Schedule as a result of any Additional Contractors not complying with the instructions of Project Co regarding coordination, scheduling and/or safety and/or method and means of construction; or
  - (iii) if Project Co incurs any additional costs or there is any delay in the Works Schedule as a result of any Additional Works,

then, provided such delay in the Works Schedule or additional costs are not as a result of Project Co's failure to perform any of its obligations under Section 11.13(c) or any act or omission of Project Co or a Project Co Party, any such delay in the Works Schedule or additional costs in respect of the Works shall, subject to and in accordance with Article 30, be treated as a Delay Event and, subject to and in accordance with Article 31, be treated as a Compensation Event.

- (e) Claims, disputes, and other matters in question between Project Co and Additional Contractors (except to the extent they involve claims, disputes and other matters between Project Co and SMH pursuant to this 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. Project Co 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) Project Co shall have a period of 10 Business Days following notice from SMH 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 Project Co from a Project Co Party or equipment supplier and given in accordance with Good Industry Practice, or (B) reasonably expected to have a material adverse effect on Project Co's ability to perform any of the Works, including a delay in the Works or additional costs in respect of the Works;
  - (ii) if Project Co has requested a Variation in accordance with Section 11.13(f)(i), SMH shall, within 10 Business Days of such request, either issue a Variation Enquiry or give notice to Project Co that it 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 SMH has given notice to Project Co that it does not agree that a Variation is required, SMH shall, within 10 Business Days of a subsequent agreement or of a determination that a Variation is required, issue a Variation Enquiry and the relevant provisions of Schedule 22 – Variation Procedure shall apply except that:
  - (A) SMH 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 Project Co's ability to perform any of the Works and Project Co has agreed with such conclusion, or the Parties otherwise agree; and
  - (B) the Parties shall, without prejudice to their respective obligations under this Project Agreement, 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 Works performed by Project Co will not relieve Project Co from its obligations under the Project Agreement with respect to the Works, except to the extent expressly described in any Variation Confirmation.

#### **11.14 Defective Works**

##### **Prior to Substantial Completion:**

- (a) Project Co 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 Project Co. The correction of Construction Defects shall be at Project Co's sole cost and expense. Project Co 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 Project Co shall prioritize the correction of any Construction Defects so as not to interfere with or derogate from the Works Schedule, provided that Project Co 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) Project Co shall Make Good promptly other contractors' work destroyed or damaged by such rectifications at Project Co's expense.

- (c) If in the opinion of the Independent Certifier it is not expedient for Project Co to correct any Construction Defect, SMH may deduct from the amount of the Guaranteed Price the difference in value between the Works as performed and that called for by the Project Agreement. If SMH and Project Co 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) Project Co represents, warrants and covenants that:
- (i) the Works shall conform to the requirements of this Project Agreement, Good Industry Practice, Applicable Law and all professional engineering principles generally accepted as standards of the industry in the Province of Ontario;
  - (ii) the Works 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 this Project Agreement.
- (b) During each Warranty Period and subject to Section 11.15(c), Project Co shall promptly, at its sole cost and expense, correct and Make Good all Construction Defects arising in respect of the Works. For greater certainty, Project Co is required to correct and Make Good Construction Defects related to any Product and any In-Contract Equipment during the applicable Warranty Period despite Project Co 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 Works. 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 Works as a whole.
- (c) In addition to the obligation to correct and Make Good Construction Defects during a Warranty Period, Project Co 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 Works ("**Construction Latent Defect**"), provided SMH gives Project Co 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 Project Co 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 SMH may have, SMH may correct such Construction Defects or Construction Latent Defects at Project Co's sole cost and expense.
- (f) Project Co 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 both Project Co 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, Project Co shall obtain industry-standard warranties from the applicable manufacturers in the name of and to the benefit of Project Co 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 Project Co 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 Works. Project Co 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 SMH, at the end of each Warranty Period, as such Warranty Period may be extended in accordance with Section 11.15(b).
- (g) Project Co shall monitor the maintenance program of SMH throughout each and every Warranty Period to satisfy itself that the Works are being maintained in accordance with the operating and maintenance manuals described in Sections 23A.5, 23B.5 and 24.5 and the Maintenance Instructions provided by Project Co. Project Co 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 Project Co hereunder. If SMH does not agree with such reported deviations, SMH and Project Co 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 Project Co hereunder. If SMH and Project Co 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), Project Co 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 Project Co 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 Works.

**11.16 Prompt Repair of Warranty Work**

- (a) Project Co 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. Project Co 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). Project Co further acknowledges that if SMH is unable to contact Project Co 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), SMH's own forces may take such emergency steps as are reasonable and appropriate to correct such Construction Defects and Construction Latent Defects at Project Co's sole cost and expense and, except in the case of damage caused by SMH's own forces, such emergency steps taken by SMH's own forces shall not invalidate any warranties in respect of such portion of the Works affected by such corrective actions of SMH's own forces.
- (b) Subject to Section 11.16(a), Project Co shall promptly, and in any event not more than 15 days after receipt of written notice thereof from 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 Works caused by the correction of such Construction Defects and Construction Latent Defects. All such corrective work shall be at Project Co's sole cost and expense and shall not be treated as, or entitle Project Co 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, Project Co shall be in compliance if Project Co:
- (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 the progress of the corrective work on an ongoing basis (including on a daily basis if requested by SMH); and
  - (D) Makes Good the Construction Defects, Construction Latent Defects and/or damage, as the case may be, in accordance with such schedule.

- (c) If Project Co 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 SMH may have, SMH may correct such Works at the sole risk, cost and expense of Project Co 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 Project Co 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 Project Co'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 Project Co's sole cost and expense.
- (e) The foregoing express warranties shall not deprive SMH of any action, right or remedy otherwise available to SMH at law or in equity for breach of any of the provisions of the Project Agreement or any Ancillary Document by Project Co, and the periods referred to in this Section 11.16, shall not be construed as a limitation on the time in which SMH may pursue such other action, right or remedy.

**11.16A Warranty Letter of Credit**

- (a) On or before the Substantial Completion Date, Project Co shall deliver, or cause to be delivered, 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 no fewer than 60 days prior to the Anticipated Substantial Completion Date but acceptable to and approved by SMH, acting reasonably, and in the amount equal to [REDACTED].
- (b) Unless the Warranty Letter of Credit is drawn by SMH in accordance with the provisions of this Project Agreement, SMH 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).
- (c) SMH shall be entitled to draw on the Warranty Letter of Credit:
  - (i) in accordance with Section 11.16(c); 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 this Project Agreement or by the Construction

Guarantor pursuant to Schedule 12 – Performance Guarantee of Construction Guarantor.

- (d) SMH may make multiple calls on the Warranty Letter of Credit.
- (e) Project Co shall continuously maintain, replace or renew the Warranty Letter of Credit (or shall cause the continuous maintenance, replacement or renewal of the Warranty Letter of Credit) until the Warranty Letter of Credit is released and delivered to Project Co pursuant to Section 11.16A(b).
- (f) In the event that Project Co does not renew (or does not cause the renewal of) the Warranty Letter of Credit and does not provide (or cause the provision of) 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 providing prior written notice to Project Co, 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 Project Co (provided that such bank account must be at a bank that meets the thresholds described in Section 11.16A(a) and if Project Co does not promptly select such bank account then 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 Project Co delivers (or causes the delivery of) a replacement Warranty Letter of Credit to SMH. All interest earned on such cash proceeds shall be for the benefit of Project Co. 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). Upon the delivery of a replacement Warranty Letter of Credit by Project Co to SMH, all remaining cash proceeds and all accrued interest thereon from such segregated bank account shall be returned to Project Co or as Project Co may direct within five Business Days.
- (g) Until a date that is one year before the Scheduled Substantial Completion Date, Project Co may propose to SMH a form of warranty bond in favour of SMH as a substitute for the Warranty Letter of Credit. Project Co agrees that the aggregate bond amount of such warranty bond shall be no less than \$[REDACTED] and a portion of such aggregate bond amount shall contain a liquid amount of no less than \$[REDACTED] to be made available to SMH upon demand. 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. For clarity, SMH shall be under no obligation whatsoever to approve of or accept any such warranty bond or to implement any such Variation.

#### **11.17 Minimize Disturbance and Works in Existing Facilities**

- (a) Project Co 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. Project Co acknowledges that in addition to the use of Good Industry Practice, this Project Agreement includes instructions as to the manner in which the

Works 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 Works which are to be carried out within the Existing Facilities and in respect of those portions of the Works where connections are being made to the Existing Facilities. In addition, Project Co acknowledges that it has familiarized itself with the facility and/or building operations of the Existing Facilities and will perform the Works taking into account the requirements of SMH to maintain normal facility and/or building operations of the Existing Facilities. Project Co further acknowledges that the Cost of the Works includes all premium time and overtime that may be required to perform the Works in accordance with this Project Agreement and Good Industry Practice. Project Co shall develop and implement protocols in furtherance of the foregoing in accordance with the Output Specifications.

- (b) Project Co recognizes that part of the Works 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. Project Co shall use all methods required to comply with the instructions set out in this Project Agreement during the performance of the Works. Project Co shall fully cooperate with SMH in complying with said instructions during the performance of the Works. Any costs incurred by Project Co in complying with said instructions shall be part of the Guaranteed Price.
- (c) Project Co acknowledges that the Project Agreement includes the Phasing Requirements and other specifications which include instructions respecting SMH's use of the Existing Facilities and infection control procedures. Project Co acknowledges having read and understood the said instructions and agrees to comply with the procedures set out therein. Project Co shall be responsible for any costs and expenses resulting 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 this Project Agreement 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 SMH, in its sole discretion.

#### **11.19 Change in Standards**

- (a) Where this Project Agreement requires Project Co 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 this Project Agreement and the date that such compliance is required, then Project Co 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 this Project Agreement), then, to the extent such change impacts the Works 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 Project Co shall continue to comply with the standard applicable as of the date of this Project Agreement, 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) Project Co shall preserve and protect the rights of the Parties under this Project Agreement with respect to the works to be performed under Subcontract, and shall:
  - (i) enter into Subcontracts or written agreements with Project Co Parties to require them to perform their work as provided in the Project Agreement;
  - (ii) incorporate the relevant terms and conditions of the Project Agreement into all contracts or written agreements with Project Co Parties; and
  - (iii) be as fully responsible to SMH for acts and omissions of the Project Co Parties as for acts and omissions of persons directly employed by Project Co.
- (b) Attached in Part 1 of Schedule 8 – Project Co Parties is a list of all Project Co Parties that Project Co has engaged or caused to be engaged for the performance of the Work as of the date of execution of this Project Agreement. Project Co agrees to update such list from time to time as additional Project Co Parties are engaged. Any of these named Project Co Parties listed by Project Co may be changed by Project Co upon prior notice to (but without the approval of) the SMH Representative, provided however, that if the SMH Representative reasonably objects to any change to a mechanical or electrical Subcontractor that is a Project Co Party, then Project Co shall select an alternative replacement mechanical or electrical Subcontractor to which the SMH Representative does not reasonably object.
- (c) Project Co hereby agrees to contractually obligate the Construction Contractor to enter into the Construction Contractor's Direct Agreement and, subject to Section 11.20(d), to cause the Construction Contractor to cause each of the other Project Co 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 – Project Co Parties, none of Project Co, the Construction Contractor or the applicable Project Co Party are obliged to enter into a Subcontractor's Direct Agreement in respect of Subcontracts having a total estimated cost of \$[REDACTED] or less.

- (e) Subject to Section 11.20(d), Project Co agrees to deliver to SMH the Subcontractor's Direct Agreements by the applicable due dates set out in Part 2 of Schedule 8 – Project Co Parties. If, following the date that 100% Construction Document Submittals are submitted to SMH in accordance with Schedule 10 – Review Procedure, Project Co is required to enter into any additional Subcontractor's Direct Agreement pursuant to this Section 11.20, Project Co 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, Project Co shall provide a plan setting out Project Co's Project-specific approach to maximizing apprenticeship opportunities on the Project (the "**Apprenticeship Plan**") for review and approval by 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 Project Co's Apprenticeship Plan targets and requirements;
  - (v) a program to support apprentices on the Project, to complete their apprenticeships during the Project Term and, for those whose apprenticeships are not complete by the end of the Project Term a program to support apprentices to complete their apprenticeships after the end of the Project Term; and
  - (vi) a focused program for youth-at-risk, local communities, and military veterans.
- (b) Project Co shall implement the approved Apprenticeship Plan.
- (c) Project Co shall provide an annual report to 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 Project Co's progress toward achieving the objectives set out in the Apprenticeship Plan, including an identification of an barriers that prevented Project Co from achieving its objectives.

- (d) SMH may require Project Co to amend its Apprenticeship Plan if, in its opinion, acting reasonably, Project Co is failing to maximize apprenticeship opportunities on the Project pursuant to the then current Apprenticeship Plan.
- (e) SMH may, in its sole discretion, release Project Co's Apprenticeship Plan to the public. Project Co's Apprenticeship Plan shall not be Confidential Information.

**11.22 Procurement Monitoring and Implementation Plan**

- (a) Project Co shall implement the procurement monitoring and implementation plan (the "**Procurement Monitoring and Implementation Plan**") attached as Schedule 20 – Procurement Monitoring and Implementation Plan to this Project Agreement.
- (b) A director of Project Co shall submit, annually, on each anniversary of Commercial Close, a completed and executed declaration in the form attached as Appendix 1 to Schedule 20 – Procurement Monitoring and Implementation Plan that Project Co has made the proper inquiries and has determined that the requirements of the Procurement Monitoring and Implementation Plan have been complied with by Project Co and its Subcontractors in the immediately previous year.

**11.23 Demolition Requirements**

- (a) Project Co shall, and shall cause each Project Co Party that is performing any part of the Works, at such person's own cost and risk, at all times during any period in which the Works that are being performed pursuant to this Project Agreement 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 Project Co 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 Project Co or any Project Co 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 Project Co or any Project Co Party that is performing any part of the Works 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 this Project Agreement, if at any time while any Demolition is being performed pursuant to this Project Agreement, Project Co or any Project Co Party that is performing any part of any Demolition receives notice from 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**"),

Project Co, and the applicable Project Co Party, shall:

- (A) be required immediately upon the occurrence of a Demolition Default Event, to notify 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 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, Project Co and the applicable Project Co 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) SMH is satisfied that Project Co or the applicable Project Co Party has taken all necessary steps to remediate such Demolition Default Event in accordance with Demolition Plan and (ii) 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. SMH shall have the right to require Project Co and the applicable Project Co 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 Project Co and the applicable Project Co Party do not take such actions within the time period required by SMH, SMH shall have the right to, or to cause a third party to, at the sole cost and expense of Project Co, 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.
- (d) Provided that Project Co has complied with Section 11.23(b), for greater certainty, the occurrence of a Demolition Default Event shall not be a Project Co Event of Default for the purposes of Section 34.1(a)(vi).

## **12. REPRESENTATIVES**

### **12.1 The SMH Representative**

- (a) Subject to the limitations set out in Section 12.1(d), the SMH Representative shall exercise the functions and powers identified in this Project Agreement as functions or powers to be performed by the SMH Representative and such other functions and powers of SMH under this Project Agreement as SMH may notify Project Co from time to time.
- (b) SMH may, from time to time by written notice to Project Co, 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.

- (c) 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 this Project Agreement, SMH shall perform or may, by written notice to Project Co, 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, Project Co and the Project Co Representative shall be entitled to treat any act of such alternative SMH Representative which is permitted by this Project Agreement as being authorized by SMH, and Project Co and the Project Co Representative shall not be required to determine whether authority has in fact been given.
- (d) The SMH Representative shall not, except as otherwise provided in this Project Agreement, be entitled to modify or waive any provision of this Project Agreement or to authorize a Variation.
- (e) Subject to the limitations set out in Sections 12.1(a) and 12.1(d), unless otherwise notified in writing, Project Co and the Project Co Representative shall be entitled to treat any act of the SMH Representative which is authorized by this Project Agreement as being authorized by SMH, and Project Co and the Project Co Representative shall not be required to determine whether authority has in fact been given.

## **12.2 The Project Co Representative**

- (a) Subject to the limitations set out in Section 12.2(d), the Project Co Representative shall have full authority to act on behalf of Project Co for all purposes of this Project Agreement.
- (b) Project Co may change the Project Co Representative with the prior written consent of SMH, not to be unreasonably withheld or delayed.
- (c) During any period when the Project Co Representative is unable, through illness, incapacity or any other reason whatsoever, to perform the Project Co Representative's functions under this Project Agreement, Project Co shall perform or may, by written notice to SMH, promptly appoint an alternative Project Co Representative to perform the functions which would otherwise be performed by the Project Co Representative, provided that, Project Co must seek SMH's consent in accordance with Section 12.2(b) if such alternative Project Co Representative is in place for more than 180 days. Upon receipt of such written notice, SMH and the SMH Representative shall be entitled to treat any act of such alternative Project Co Representative which is permitted by this Project Agreement as being authorized by Project Co, and SMH and the SMH Representative shall not be required to determine whether authority has in fact been given.
- (d) The Project Co Representative shall not, except as otherwise provided in this Project Agreement, be entitled to modify or waive any provision of this Project Agreement.

- (e) Subject to the limitations set out in Section 12.2(d), unless otherwise notified in writing, SMH and the SMH Representative shall be entitled to treat any act of the Project Co Representative which is authorized by this Project Agreement as being authorized by Project Co, and SMH and the SMH Representative shall not be required to determine whether authority has in fact been given.

### **12.3 Communications to Representatives**

- (a) At the time that a Party appoints or changes the appointment of the SMH Representative or the Project Co Representative, as applicable, that Party shall also provide the other Party 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 Works are identified in Schedule 9 – Key Individuals. Project Co shall use commercially reasonable efforts to ensure that such persons remain involved in the Works in the capacity set out in Schedule 9 – Key Individuals and, in particular, will not, for the duration of the Works, require or request any such person to be involved in any other project on behalf of Project Co or any Project Co Party if, in the opinion of SMH, acting reasonably, such involvement would have a material adverse effect on the Works.
- (b) If Project Co considers it necessary to replace any individual identified in Schedule 9 – Key Individuals, Project Co shall provide SMH with relevant information on the proposed replacement and shall consult with SMH before finalizing the appointment of such replacement. Project Co shall not replace any of the individuals identified in Schedule 9 – Key Individuals without the prior written consent of 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.
- (c) If SMH determines, acting reasonably, that it is in the best interests of SMH that any individual identified in Schedule 9 – Key Individuals be replaced, SMH shall notify Project Co (including a detailed explanation of the reasons for such determination), and, within 30 days of receipt by Project Co of such notice, Project Co shall provide SMH with relevant information on the proposed replacement and shall consult with SMH before finalizing the appointment of such replacement. Project Co shall not replace any of the individuals identified in Schedule 9 – Key Individuals without the prior written consent of 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. WORKS SCHEDULE AND WORKS REPORT**

**13.1 Completion of the Works**

- (a) Project Co shall complete the Works in accordance with this Project Agreement 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 Works Schedule**

- (a) Project Co shall, in accordance with Schedule 3 – Works Scheduling Requirements, prepare and submit to SMH and the Independent Certifier as soon as practical and in any event within 45 days of Financial Close, a detailed computerized draft Works Schedule. SMH shall provide Project Co with comments on the draft Works Schedule in accordance with Schedule 10 – Review Procedure, provided that the period for review of such draft Works Schedule shall be 20 Business Days rather than the 15 Business Days prescribed in Section 2.4 of Schedule 10 – Review Procedure. Project Co shall revise the draft Works Schedule to the extent required by Schedule 10 – Review Procedure within 30 days of receipt of any comments from SMH. When agreed by the Parties, the draft Works Schedule shall become the Works Schedule.
- (b) Project Co and SMH shall comply with the provisions of Schedule 3 – Works Scheduling Requirements.

**13.3 Changes to Critical Path**

- (a) Any change to the critical path of the Works Schedule initiated by Project Co 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. Subject to the terms of Schedule 22 – Variation Procedure, any SMH approval of such changes to the critical path does not entitle Project Co 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 this Project Agreement but subject to Article 30, if, at any time:

- (i) the actual progress of the Works has fallen significantly behind the Works Schedule, including, for clarity, any failure of Project Co to achieve a Works Milestone; or
- (ii) SMH is of the opinion that:
  - (A) the actual progress of the Works has fallen significantly behind the Works Schedule;
  - (B) Project Co will not achieve one or more Phase Completions by the applicable Phase Completion Dates;
  - (C) Project Co will not achieve Tower Interim Completion by the Scheduled Tower Interim Completion Date; or
  - (D) Project Co will not achieve Substantial Completion by the Longstop Date,

Project Co shall:

- (iii) within 5 Business Days of receipt of notice from 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 Project Co 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 Works Schedule incorporating the measures required to bring the progress of the Works 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 Works back on schedule in accordance with the plan delivered under Section 13.4(a)(iii)(iii)(B) and approved by the SMH Representative.
- (b) Project Co shall notify the SMH Representative if, at any time, the actual progress of the Works is significantly ahead of the Works Schedule.
- (c) For greater certainty, provided that Project Co 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 Project Co Event of Default.

**13.4A Notification of Early Phase Completion**

- (d) Unless Project Co obtains the prior written consent of SMH, in its sole discretion, Project Co 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.
- (e) If Project Co advises SMH that it expects to be able to achieve a Phase Completion prior to the applicable Scheduled Phase Completion Date, the SMH Representative shall be entitled to require Project Co to produce and submit to the SMH Representative a revised Works Schedule showing the manner and the periods in which the Works 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 Project Agreement in order to accommodate such earlier Scheduled Phase Completion Date.

All costs associated with any such modifications to this Project Agreement shall be borne by Project Co.

**13.4B Notification of Early Tower Interim Completion**

- (f) Unless Project Co obtains the prior written consent of SMH, in its sole discretion, Project Co 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.
- (g) If Project Co advises SMH that it expects to be able to achieve Tower Interim Completion prior to the Scheduled Tower Interim Completion Date, the SMH Representative shall be entitled to require Project Co to produce and submit to the SMH Representative a revised Works Schedule showing the manner and the periods in which

the Works 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 this Project Agreement in order to accommodate such earlier Scheduled Tower Interim Completion Date.

All costs associated with any such modifications to this Project Agreement shall be borne by Project Co.

### **13.5 Notification of Early Substantial Completion**

- (a) Unless Project Co obtains the prior written consent of SMH, in its sole discretion, Project Co 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 Project Co advises SMH that Project Co expects to be able to achieve Substantial Completion prior to the Scheduled Substantial Completion Date, the SMH Representative shall be entitled to require Project Co to produce and submit to the SMH Representative a revised Works Schedule showing the manner and the periods in which the Works 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 this Project Agreement in order to accommodate such earlier Scheduled Substantial Completion Date.

All costs associated with any such modifications to this Project Agreement shall be borne by Project Co.

### **13.6 Works Report**

- (a) Project Co shall continuously monitor the progress of the Works in relation to the Works Schedule and, within 15 Business Days following the end of each calendar month from Financial Close until the Final Completion Date, Project Co shall provide to the SMH Representative and the Independent Certifier a works report (each, a "Works Report"), which will include:
  - (i) an executive summary describing the general status of the Works and progress made over the relevant month;
  - (ii) a table setting out and responding to items of Project Agreement non-compliance and deficiencies in ongoing Works as identified by SMH and/or Project Co;

- (iii) an updated Works 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 Works, including:
    - (A) the progress towards achieving the Works Milestones;
    - (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 Works, interdependencies or original activity durations set out in the Works Schedule, which changes, for clarity, shall be incorporated into the updated Works Schedule;
    - (E) comparisons of the actual versus the planned progress of the Works, with a brief commentary on any actual or forecasted delays or problems that might have an impact on the scheduled completion dates of the Works in the Works Schedule and a discussion of the measures being (or to be) adopted by Project Co to overcome them, and
    - (F) any other information specifically requested by SMH on the progress of the Works;
  - (v) a narrative description of any Disputes related to the Works, including any action that has taken place over the relevant month to resolve such Disputes; and
  - (vi) an update on those matters set out in Schedule 17 – Works Report Requirements, all in form and substance satisfactory to SMH, acting reasonably. For greater certainty, for all updates and revisions to the Works Schedule, Project Co must provide a revised critical path reflecting the updated or revised Works Schedule.
- (b) Project Co shall use and interact with, and ensure that the Construction Contractor uses and interacts 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 – Works Report Requirements and other processes as determined by SMH in its sole discretion.

## **14. WORKS COMMITTEE**

### **14.1 Establishment**

- (a) The Parties 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;
    - (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 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 the Parties by promoting cooperative and effective communication with respect to matters related to the Works. 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, including:
  - (i) any design, construction and commissioning issues;
  - (ii) the Works Schedule;
  - (iii) any issues arising from reports or documents provided by Project Co or the Independent Certifier;
  - (iv) any quality assurance and safety issues;

- (v) the Works Reports;
  - (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;
  - (ix) monitoring each Phase Commissioning Program, the Tower Interim Completion Commissioning Program and the Final Commissioning Program; and
  - (x) any other issues pertaining to the Works.
- (c) Subject to Section 14.2(d), 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 may refer the matter for resolution in accordance with Schedule 27 – Dispute Resolution Procedure.
- (d) The Works Committee shall not have authority to make decisions with respect to or approve:
- (i) any amendment to or waiver of any provision of this 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;
  - (iii) any Variation;
  - (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; 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 this Project Agreement.

### **14.3 Term of Works Committee**

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

**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 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) 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 until the Final Completion Date, unless otherwise agreed by the members of the Works Committee or the Parties.
- (c) Any one of the Project Co Representatives or the SMH Representatives on the Works Committee may convene a special meeting of the Works Committee at any time. Special meetings of the Works Committee 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) 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 Project Co. Project Co 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 it disagrees with the contents of the minutes, Project Co and SMH shall be deemed to have approved such minutes. Project Co 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 during regular business hours.

## **15. QUALITY ASSURANCE**

### **15.1 Quality Plans and Systems**

- (a) Project Co shall cause all of the Works 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. Project Co 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 Project Co shall not be entitled to implement or cause the implementation of any Quality Plan unless and until Project Co is entitled to proceed with such implementation pursuant to Schedule 10 – Review Procedure.
- (f) Project Co shall implement the Quality Plans, shall perform and cause to be performed the Works in compliance with the Quality Plans, including by causing the Construction Contractor to implement the Design Quality Plan and the Construction Quality Plan.
- (g) Where any aspect of the Works is performed by more than one Project Co Party, then this Article 15, in so far as relevant or appropriate to the activities to be performed by such Project Co Party, shall apply in respect of each of them and references in this Article 15 to such Project Co Party, including the Construction Contractor, shall be construed accordingly.

## **15.2 Changes to Plans**

- (a) Project Co 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 SMH's other rights pursuant to this Project Agreement, including Section 26, SMH may, from time to time, directly or indirectly, perform periodic monitoring, spot checks and auditing of Project Co's quality management systems, including all relevant Quality Plans and any quality manuals and procedures. Project Co shall ensure that SMH also has the right to perform periodic monitoring, spot checks and auditing of the Construction Contractor's quality management systems.
- (b) Project Co shall cooperate, and shall cause the Construction Contractor to cooperate, with SMH in monitoring quality management systems and shall provide SMH with all information and documentation reasonably required in connection with SMH's rights under this Section 15.4.

## **16. LICENCE**

### **16.1 Licence to Site**

- (a) Effective from the date of Financial Close until the Termination Date and subject to this Article 16, SMH hereby grants or shall cause to be granted, and shall continuously until the earlier of the termination of the Project Agreement or Final Completion grant or cause to be granted, to Project Co and all Project Co Parties such non-exclusive licence rights of use and access to, on and over the Site and the Facility in accordance with the Phasing Requirements, except such rights set out as a Project Co 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 Project Co and such Project Co Parties and sufficient (subject to Project Co performing its obligations described in the Permits, Licences, Approvals and Agreements tables attached as Appendix "A" to Schedule 1 – Definitions and Interpretation) to allow Project Co and such Project Co Parties to perform the Works. Following Final Completion, SMH shall grant, or cause to be granted, to Project Co and all Project Co Parties such rights of use

and access to, on and over the Site and the Facility as are required by Project Co and such Project Co Parties sufficient (subject to Project Co performing its obligations described in the Permits, Licences, Approvals and Agreements tables attached as Appendix "A" to Schedule 1 – Definitions and Interpretation) to allow Project Co and such Project Co Parties to carry out its remaining obligations under the Project Agreement.

- (b) In consideration for the licence granted pursuant to Section 16.1(a), Project Co shall provide the Works subject to and in accordance with this Project Agreement.
- (c) Without derogating from any of SMH's rights hereunder, in particular and subject to this Section 16.1(c), 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 acknowledges that, in respect of the Works, Project Co and the Project Co 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. Project Co further acknowledges that following Final Completion, its access to the Site and the Facility shall be subject to the SMH Activities.
- (d) None of the rights granted pursuant to 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 this Project Agreement, to the extent the same are necessary for the Works. Notwithstanding the foregoing, SMH shall provide Project Co with limited access to the Existing Facilities in accordance with the Phasing Requirements, to the extent necessary to perform the Works and subject to such reasonable conditions as are imposed by SMH.
- (e) Project Co 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 Project Co is performing the Works 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) Project Co acknowledges and agrees that the rights granted to Project Co and the Project Co Parties hereunder shall be non-exclusive and that SMH and any person authorized by SMH may occupy and possess the Site, the Facility and the Existing Facilities.

- (b) Without limiting Section 16.2(a), Project Co 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. To the extent that such use or development materially adversely interferes with Project Co's licence rights hereunder or materially adversely interferes with Project Co's ability to perform the Works, such use or development shall, subject to and in accordance with Schedule 22 – Variation Procedure, result in a Variation.

### **16.3 Limited Access Areas**

- (a) For purposes related to the provision of the SMH Activities or to patient safety SMH may limit or restrict Project Co'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) Project Co 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, Project Co, the Project Co 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) Project Co acknowledges and agrees that, subject to the provisions of the CLA, in accordance with the principles of the IPFP Framework, neither 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 this Project Agreement, 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 Project Co or the Lenders. Project Co 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 and the Lenders' Direct Agreement, respectively.

**16.6 Non-Disturbance Agreement**

- (a) If SMH mortgages, charges or otherwise encumbers the Site, SMH shall notify Project Co and, at the request of Project Co, provide Project Co with an agreement, in form satisfactory to Project Co, acting reasonably, executed by the mortgagee of the Site permitting Project Co and the Lenders' Agent to access and use the Site under the licence granted pursuant to this Section 16 and the Lenders' Direct 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 this Section 16 nor the Works pertain to such portion of the Site.

**17. TITLE ENCUMBRANCES****17.1 Title Encumbrances**

- (a) Project Co shall perform all obligations under the Title Encumbrances for or on behalf of SMH, other than:
- (i) obligations under any Title Encumbrance which Project Co is not legally capable of performing for or on behalf of SMH (including, for clarity, any and all obligations under the SMH Mortgages);
  - (ii) obligations under any Title Encumbrance added after the date of this Project Agreement unless such obligations are provided in the Output Specifications as obligations of Project Co or the Parties agree that such obligations are obligations of Project Co;
  - (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 Works performed by or on behalf of Project Co shall be performed in a manner which does not breach the Title Encumbrances or any of the Development Approvals.
- (c) Subject to Encumbrances that Project Co shall remove pursuant to Section 17.2 and Section 17.3, the performance of the Works 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 Project Agreement.

**17.2 No Site Encumbrances**

- (a) Project Co shall not create, incur, permit or suffer to exist any Encumbrance to be filed, issued or registered against the Site, the Facility or the Existing Facilities or any part thereof or any interest therein due to an act or omission of Project Co or any Project Co Party.
- (b) Subject to Encumbrances that Project Co shall remove pursuant to Section 17.2(c), the performance of the Work shall not give rise to a right for any person to obtain title to or any interest in the Site, the Facility or the Existing Facilities or any part of it or them except in accordance with the terms of this Project Agreement.
- (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 Works which has not been consented to in writing by SMH, Project Co shall immediately take all steps necessary to remove, vacate or discharge such Encumbrance. If such Encumbrance is not removed, vacated or discharged within 10 Business Days of the filing, issuance or registration of such Encumbrance then, without prejudice to any other rights or remedies it may have, SMH will be at liberty to take whatever steps it deems necessary and appropriate to remove, vacate or discharge the Encumbrance, including payment of any amount owing or claimed thereunder, and seek immediate recovery from Project Co of the amount of any such payment and any associated costs, including legal costs (on a full indemnity basis), all of which shall be payable on demand.
- (d) Notwithstanding the provisions of this Section 17.2, the Parties acknowledge that the provisions of Section 17.3 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) Project Co 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*, any contract for the performance of the Works entered into by and between Project Co and any Subcontractor in relation to the performance of the Works shall be considered a "contract" as defined in the *CLA*.
- (b) In furtherance of Section 17.3(a), Project Co shall, as a condition of final payment under any Subcontract for which lien rights or rights in respect of the holdback may be claimed under the *CLA*, require that a certificate of completion under Section 33(1) of the *CLA* for such Subcontract be issued and the relevant Subcontractor provide statutory declarations or other assurances confirming that all those engaged by the Subcontractor have been paid in accordance with Applicable Law.

- (c) Project Co shall follow the requirements of the CLA and Good Industry Practice for posting and advertising certificates of completion when issued.
- (d) Project Co and SMH 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, Project Co and SMH 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 this Project Agreement, in the event that:
  - (i) a claim for a construction lien arising in relation to the performance of the Works is registered against the Site, the Facility or the Existing Facilities, and unless Project Co makes alternative arrangements to bond or otherwise secure the amount of the lien claim and costs associated therewith satisfactory to SMH, acting reasonably, or
  - (ii) SMH receives any written notice of lien arising in relation to the performance of the Works,

SMH shall be entitled to withhold such portion of any payment otherwise due to Project Co in an amount SMH reasonably determines would be required to satisfy the applicable lien claimant and any costs and expenses incurred by SMH in connection therewith, including such amount on account of costs of the lien claimant such that SMH 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 Works is received by SMH, and unless Project Co makes alternative arrangements to bond or otherwise secure the amount of the lien claim and costs associated therewith satisfactory to SMH, acting reasonably, Project Co 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 Works is registered against the Site, the Facility or the Existing Facilities, and unless Project Co makes alternative arrangements to bond or otherwise secure the amount of the lien claim and costs associated therewith satisfactory to SMH, acting reasonably, Project Co 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, Project Co shall, if requested, undertake SMH's defence of any action commenced in respect of the lien at Project Co's expense and (i) if an action against SMH has been commenced in respect of the lien, Project Co shall, at its sole cost and expense, promptly use best efforts

to obtain a discontinuance of such action as it relates to SMH, or (ii) if no action has been commenced in respect of the lien, Project Co shall, at its sole cost and expense, promptly use best efforts to obtain a release from the lien claimant releasing SMH from all claims of such claimant that arise from the subject matter of the lien.

- (h) If Project Co 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 Works 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 Project Co makes alternative arrangements to bond or otherwise secure the amount of the lien claim and costs associated therewith satisfactory to SMH, acting reasonably, then SMH shall, at its option, be entitled to take all steps necessary to vacate and/or discharge the lien, and all costs incurred by SMH 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 Project Co, and Owner may deduct such amounts from the amounts otherwise due or owing to Project Co.
- (i) Without limiting any of the provisions of this Section 17.3, Project Co shall satisfy all judgments and pay all costs resulting from any construction liens arising in relation to the performance of the Works or any actions brought in connection with any such liens, or in connection with any other claim or lawsuit brought against SMH by any person that provided services or materials to the Site, the Facility or the Existing Facilities in relation to the Works.
- (j) The provisions of Sections 17.3(e) through 17.3(i) (inclusive) do not apply to construction liens (i) filed by Project Co which are claimed as a result of any default of SMH to make payments to Project Co in accordance with the terms of the Project Agreement 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, Project Co 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, Project Co 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 this Project Agreement 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, Project Co shall not be entitled to

make any claim of any nature whatsoever against 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 SMH or a SMH Party, unless the relevant person has given Project Co an express written entitlement to rely on information relating to the Site provided by such person to Project Co.

- (b) Subject to Sections 7.4, 18.2 and 18.3, Project Co 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 Works;
  - (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 this Project Agreement;
  - (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) Project Co further acknowledges and agrees that, other than as referred to or contained in this Project Agreement, no representations or warranties have been made, nor documentation delivered to Project Co or any Project Co Party, which would indicate that Project Co would be unable to perform the Works in a lawful manner.

## **18.2 Contamination**

- (a) 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 Project Co or any Project Co Party.
- (b) Upon the discovery of any Contamination for which SMH is responsible pursuant to Section 18.2(a), Project Co 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).
- (c) In the event that SMH wishes Project Co to perform actions which are in addition to any required pursuant to Section 18.2(b), then SMH shall issue an instruction to Project Co specifying what action SMH requires Project Co to take and Project Co shall promptly and diligently comply with all such instructions at SMH's cost pursuant to Section 18.2(d).
- (d) If Sections 18.2(b) and 18.2(c) require Project Co to perform any alteration, addition, Demolition, extension or variation in the Works as a result of Contamination for which SMH is responsible pursuant to Section 18.2(a) and which would not otherwise be required under this Project Agreement, then any such alteration, addition, Demolition, extension or variation in the Works shall, subject to and in accordance with Section 30,

be treated as a Delay Event and, subject to and in accordance with Section 31, 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 Works, Project Co shall:
  - (i) immediately inform the SMH Representative of such discovery;
  - (ii) take all steps not to disturb the item and, if necessary, cease any Works in so far as performing such Works would endanger the item or prevent or impede its excavation;
  - (iii) take all necessary steps to preserve and ensure the preservation of the item in the same position and condition in which it was found; and
  - (iv) comply, and ensure compliance by all Project Co Parties, with Applicable Law and all requirements of Governmental Authorities with respect to such discovery, including the *Funeral, Burial and Cremations Act* and the Heritage Guidelines and Protocols.
- (c) In the event that SMH wishes Project Co to perform actions which are in addition to any required pursuant to Section 18.3(b), then SMH shall issue an instruction to Project Co specifying what action SMH requires Project Co to take and Project Co shall promptly and diligently comply with all such instructions.
- (d) If Sections 18.3(b) and 18.3(c) require Project Co to perform any alteration, addition, Demolition, extension or variation in the Works as a result of such discovery and which would not otherwise be required under this Project Agreement, then any such alteration, addition, Demolition, extension or variation in the Works shall, subject to and in accordance with Article 30, be treated as a Delay Event and, subject to and in accordance with Article 31, 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), Project Co 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 Works, including:

- (i) any development charges relating to the Works, 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 Project Co 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 Project Co to the extent such Financial Obligations were paid by Project Co.
- (c) 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 as being the responsibility of SMH.

## **20. SMH ACCESS AND MONITORING**

### **20.1 SMH Access During the Works**

- (a) Subject to Section 20.1(b) but without limiting any of SMH's rights in respect of the Site and the Existing Facilities, Project Co acknowledges and agrees that 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 SMH's right to use and access the Existing Facilities or any part of the Site not required at that time for Project Co's performance of the Works in accordance with the terms hereof.
- (b) In exercising their access rights under Section 20.1(a), 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 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 Project Co Representative from time to time; and

- (iii) if required by Project Co, be accompanied by a representative of Project Co or a Project Co Party.

## **20.2 Increased Monitoring**

- (a) If, at any stage, SMH is of the opinion, acting reasonably, that there are defects in the Works or that Project Co has failed to comply, in any material respect, with the requirements of this Project Agreement, SMH may, without prejudice to any other right or remedy available to it, by notice to Project Co, increase the level of monitoring of Project Co from that set out in this Project Agreement to such level as SMH considers reasonable taking into account the nature of the relevant defect or failure until such time as Project Co shall have demonstrated, to SMH's satisfaction, that it is capable of performing and will perform, in all material respects, its obligations related to the Works under this Project Agreement. Project Co will compensate SMH for any reasonable costs incurred as a result of such increased monitoring.

## **20.3 Right to Open Up**

- (a) SMH shall have the right, at any time prior to the Final Completion Date to request Project Co to open up and inspect (or allow SMH to inspect) any part or parts of the Works, or to require testing of any part or parts of the Works, where SMH reasonably believes that such part or parts of the Works is or are defective or that Project Co has failed to comply with the requirements of this Project Agreement (including the Design Data) relevant to such part or parts of the Works, and Project Co shall comply with such request. When SMH makes such a request, SMH shall include reasonably detailed reasons with such request.
- (b) If the inspection shows that the relevant part or parts of the Works is or are defective or that Project Co has failed to comply with the requirements of this Project Agreement (including the Design Data) relevant to such part or parts of the Works, Project Co shall rectify all such defects and non-compliance diligently and at no cost to SMH and Project Co 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 Works is or are not defective and that Project Co has complied with the requirements of this Project Agreement (including the Design Data) relevant to such part or parts of the Works, the exercise by SMH of its rights pursuant to this Section 20.3 shall, subject to and in accordance with Section 30, be treated as a Delay Event and, subject to and in accordance with Section 31, be treated as a Compensation Event.

## **20.4 No Relief from Obligations**

- (a) The Parties acknowledge that the exercise by SMH or the SMH Representative of the rights under this Article 20 shall in no way affect the obligations of Project Co under this Project Agreement except as set out in this Article 20.

**20.5 Right of Access of Additional Contractors to Works**

- (a) Subject to Section 11.13, Project Co shall grant, and shall cause all Project Co Parties to grant, Additional Contractors access to those parts of the Works as may be necessary for the Additional Contractors to carry out any Additional Works.

**21. EQUIPMENT**

**21.1 Equipment Steering Committee**

- (a) The Parties 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, 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 the Parties by promoting cooperative and effective communication with respect to matters related to 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. Project Co 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) Project Co 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 Project Co and Project Co 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 it disagrees with the contents of the minutes, Project Co and SMH shall be deemed to have approved such minutes; and
- (iv) Project Co 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 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 shall approve the selection of and the entering into of each and every purchase order, contract and manufacturer's installation invoice by Project Co with respect to each item of In-Co ntract Equipment. Prior to SMH providing any such approval, if applicable,

Project Co 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, not Project Co, 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) Project Co, 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 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 that SMH has given its prior written approval to such arrangements.

(e) SMH 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 Project Co.

### **21.3 SMH Early Procured In-Contract Equipment**

(a) Upon Financial Close, SMH shall assign to Project Co and/or Project Co 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"). Project Co 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 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, Project Co has the same obligations in respect of SMH Early Procured In-Contract Equipment as it does for In-Contract Equipment under this Project Agreement and, for clarity, Project Co 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 this Project Agreement have the meanings given to them in the SMH Early Procured In-Contract Equipment Assumption. 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 this 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 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.
- (d) 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 Project Co Equipment Responsibilities**

- (a) Project Co 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 Project Co'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 Project Co is required to commission to achieve such Phase Completion must be successfully commissioned by Project Co in accordance with each Phase Commissioning Program. Not less than 10 Business Days prior to Project Co's submission of a draft Phase Commissioning Program under Section 23A.1(a), SMH shall identify for Project Co the Existing Equipment, if any, that must be successfully commissioned by Project Co 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 if (A), despite having used commercially reasonable efforts to do so, Project Co 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 Project Co 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 if, despite having used commercially reasonable efforts to do so, Project Co 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 Project Co is required to commission to achieve Tower Interim Completion must be successfully commissioned by Project Co in accordance with the Tower Interim Completion Commissioning Program. Not less than 10 Business Days prior to Project Co's submission of the draft Tower Interim Completion Commissioning Program under Section 23B.2(a), SMH shall identify for Project Co the Existing Equipment, if any, that must be successfully commissioned by Project Co 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 if, (A) despite having used commercially reasonable efforts to do so, Project Co 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 Project Co 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 if, despite having used commercially reasonable efforts to do so, Project Co 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 Project Co in accordance with the Final Commissioning Program. Not less than 10 Business Days prior to Project Co's submission of the draft Final Commissioning Program under Section 24.2(a), SMH shall identify for Project Co the Existing Equipment, if any, that must be successfully commissioned by Project Co 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 if, (A) despite having used commercially reasonable efforts to do so, Project Co 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 Project Co 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 if, despite having used commercially reasonable efforts to do so, Project Co 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 Project Co has completed the installation and commissioning of all Not-In-Contract Equipment in accordance with this Section 21, SMH may withhold from any payment or payments due to Project Co a holdback amount equal to the greater of the Not-In-Contract Equipment Fee and \$[REDACTED].

## **21.5 Project Co Procurement Responsibilities**

- (a) 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 Project Co'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 Project Co;
  - (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 In-Contract Equipment vendors.
- (b) Based on the awards, tenders, quotations and proposals received by SMH from Not-In-Contract Equipment vendors, Project Co 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) Project Co 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. Project Co 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, Project Co 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 shall make its staff available for training purposes in accordance with the Works Schedule, each Phase Commissioning Program, the Tower Interim Completion Commissioning Program and the Final Commissioning Program, as applicable.
- (c) Project Co'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 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, SMH shall provide to Project Co a written list of the Equipment training that Project Co 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. Promptly following the receipt of such written list, SMH and Project Co shall agree to the time(s) and date(s) upon which such training shall be completed by Project Co following the applicable Phase Completion Date, Tower Interim Completion Date or Substantial Completion Date, as the case may be, and Project Co shall incorporate the time(s) and date(s) of such training into the Works 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) Project Co 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 Works 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) 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 Works Schedule, provided that the SMH Representative shall have received such documentation as SMH requires, acting reasonably, to discharge its obligations under this Section 21 no later than 30 days prior to the relevant date set out in the Works Schedule. Notwithstanding the foregoing, SMH 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 ENERGY AND ENVIRONMENTAL DESIGN AND OTHER REQUIREMENTS**

**22.1 LEED Design and Construction Obligations**

- (a) Project Co shall perform the Works 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, Project Co may, in its sole discretion, determine which additional credits to pursue.

**22.2 Mandatory Prerequisites and Credits**

- (a) Project Co 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 Works Report, Project Co shall submit a monthly progress report comparing actual construction and procurement activities with the LEED Silver Rating requirements.

**22.4 LEED Silver Rating**

- (a) Project Co shall cause the Project to be registered with CaGBC on behalf of SMH. Project Co shall verify that the Project is registered with CaGBC within 60 days following Financial Close and confirm to SMH that Project Co 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 Project Co is required by the CaGBC to comply with such change, then Project Co shall notify SMH of such change and such change shall, subject to and in accordance with Schedule 22 – Variation Procedure, result in a Variation.
- (c) Project Co shall apply to the CaGBC to obtain a LEED Silver Rating for the Tower and the New Shuter Wing as soon as possible.
- (d) In the event that:
- (i) Project Co 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 SMH, any SMH Party or any Government Entity, SMH shall be entitled to be paid liquidated damages by Project Co in the amount of: (i) \$[REDACTED] in relation to the Tower LEED requirements; and (ii) \$[REDACTED] in relation to the New Shuter Wing LEED requirements. 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 events 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 SMH as a result of the occurrence of either of such events. For greater certainty, Project Co'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 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 Project Co 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 this Project Agreement, including for certainty all obligations under this Article 22, are required to be made the obligations of the Construction Contractor under the Design and Construction Contract.

## **22.7 Energy Matters**

- (a) The Parties shall comply with the provisions of Schedule 33 – Energy Matters.

**23. INDEPENDENT CERTIFIER**

**23.1 Appointment**

- (a) On or prior to Financial Close, the Parties shall appoint an independent and suitably qualified and experienced consultant to act as the Independent Certifier for the purposes of this Project Agreement and shall enter into an agreement with the Independent Certifier substantially in the form of Schedule 6 – Independent Certifier Agreement. If the Parties 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) Neither Party shall, without the prior written consent of the other Party, enter into any agreement with the Independent Certifier in connection with the Project other than the Independent Certifier Agreement, and Project Co shall ensure that no Project Co Party enters into any separate 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) 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) The Parties shall perform their respective obligations arising under or in connection with the Independent Certifier Agreement.

**23.4 Right to Change Appointment**

- (a) The Parties acknowledge that the Independent Certifier shall provide certain services and reports to Project Co, the Lenders and the Project Co Parties in addition to performing the functions of the Independent Certifier under this Project Agreement. The Parties 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, a new Independent Certifier will be appointed. The Parties 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 Parties agree to cooperate with each other generally in relation to all matters within the scope of or in connection with the Independent Certifier Agreement. All instructions and representations issued or made by either of the Parties to the Independent Certifier shall be simultaneously copied to the other and both Parties shall be entitled to attend all inspections performed by or meetings involving the Independent Certifier.

**23.6 Payment of Independent Certifier**

- (a) Project Co. and SMH shall share equally the responsibility for the payment of all fees and costs of the Independent Certifier.

**23.7 Replacement**

- (a) In the event of the Independent Certifier's engagement being terminated otherwise than for full performance, the Parties 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 the Parties and the terms of his/her appointment shall, unless otherwise agreed, be as set out in the Independent Certifier Agreement.
- (b) In the event the Parties 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) each Party 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 the Parties have both 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 Parties) shall be selected, and in the event of a tie, the lowest-cost of such tied replacements shall be selected; and
  - (iii) if the Parties 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.

**23A. PHASE COMMISSIONING AND COMPLETION**

**23A.1 Phase Commissioning Activities**

- (c) Project Co shall perform all Phase Project Co Commissioning, and shall facilitate the performance of the Phase SMH Commissioning, set out in each Phase Commissioning Program.

**23A.2 Phase Commissioning Program**

- (d) Project Co shall prepare a draft of the applicable Phase Commissioning Program in respect of each Phase Project Co 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.
- (e) 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 Project Co 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 Project Co Commissioning;
  - (vi) include a schedule of each of the Phase Project Co 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 to coordinate the performance of the applicable Phase Project Co 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).
- (f) SMH shall 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 Project Co 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.
- (g) 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 Project Co Commissioning**

- (h) 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 each Phase Project Co Commissioning.
- (i) Project Co shall give at least five Business Days' notice in respect of the commencement of each Phase Project Co 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 Project Co Commissioning. Project Co 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**

- (j) Project Co shall give the Independent Certifier and the SMH Representative at least ten Business Days' notice prior to the date upon which Project Co anticipates delivering a Phase Completion Notice.
- (k) Project Co shall 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 Project Co's

opinion as to whether the conditions for issuance of the applicable Phase Completion Certificate have been satisfied.

- (l) SMH shall, 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.
- (m) Within five Business Days after Project Co's receipt of SMH's opinion pursuant to Section 23A.4(c), the Parties 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 both Project Co 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; 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 applicable Phase Completion Certificate.
- (n) Where the Independent Certifier has issued a report in accordance with Section 23A.4(d)(ii) and Project Co has not referred a Dispute in relation thereto for resolution in accordance with Schedule 27 – Dispute Resolution Procedure, 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 Project Co Commissioning that needs to be undertaken as a result of the rectification actions,and Project Co shall perform all such additional rectification actions and applicable Phase Project Co Commissioning in a timely manner. Upon completion thereof, 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.
- (o) Project Co 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**

- (p) Project Co 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**

- (q) No later than 30 days prior to each Scheduled Phase Completion Date, Project Co 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 of such maintenance data, SMH shall upload it into the CMMS.

**23A.6 Phase SMH Commissioning**

- (r) The Parties acknowledge that each Phase SMH Commissioning shall be performed both before and after each Phase Completion Date. Prior to each Phase Completion, Project Co shall give SMH full access to the Site, the Facility, any portion of the Existing Facilities in which any Works 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. 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 and shall use commercially reasonable efforts to minimize disruption to the Works in performing all Phase SMH Commissioning.
- (s) SMH acknowledges that, during each Phase SMH Commissioning Period, Project Co 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 Project Co Commissioning, and SMH shall take commercially reasonable steps to allow such activities to proceed in accordance with each Phase Commissioning Program.
- (t) Project Co acknowledges that, prior to and during each Phase SMH Commissioning Period, Project Co 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**

- (u) With respect to each Phase Completion, 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 Project Co anticipates that such Phase Completion will be achieved (the "**Anticipated Phase Completion Date**").
- (v) Each Phase Countdown Notice shall be delivered not less than 90 days prior to each Anticipated Phase Completion Date. If Project Co 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.
- (w) Project Co 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.
- (x) 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, in its sole discretion.

**23A.8 Phase Minor Deficiencies**

- (y) In the event that Phase Minor Deficiencies in respect of a Phase of the Works exist when 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.
- (z) 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, Project Co 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.
- (aa) The Independent Certifier 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.
- (bb) 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**

- (cc) Project Co shall, in consultation with the SMH Representative and so as to minimize, to the greatest extent reasonably possible, any disruption of the 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.
- (dd) Project Co 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**

- (ee) If Project Co 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,

SMH may engage others to perform the work necessary to complete and rectify any such Phase Minor Deficiencies, at the risk and cost of Project Co, and, if and as applicable, SMH may deduct such cost 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**

- (ff) 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 this Project Agreement, shall, in no way:
  - (i) limit the obligations of Project Co under this Project Agreement 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 of the Works or the way in which they have been carried out.

**23B. TOWER INTERIM COMPLETION COMMISSIONING AND COMPLETION**

**23B.1 Tower Interim Completion Commissioning Activities**

- (gg) Project Co shall perform all Tower Interim Completion Project Co 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**

- (hh) Project Co shall prepare a draft of the Tower Interim Completion Commissioning Program in respect of the Tower Interim Completion Project Co 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.
- (ii) 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 Project Co 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 Project Co Commissioning;
  - (vi) include a schedule of each of the Tower Interim Completion Project Co 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 to coordinate the performance of the Tower Interim Completion Project Co 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).
- (jj) SMH shall provide Project Co 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 Project Co 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.
- (kk) When agreed by the Parties, 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 Project Co Commissioning**

- (ll) 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 Project Co Commissioning.
- (mm) 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 Project Co Commissioning. Project Co 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**

- (nn) Project Co shall give the Independent Certifier and the SMH Representative at least ten Business Days' notice prior to the date upon which Project Co anticipates delivering the Tower Interim Completion Notice.
- (oo) 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 Project Co's opinion as to whether the conditions for issuance of the Tower Interim Completion Certificate have been satisfied.

- (pp) 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.
- (qq) Within five Business Days after Project Co's receipt of SMH's opinion pursuant to Section 23B.4(c), the Parties 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 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; 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 Tower Interim Completion Certificate.
- (rr) Where the Independent Certifier has issued a report in accordance with Section 23B.4(d)(ii) and Project Co has not referred a Dispute in relation thereto for resolution in accordance with Schedule 27 – Dispute Resolution Procedure, Project Co shall, 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 Project Co Commissioning that needs to be undertaken as a result of the rectification actions,

and Project Co shall perform all such additional rectification actions and Tower Interim Completion Project Co Commissioning in a timely manner. Upon completion thereof, Project Co 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.

**St. Michael's Hospital Redevelopment Project**

- (ss) The Independent Certifier's decision to issue or not to issue the Tower Interim Completion Certificate shall be final and binding on the Parties 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.
- (tt) Project Co 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**

- (uu) Project Co 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**

- (vv) No later than 30 days prior to the Tower Interim Completion Date, Project Co 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 of such maintenance data, SMH shall upload it into the CMMS.

**23B.6 Tower Interim Completion SMH Commissioning**

- (ww) 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, Project Co shall give SMH full access to the Site, the Facility, any portion of the Existing Facilities in which any Works are 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. 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 and shall use commercially reasonable efforts to minimize disruption to the Works in performing the Tower Interim Completion SMH Commissioning.
- (xx) SMH acknowledges that, during the Tower Interim Completion SMH Commissioning Period, Project Co and each Subcontractor 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 Project Co Commissioning, and SMH shall take commercially reasonable steps to allow such activities to proceed in accordance with the Tower Interim Completion Commissioning Program.

- (yy) Project Co acknowledges that, prior to and during the Tower Interim Completion SMH Commissioning Period, Project Co 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**

- (zz) 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 Project Co anticipates that Tower Interim Completion will be achieved (the "**Anticipated Tower Interim Completion Date**").
- (aaa) The Tower Interim Completion Countdown Notice shall be delivered not less than 90 days prior to the Anticipated Tower Interim Completion Date. If Project Co 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.
- (bbb) Project Co 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.
- (ccc) 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, in its sole discretion.

**23B.8 Tower Interim Completion Minor Deficiencies**

- (ddd) In the event that any Tower Interim Completion Minor Deficiencies exist when Project Co gives the Tower Interim Completion Notice, the Independent Certifier, 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. SMH may withhold from the Tower Interim Completion Payment a holdback amount that is [REDACTED]% 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.

- (eee) 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, Project Co 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.
- (fff) 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.
- (ggg) SMH may, in its sole discretion, 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**

- (hhh) Project Co shall, in consultation with the SMH Representative and so as to minimize, to the greatest extent reasonably possible, any disruption of the Works, 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.
- (iii) Project Co 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**

- (jjj) If Project Co 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,

SMH 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 Project Co, and SMH may deduct such cost from the Tower Interim Completion Holdback and interest earned thereon.

- (kkk) Upon completion and rectification of each Phase Minor Deficiency for which a holdback has been retained by SMH pursuant to Section 23B.8(a), SMH shall release to Project Co the amount of the Tower Interim Completion Holdback related to such Phase Minor Deficiency. Upon completion and rectification of each Tower Interim Completion Minor Deficiency, SMH shall release to Project Co the amount of the Tower Interim Completion Holdback related to such Tower Interim Completion Minor Deficiency. Upon completion and rectification of all applicable Phase Minor Deficiencies and all Tower Interim Completion Minor Deficiencies, SMH shall release to Project Co the then remaining amount of Tower Interim Completion Holdback, together with all interest accrued thereon. Where SMH 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 Project Co shall reimburse SMH for all such excess cost.

#### **23B.11 Effect of Certificate/Use**

- (lll) 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 this Project Agreement, shall, in no way:
  - (i) limit the obligations of Project Co under this Project Agreement 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 SMH of the Works or the way in which they have been carried out.

### **24. COMMISSIONING AND COMPLETION**

#### **24.1 Commissioning Activities**

- (a) Project Co shall perform all Project Co Commissioning, and shall facilitate the performance of all SMH Commissioning, pursuant to the Final Commissioning Program.

**24.2 Final Commissioning Program**

- (a) Project Co shall prepare a draft of the Final Commissioning Program in respect of the Project Co Commissioning and the 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 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 Project Co 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 the 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 Project Co Commissioning;
  - (vi) include a schedule of each of the Project Co Commissioning Tests and the 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 Project Co Commissioning and the SMH Commissioning;
  - (viii) provide for the re-verification of systems following the 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 Transition (as set out in the Transition Parameters).
- (c) SMH shall provide Project Co with comments on the draft Final Commissioning Program in accordance with the procedures contemplated by Section 4.1 of Schedule 10 – Review Procedure, and Project Co shall revise the draft Final 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 Final Commissioning Program shall replace the Outline Commissioning Program with respect to Substantial Completion and Final Completion.

#### **24.3 Commencement of Project Co Commissioning**

- (a) 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 Project Co Commissioning.
- (b) 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 Project Co Commissioning. Project Co 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.

#### **24.4 Substantial Completion Certificate**

- (a) Project Co shall give the Independent Certifier and the SMH Representative at least ten Business Days' notice prior to the date upon which Project Co anticipates delivering the Substantial Completion Notice.
- (b) 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 Project Co's opinion as to whether the conditions for issuance of the Substantial Completion Certificate have been satisfied.
- (c) 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) Within five Business Days after Project Co's receipt of SMH's opinion pursuant to Section 24.4(c), the Parties 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 both Project Co and SMH, 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) and Project Co has not referred a Dispute in relation thereto for resolution in accordance with Schedule 27 – Dispute Resolution Procedure, Project Co shall, 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 Project Co Commissioning that needs to be undertaken as a result of the rectification actions,and Project Co shall perform all such additional rectification actions and Project Co Commissioning in a timely manner. Upon completion thereof, Project Co may give a further 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 to issue or not to issue the Substantial Completion Certificate shall be final and binding on the Parties 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) Project Co 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) Project Co 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**

- (b) No later than 30 days prior to the Substantial Completion Date, Project Co 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 of such maintenance data, SMH shall upload it into the CMMS.

#### **24.6 SMH Commissioning**

- (a) The Parties acknowledge that the SMH Commissioning shall be performed both before and after the Substantial Completion Date. Prior to Substantial Completion, Project Co shall give SMH full access to the Site, the Facility, any portion of the Existing Facilities in which any Works 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 the SMH Commissioning in accordance with the Final Commissioning Program. 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 and shall use commercially reasonable efforts to minimize disruption to the Works in performing the SMH Commissioning.
- (b) SMH acknowledges that, during the SMH Commissioning Period, Project Co and each Subcontractor will be active in the Facility and, if applicable, in the Existing Facilities, in both the rectification of Minor Deficiencies and the completion of Project Co Commissioning, and SMH shall take commercially reasonable steps to allow such activities to proceed in accordance with the Final Commissioning Program.
- (c) Project Co acknowledges that, prior to and during the SMH Commissioning Period, Project Co 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 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) 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 Project Co 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 Project Co 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) Project Co acknowledges and agrees that SMH requires a minimum of 90 days' notice prior to the Anticipated Substantial Completion Date to prepare for the 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 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. SMH may withhold from the Substantial Completion Payment a holdback amount that is **[REDACTED]**% 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. 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, Project Co 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 Works.
- (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, 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) Project Co shall, in consultation with the SMH Representative and so as to minimize, to the greatest extent reasonably possible, any disruption of the Works, 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) Project Co 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 Project Co 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,

SMH may engage others to perform the work necessary to complete and rectify any such Minor Deficiencies, at the risk and cost of Project Co, and SMH may deduct such cost 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), SMH shall release to Project Co the amount of the Completion Holdback related to such Phase Minor Deficiency. Upon completion and rectification of each Minor Deficiency, SMH shall release to Project Co the amount of the Completion Holdback related to such Minor Deficiency. Upon completion and rectification of all applicable Phase Minor Deficiencies and Minor Deficiencies, SMH shall release to Project Co the then remaining amount of Completion Holdback, together with all interest accrued thereon. Where SMH exercises its 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 Project Co shall reimburse SMH for all such excess cost.

**24.11 Final Completion Countdown Notice**

- (a) 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 Project Co anticipates that Final Completion will be achieved (the "**Anticipated Final Completion Date**").
- (b) The Final Completion Countdown Notice shall be delivered not less than 60 days prior to the Anticipated Final Completion Date. If Project Co fails to deliver the Final Completion Countdown Notice not less than 60 days prior to the Scheduled Final Completion Date, the Anticipated Final Completion Date shall be deemed to be the same date as the Scheduled Final Completion Date.

**24.12 Final Completion Certificate**

- (a) Project Co shall give the Independent Certifier and the SMH Representative at least ten Business Days' notice prior to the date upon which Project Co anticipates delivering the Final Completion Notice.
- (b) 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 Project Co's opinion as to whether the conditions for issuance of the Final Completion Certificate have been satisfied. The Final Completion Notice shall also include the following documentation:
  - (i) Project Co's written request for release of 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 have been performed to the requirements of the Ancillary Documents, itemizing approved changes in the Works, the Independent Certifier's written instructions, and modifications required by Governmental Authorities.
- (c) 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), the Parties 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 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) and Project Co has not referred a Dispute in relation thereto for resolution in accordance with Schedule 27 – Dispute Resolution Procedure, 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 Project Co Commissioning that needs to be undertaken as a result of the rectification actions,
- and Project Co shall perform all such additional rectification actions and Project Co Commissioning in a timely manner. Upon completion thereof, Project Co may give a further Final Completion Notice and Sections 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 this Project Agreement, shall, in no way:
- (i) limit the obligations of Project Co under this Project Agreement 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 of the Works or the way in which they have been carried out.

**24.14 Transitions**

- (a) Subject to Section 24.14(b), Project Co 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 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 Project Co at all times in accordance with the applicable requirements of Schedule 11 – Design Quality Plan and Construction Quality Plan.

- (b) 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. 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) Project Co shall, within 30 days following Financial Close, prepare and submit to 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 (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 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), Project Co shall conduct a competitive bid process for the selection of the Transition Advisor from among the Transition Advisor Candidates. Project Co shall consult with 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 SMH with respect thereto. 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) The Parties shall, within 30 days following Financial Close, establish a transition subcommittee of the Works Committee (the "**Transition Subcommittee**") consisting of 3 representatives of each Party. 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 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 Works Schedule and with each applicable Phase Commissioning Program, the Tower Interim Completion Commissioning Program and the Final Commissioning Program.
- (d) 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) 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) The Transition Subcommittee shall operate until the Final Completion Date.

#### **25. HUMAN RESOURCES Admittance of Personnel, Security and Safety**

- (a) Without limitation, Project Co 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 Project Co, or any Project Co 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 Project Co replace such employee or restrict access to the Site, the Facility and/or the Existing Facilities to that employee and Project Co shall engage or cause the Project Co Parties to engage substitute employees to proceed with the Works so as not to jeopardize security or safety or cause delay to the progress of the Works contrary to the Works 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) Project Co, or any Project Co 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 this Section 25.1 shall be final and conclusive.
- (d) Any action taken under this Section 25.1 shall promptly be confirmed by SMH to Project Co and, for greater certainty, shall not relieve Project Co of any of its obligations under this Project Agreement.

## **25.2 Notification of Convictions**

- (a) To the extent permitted by Applicable Law, Project Co shall ensure that SMH is immediately notified in the event that Project Co or any Project Co Party becomes aware that any person employed or engaged by Project Co or any Project Co Party in the provision of any of the Works has been convicted of a Relevant Conviction. Project Co shall use commercially reasonable efforts to obtain, or to cause all Project Co Parties to obtain, all consents as may be required by Applicable Law or otherwise authorizing the disclosure of such information to SMH as contemplated in this Section 25.2.

## **25.3 Human Resources Policies**

- (a) Project Co shall ensure that there are set up and maintained by it and by all Project Co Parties, human resources policies and procedures covering all relevant matters relating to the Works (including, for example, health and safety). Project Co 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 SMH and all Project Co Parties.

## **25.4 Management Organizations**

- (a) Project Co shall provide, and shall ensure that all Project Co Parties provide, to SMH, as required to keep such information current, the names of the management teams responsible for the provision of the Works.

**25A SMH'S REMEDIAL RIGHTS**

**25A.1 Exercise of Remedial Rights**

(b) SMH may exercise all rights set out in this Article 25A at any time and from time to time if:

(i) SMH, acting reasonably, considers that a breach by Project Co of any obligation under this Project Agreement, or any act or omission on the part of Project Co or any Project Co Party:

(A) does or can reasonably be expected to create a serious threat to the health, 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 Project Co of any obligation under this Project Agreement or any act or omission on the part of Project Co or any Project Co Party which can reasonably be expected to cause any of the consequences set out in Section 25A.1(a)(i)(A), SMH shall not exercise its rights under this Article 25A unless Project Co has failed to cure the relevant breach, act or omission within 5 Business Days of notice from SMH or, if such breach, act or omission cannot reasonably be cured within such 5 Business Day period, Project Co thereafter fails to diligently and continuously pursue such cure and to cure such breach, act or omission within a reasonable period thereafter, provided that Project Co shall not be entitled to a cure period if any of the consequences set out in Section 25A.1(a)(i)(A) actually occur;

(D) in respect of Section 25A.1(a)(i)(B), SMH shall not exercise its rights under this Article 25A unless Project Co has failed to cure the relevant breach, act or omission within 5 Business Days of notice from SMH or, if such breach, act or omission cannot reasonably be cured within such 5 Business Day period, Project Co thereafter fails to diligently and continuously pursue such cure and to cure such breach, act or omission within a reasonable period thereafter; and

(E) subject to Section 9.1(c), Project Co has failed to comply with any written direction issued by or on behalf of SMH's board of directors.

**25A.2 Emergency**

- (c) Notwithstanding that Project Co is not in breach of its obligations under this Project Agreement, SMH may exercise all of the rights set out in this Article 25A at any time and from time to time if SMH, acting reasonably, considers the circumstances to constitute an Emergency.

**25A.3 Rectification**

- (d) Without prejudice to SMH's rights under Article 34 and any other rights under this Project Agreement, in any of the circumstances set out in Sections 25A.1 or 25A.2, SMH may, by written notice, require Project Co to take such steps as SMH, acting reasonably, considers necessary or expedient to mitigate, rectify or protect against such circumstance, including, if applicable, the termination and replacement of any Project Co Party, and Project Co shall use commercially reasonable efforts to comply with SMH's requirements as soon as reasonably practicable.
- (e) If SMH gives notice to Project Co pursuant to Section 25A.3(a) and either:
  - (i) Project Co does not either confirm, within 5 Business Days of such notice or such shorter period as is appropriate in the case of an Emergency that it is willing to take the steps required in such notice or present an alternative plan to SMH to mitigate, rectify and protect against such circumstances that SMH may accept or reject acting reasonably; or
  - (ii) Project Co fails to take the steps required in such notice or accepted alternative plan within such time as set out in such notice or accepted alternative plan or within such longer time as SMH, acting reasonably, shall think fit,then SMH may take such steps as it considers to be appropriate, acting reasonably, requiring the termination and replacement of Project Co Parties, either itself or by engaging others (including a third party) to take any such steps.
- (f) 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 SMH may, prior to Project Co'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**

- (g) Subject to SMH's obligations pursuant to Sections 25A.5 and 25A.6:
  - (i) Project Co shall bear all costs and expenses incurred by Project Co in relation to the exercise of SMH's rights pursuant to this Article 25A; and

- (ii) Project Co shall reimburse SMH for all reasonable costs and expenses incurred by SMH in relation to the exercise of SMH's rights pursuant to this Article 25A, including in relation to SMH taking such steps, either itself or by engaging others (including a third party) to take any such steps as SMH considers appropriate and as are in accordance with this Article 25A.

#### **25A.5 Reimbursement Events**

- (h) In this Section 25A.5, a "**Reimbursement Event**" means:
  - (i) an act or omission of Project Co or any Project Co Party or a breach of any obligation under this Project Agreement, but only to the extent such act, omission or breach is caused by SMH or an SMH Party; or
  - (ii) an Emergency that is not caused or contributed to by an act or omission of Project Co or any Project Co Party or a breach by Project Co or any Project Co Party of any obligation under this Project Agreement.
- (i) If SMH either takes steps itself or requires Project Co to take steps in accordance with this Article 25A as a result of a Reimbursement Event:
  - (i) SMH shall reimburse Project Co for the reasonable costs and expenses incurred by Project Co in relation to the exercise of SMH's rights pursuant to this Article 25A that would not otherwise have been incurred by Project Co in the proper performance of its obligations under this Project Agreement; and
  - (ii) SMH shall bear all costs and expenses incurred by SMH in relation to the exercise of SMH's rights pursuant to this Article 25A.

#### **25A.6 Reimbursement if Improper Exercise of Rights**

- (j) If SMH exercises its rights pursuant to this Article 25A, but SMH was not entitled to do so, SMH shall reimburse Project Co for the reasonable costs and expenses directly incurred by Project Co over and above those that would otherwise have been incurred by Project Co in the proper performance of its obligations under this Project Agreement and that are directly and reasonably incurred by Project Co in complying with those written requirements of SMH issued as a result of SMH having exercised such rights.
- (k) Project Co acknowledges and agrees that Project Co has no right to require a determination of whether or not SMH is entitled to exercise its rights pursuant to this Article 25A before taking any such action that SMH may require and Project Co shall comply with all of SMH's requirements. Only concurrently with or after complying with SMH's requirements shall Project Co 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) Project Co shall comply with Schedule 26 – Record Provisions.

**26.2 Information and General Audit Rights**

- (a) Project Co shall provide, and shall cause each Subcontractor to provide, to 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, Project Co as SMH may reasonably require from time to time for any purpose in connection with this Project Agreement, other than Sensitive Information. Project Co 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 Construction Contractor shall be available to Project Co and Project Co shall include relevant terms in all Subcontracts to this effect.
- (b) Project Co shall also provide to SMH, and shall require each Subcontractor, including the Construction Contractor, to provide to SMH (at SMH's reasonable cost), 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, Project Co or each Subcontractor, as SMH may reasonably require from time to time to enable 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) Project Co shall promptly after receipt provide 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 Works, or the Site, and Project Co shall include relevant terms in all Subcontracts to this effect.
- (d) Project Co shall promptly notify SMH of any actions, suits, proceedings, or investigations commenced, pending or threatened against Project Co or, to Project Co'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 Project Co or in any impairment of its ability to perform its obligations under this Project Agreement.
- (e) All information, reports, documents and records in the possession of, or available to, Project Co, including as referred to in Schedule 26 – Record Provisions, which are required to be provided to or available to SMH hereunder, shall be subject and open to inspection and audit by SMH at any time and from time to time, which inspection and

audit shall take place during normal business hours and at Project Co's normal places of business unless SMH and Project Co otherwise agree. SMH shall also have the right to monitor and audit the performance of any and all parts of the Works wherever located, and Project Co shall cooperate with, and shall require each Subcontractor to cooperate with, and provide access to the representatives of SMH monitoring and auditing such parts of the Works, including providing them with access and copies (at SMH's reasonable cost) of all relevant information, reports, documents and records pertaining to the performance of such parts of the Works. Except as otherwise provided herein, all of SMH's costs for the inspections, audits and monitoring shall be borne by SMH.

- (f) In conducting an audit of Project Co under Section 26.2(e) or as otherwise provided under this Project Agreement, 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 SMH's reasonable cost) of all books and records of Project Co required to be provided to or available to SMH hereunder, upon reasonable notice and at reasonable times. Project Co shall fully cooperate with 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 Project Co further agrees to promptly review and settle with SMH all matters arising from such audits, including the refunding of monies to SMH where applicable. At the reasonable request of SMH's auditors, Project Co shall provide such information, reports, documents and records as SMH's auditors may reasonably require, other than Sensitive Information.
- (g) 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 this Project Agreement.
- (h) 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.

### **26.3 Lenders' Consultant Reports**

- (a) Project Co shall cause the Lenders' Agent to cause, in accordance with Section 6.1(i) of Schedule 4 – Lenders' Direct Agreement, the Lenders' Consultant to provide SMH a copy of any written assessment or report of the Works under the Design and Construction Contract, including but not limited to, any certificate of payment, concurrently with its delivery to the Lenders' Agent.

## **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, Project Co shall perform the Works in accordance with the terms of this Project Agreement, including in compliance with Applicable Law.

**28.2 Works Change in Law**

- (a) On the occurrence of a Works Change in Law:
- (i) either Party may give notice to the other of the need for a Variation as a result of such Works Change in Law;
  - (ii) the Parties shall meet within ten Business Days of such notice to consult with respect to the effect of the Works Change in Law and to reach an agreement on whether a Variation is required as a result of such Works 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 Works Change in Law has occurred or the effect of any Works Change in Law for resolution in accordance with Schedule 27 – Dispute Resolution Procedure; and
  - (iii) SMH 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) Project Co 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 Works Change in Law;
    - (B) Project Co shall be responsible for obtaining all Development Approvals and Project Co Permits, Licences, Approvals and Agreements required in respect of the Variation;
    - (C) SMH shall not be entitled to withdraw any such Variation Enquiry unless the Parties otherwise agree;
    - (D) Project Co shall proceed to implement the Variation within such period as will enable it to comply with the Works Change in Law as soon as reasonably practicable; and
    - (E) Project Co shall not be entitled to any payment or other compensation or relief from performance of its obligations under this Project Agreement in respect of any Works Change in Law or associated Variation other than as established pursuant to Schedule 22 – Variation Procedure.

**28.3 Relevant Change in Law**

- (a) On the occurrence of a Relevant Change in Law, either Party shall be entitled to seek compensation for any increase or decrease (as the case may be) in the net cost to Project Co of performing the Works 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; and
  - (iii) SMH 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) Project Co 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) Project Co shall be responsible for obtaining all Development Approvals and Project Co Permits, Licences, Approvals and Agreements required in respect of the Variation;
    - (C) SMH shall not be entitled to withdraw any such Variation Enquiry unless the Parties otherwise agree;
    - (D) Project Co 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 this Project Agreement:
      - (I) use commercially reasonable efforts to mitigate the adverse effects of any Relevant Change in Law and take commercially reasonable steps to minimize any increase in costs arising from such Relevant Change in Law; and

- (II) use commercially reasonable efforts to take advantage of any positive or beneficial effects of any Relevant Change in Law and take commercially reasonable steps to maximize any reduction in costs arising from such Relevant Change in Law; and
- (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 Project Co recovers under any insurance policy (or would recover if it complied with its obligations to insure under this Project Agreement or the terms of any policy of insurance required under this Project Agreement) which amount, for greater certainty, shall not include the amount of any excess or deductibles or any amount above the maximum insured amount applicable to any such insurance policy.
- (c) Project Co shall not be entitled to any payment or compensation or, except as provided in Article 30 or otherwise in this Project Agreement, relief in respect of any Relevant Change in Law, or the consequences thereof, other than in accordance with this Section 28.3, and Article 31 shall be construed accordingly.

## **29. VARIATIONS**

### **29.1 Variation Procedure**

- (a) Except as otherwise expressly provided in this Project Agreement, Schedule 22 – Variation Procedure shall apply in respect of Variations.
- (b) For greater certainty, Project Co 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 SMH's board of directors to Project Co or any Project Co Party results in a variation, addition, reduction, substitution, omission, modification, deletion, removal or other change to the whole or any part of the Works.
- (c) Without limiting Project Co's obligations pursuant to Section 11.11(a) and Schedule 22 – Variation Procedure, Project Co shall include in each Subcontract, or shall otherwise cause each Project Co Party to comply with, the Variation Procedure, to the extent that the Variation Procedure requires Project Co to minimize the cost and impact of Variations.

**29.2 Innovation and Value Engineering**

- (a) Project Co acknowledges that SMH at all times desires to reduce the overall cost to SMH of the Project, and Project Co 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 Project Co, Project Co may 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 SMH; 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 Project Co's reasons and justification for proposing the Innovation Proposal;
  - (iii) request SMH 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 this Project Agreement, and the comparative advantages of each to 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 Works, the Facility, or the likelihood of successful completion of the Works;

- (ii) the Innovation Proposal will benefit or interfere with the efficient operation of the Facility or the performance of the SMH Activities;
  - (iii) the Innovation Proposal will interfere with the relationship between SMH and third parties;
  - (iv) the financial strength of Project Co is sufficient to deliver the changed Works, 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 may request clarification or additional information regarding the Innovation Proposal, and may request modifications to the Innovation Proposal.
- (g) SMH may, in its sole discretion, accept or reject any Innovation Proposal.
- (h) If SMH 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 this Project Agreement 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 Project Co in connection with the Innovation Proposal and any other uses of the Innovation Proposal by Project Co, the Innovation Proposal causes or will cause the costs of Project Co and/or of a Subcontractor to decrease, the net savings in the costs of Project Co and/or the Subcontractor will be shared equally by Project Co and SMH, and SMH's share of the net savings shall, if the Parties agree, be reflected in a lump sum payment.
- (j) If an Innovation Proposal causes or will cause the costs of SMH to decrease, 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 be reflected in a lump sum payment.

**30. DELAY EVENTS**

**30.1 Definition**

- (a) For the purposes of this Project Agreement, "**Delay Event**" means any of the following events or circumstances only to the extent, in each case, that it causes a delay in achieving 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 Project Co 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 this Project Agreement (including, subject to Section 30.2(h), any delay by SMH in giving access to the Site or to the Existing Facilities pursuant to Section 16.1), any obstruction of the rights afforded to Project Co under Section 16.1, any delay by SMH in carrying out its obligations set forth in Section 21.8(b) 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 Project Co or any Project Co Party;
  - (iii) an opening up of the Works pursuant to Section 20.3 where such Works are not subsequently found to be defective or not in compliance with the requirements of this Project Agreement (including the Output Specifications, the Project Co Proposal Extracts and the Design Data), unless such opening up of the Works was reasonable in the light of other defects or non-compliance previously discovered by SMH in respect of the same or a similar component of the Works or subset of the Works;
  - (iv) a requirement pursuant to Sections 18.2(b) or 18.2(c) for Project Co to perform any alteration, addition, Demolition, extension or variation in the Works, or to suspend or delay performance of the Works, upon the discovery of Contamination, which alteration, addition, Demolition, extension or variation in the Works, or suspension or delay in the performance of the Works, would not otherwise be required under this Project Agreement;
  - (v) a requirement pursuant to Sections 18.3(b) or 18.3(c) for Project Co to perform any alteration, addition, Demolition, extension or variation in the Works, or to suspend or delay performance of the Works, 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 Works, or suspension or delay in the performance of the Works, would not otherwise be required under this Project Agreement;

- (vi) subject to the provisions of Section 11.13, 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 Project Co to proceed in accordance with the direction of SMH during the pendency of a Dispute, which Dispute is subsequently determined in Project Co'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) Project Co shall provide written notice to the SMH Representative and the Independent Certifier within five Business Days of becoming aware of the occurrence of a Delay Event. Project Co shall, within ten Business Days after such notification, provide further written details 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 Project Co 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 Project Co 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 Project Co receiving, or becoming aware of, any supplemental information which may further substantiate or support Project Co's claim, Project Co shall submit further particulars based on such information to the SMH Representative and the Independent Certifier.
- (c) 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. Project Co shall afford the SMH Representative and the

Independent Certifier reasonable facilities for investigating the validity of Project Co's claim, including, without limitation, on-site inspection.

- (d) Subject to the provisions of this Section 30, the SMH Representative shall allow Project Co 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 Project Co's notice 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 Project Co 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) the SMH Representative 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) Project Co 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 Project Co 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 Works should be behind schedule for a reason other than a Delay Event, or if a Project Co Party delays the progress of any portion of the Works necessary to complete the Works on schedule, Project Co shall use all reasonable measures to bring the Works back on schedule. Project Co shall exercise all means within its discretion, such as directing any Project Co Party that is creating delays to increase their labour forces and equipment, to improve the organization and expediting of the Works, or to work overtime as may be necessary. Project Co shall provide any additional supervision, coordination and expediting, including overtime by its own personnel as may be required to achieve this end. The costs and expenses incurred by the use of such measures and overtime shall be borne by Project Co and/or the Project Co Parties and there shall be no adjustment to the Guaranteed Price as a result of such costs and expenses and for clarity, no extension

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 SMH or others for whom SMH is responsible, and some of which are caused by Project Co or others for whom Project Co is responsible, Project Co shall not be entitled to either an extension in the 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) Subject to Sections 11.17(b) and 11.17(c), SMH shall provide Project Co with access to and use of the Site and the Existing Facilities as required pursuant to Article 16 of this Project Agreement in a manner consistent with the Works Schedule and in accordance with the notification requirements and restrictions set out in the Project Agreement, provided that Project Co agrees that the inability of SMH to provide Project Co 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) 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) Project Co acknowledges and agrees that the Works Schedule includes a Schedule Cushion at no additional cost or expense to SMH. Project Co shall separately identify the extent of the Schedule Cushion in the Works Schedule.
- (k) Project Co 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 this Project Agreement (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), SMH 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 SMH has elected to apply.

**30.3 Mitigation**

- (a) If Project Co is (or claims to be) affected by a Delay Event, Project Co shall, and shall require all Project Co Parties to, take and continue to take commercially reasonable steps:
  - (i) to eliminate or mitigate the consequences of such event upon the performance of its obligations under this Project Agreement;
  - (ii) to continue to perform its obligations under this Project Agreement to the extent possible notwithstanding the Delay Event; and
  - (iii) to resume performance of its obligations under this Project Agreement affected by the Delay Event as soon as practicable.
- (b) To the extent that Project Co does not comply with its obligations under this Section 30.3, such failure shall be taken into account in determining Project Co's entitlement to an extension of time pursuant to this Section 30.

**31. COMPENSATION EVENTS**

**31.1 Definition**

- (a) For the purposes of this Project Agreement, "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 Project Co 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, Project Co'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 Project Co 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, that there has been a Compensation Event, Project Co shall be entitled to such compensation as would place Project Co in no better or no worse position than it would have been in had the relevant Compensation Event not occurred. For greater certainty, in respect of a Compensation Event that is also a Delay

Event, such compensation will include amounts which, but for the Delay Event, would have been paid by SMH to Project Co. Project Co shall promptly provide the SMH Representative with any information the SMH Representative may require in order to determine the amount of such compensation.

- (c) If SMH is required to compensate Project Co pursuant to this Section 31.2, then SMH may either pay such compensation as a lump sum payment or payments at times and in a manner to be agreed with Project Co, acting reasonably.
- (d) Notwithstanding any other provision in this Project Agreement, including Section 31.2(b), where SMH elects to apply all or any portion of the number of days of the Schedule Cushion, Project Co shall not be entitled to any Direct Losses or any other additional compensation related to the time that is reduced or eliminated by the Schedule Cushion, except as otherwise provided for in Schedule 22 – Variation Procedure.

### **31.3 Mitigation**

- (a) If Project Co is (or claims to be) affected by a Compensation Event, Project Co shall, and shall require all Project Co Parties to, take and continue to take commercially reasonable steps to minimize the amount of compensation due in accordance with this Section 31 in relation to any Compensation Event.
- (b) To the extent that Project Co does not comply with its obligations under this Section 31.3, such failure shall be taken into account in determining Project Co's entitlement to relief pursuant to this Section 31.

### **31.4 Insured Exposure**

- (a) The compensation payable to Project Co pursuant to this Section 31 shall be reduced by any amount which Project Co or a Project Co Party recovers, or is entitled to recover, under any insurance policy, or would have recovered if it had complied with the requirements of this Project Agreement in respect of insurance or the terms of any policy of insurance required under this Project Agreement, which amount, for greater certainty, shall not include any excess or deductibles or any amount over the maximum amount insured under any such insurance policy.

## **32. RELIEF EVENTS**

### **32.1 Definition**

- (a) For the purposes of this Project Agreement, "**Relief Event**" means any of the following events or circumstances to the extent, in each case, that it causes any failure by a Party to perform any of its obligations under this Project Agreement:
  - (i) fire, explosion, lightning, storm, tempest, hurricane, tornado, flood, bursting or overflowing of water tanks, apparatus or pipes, ionizing radiation (to the extent it does not constitute Force Majeure), earthquake, riot or civil commotion;

- (ii) failure by any Utility Company, local authority or other like body to perform works or provide services;
- (iii) accidental loss or damage to the Works and/or the Facility or any roads servicing the Site;
- (iv) without prejudice to any obligation of Project Co to provide stand-by power facilities in accordance with this Project Agreement, failure or shortage of power, fuel or transport;
- (v) blockade or embargo falling short of Force Majeure;
- (vi) any official or unofficial strike, lockout, work to rule or other labour-related action generally affecting the hospital or construction industry (or a significant sector of that industry) in the Province of Ontario; or
- (vii) any civil disobedience or protest action, including any action taken by any person or persons protesting or demonstrating against the carrying out of any part of the Works or the construction and/or operation of hospitals in general,

provided, in each case, that such event does not arise (directly or indirectly) as a result of any act or omission of the Party claiming relief and/or (i) in the case of Project Co claiming relief, as a result of any act or omission of any Project Co Party and (ii) in the case of SMH claiming relief, as a result of any act or omission of any SMH 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 this Project Agreement pursuant to Section 36.1, shall arise under this Project Agreement by reason of any failure by a Party to perform any of its obligations under this Project Agreement, but only to the extent that such failure to perform is caused by the occurrence of a Relief Event (it being acknowledged and agreed by the Parties that all other rights and obligations of the Parties under this Project Agreement remain unaffected by the occurrence of a Relief Event).
- (b) In respect of a Relief Event that is also a Delay Event pursuant to Section 30.1(a)(viii):
  - (i) Project Co shall only be relieved of its obligations under this Project Agreement to the extent, if any, provided for in Section 30; and
  - (ii) in respect of a Relief Event referred to in Section 32.1(a)(v), 32.1(a)(vi) or 32.1(a)(vii), on the earlier of (A) the Substantial Completion Date and (B) the date of payment of the SMH Default Termination Sum or Non-Default Termination Sum (and as a part thereof) in accordance with Schedule 23 – Compensation on Termination, SMH shall pay to Project Co an amount equal to the Senior Debt Service Amount accrued and paid or that became payable in accordance with the Lending Agreements during the period of delay by Project

Co or any Project Co Party to the Senior Lenders up to and including such date, together with interest thereon at the rate payable on the Senior Debt Amount, which, but for the Delay Event, would have been paid by Project Co to the Senior Lenders.

- (c) If a Relief Event occurs, Project Co shall not be entitled to receive any compensation other than as expressly provided in Sections 32.2(b)(ii) and 38.
- (d) Subject to Section 38, Project Co's sole right to payment or otherwise in relation to the occurrence of a Relief Event shall be as provided in this Section 32.

### **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 this Project Agreement, shall resume performance of its obligations affected by the Relief Event as soon as practicable and shall use commercially reasonable efforts to remedy its failure to perform.
- (b) To the extent that the Party claiming relief does not comply with its obligations under this Section 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 Project Co pursuant to this Section 32 shall be reduced by any amount which Project Co or a Project Co Party recovers, or is entitled to recover,

under any insurance policy, or would have recovered if it had complied with the requirements of this Project Agreement in respect of insurance or the terms of any policy of insurance required under this Project Agreement, which amount, for greater certainty, shall not include any excess or deductibles or any amount over the maximum amount insured under any such insurance policy.

**33. FORCE MAJEURE**

**33.1 Definition**

- (a) For the purposes of this Project Agreement, “Force Majeure” means any of the following events or circumstances which directly causes either Party to be unable to perform all or a material part of its obligations under this Project Agreement:
- (i) war, civil war, armed conflict, terrorism, acts of foreign enemies or hostilities;
  - (ii) nuclear or radioactive contamination of the Works, the Facility and/or the Site, unless Project Co or any Project Co Party is the source or cause of the contamination;
  - (iii) chemical or biological contamination of the Works, 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 Works to be abandoned.

**33.2 Consequences of Force Majeure**

- (a) Subject to Section 33.3, the Party claiming relief shall be relieved from liability under this Project Agreement to the extent that, by reason of the Force Majeure, it is not able to perform its obligations under this Project Agreement.
- (b) In respect of an event of Force Majeure that is also a Delay Event pursuant to Section 30.1(a)(ix):
- (i) Project Co shall only be relieved of its obligations under this Project Agreement to the extent, if any, provided for in Section 30; and
  - (ii) on the earlier of (A) the Substantial Completion Date and (B) the date of payment of the SMH Default Termination Sum or Non-Default Termination Sum (and as a part thereof) in accordance with Schedule 23 – Compensation on Termination, SMH shall pay to Project Co an amount equal to the Senior Debt Service Amount and the Junior Debt Service Amount accrued and paid or that accrued in accordance with the Lending Agreements during the period of delay by Project

Co or any Project Co Party to the Lenders up to and including such date, together with interest thereon at the rate payable on the principal amount of debt funded under the Lending Agreements, which, but for the Delay Event, would have been paid by Project Co to the Lenders.

- (c) If an event of Force Majeure occurs prior to the Substantial Completion Date, Project Co shall not be entitled to receive any compensation other than as expressly provided in Sections 33.2(b)(ii) and 38.
- (d) Subject to Section 38, Project Co's sole right to payment or otherwise in relation to the occurrence of an event of Force Majeure shall be as provided in this 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 this Project Agreement, shall resume performance of its obligations affected by the event of Force Majeure as soon as practicable and shall use commercially reasonable efforts to remedy its failure to perform, including efforts to minimize any negative impact of the event of Force Majeure on the Works 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 Project Co pursuant to this Section 33 shall be reduced by any amount which Project Co or a Project Co Party recovers, or is entitled to recover, under any insurance policy, or would have recovered if it had complied with the requirements of this Project Agreement in respect of insurance or the terms of any policy of insurance required under this Project Agreement, which amount, for greater certainty, shall not include any excess or deductibles or any amount over the maximum amount insured under any such insurance policy.

**33.5 Modifications**

- (a) The Parties shall use commercially reasonable efforts to agree to any modifications to this Project Agreement which may be equitable having regard to the nature of an event or events of Force Majeure. Schedule 27 – Dispute Resolution Procedure shall not apply to a failure of SMH and Project Co to reach agreement pursuant to this Section 33.5.

**34. PROJECT CO DEFAULT**

**34.1 Project Co Events of Default**

- (a) For the purposes of this Project Agreement, “**Project Co Event of Default**” means any one or more of the following events or circumstances:
  - (i) the occurrence of any of the following events other than as a consequence of a breach by SMH of its payment obligations hereunder:
    - (A) Project Co admits in writing its inability to pay its debts generally as they become due, or makes a general assignment for the benefit of creditors, or a receiver, manager, administrator, administrative receiver, receiver and manager, trustee, custodian or other similar official or any other like person is appointed by or on behalf of or at the instance of a creditor of Project Co with respect to Project Co or any of the property, assets or undertaking of Project Co, or any creditor of Project Co takes control, or takes steps to take control, of Project Co or any of Project Co's assets, or any proceedings are instituted against Project Co that result in Project Co being declared or ordered bankrupt or 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 Project Co seeking any such result, or any such proceedings are instituted by a person other than Project Co, SMH, a SMH 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 Works or of the 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 Project Co are taken to authorize any of the actions set forth in this Section 34.1(a)(i);

- (B) Project Co ceases performing a substantial portion of its business, or a substantial portion of such business is suspended or is not being performed, whether voluntarily or involuntarily, that has or will have a material adverse effect on Project Co's ability to perform its obligations under this Project Agreement;
  - (C) if any execution, sequestration, extent or other process of any court becomes enforceable against Project Co or if a distress or analogous process is levied against any property of Project Co that materially adversely affects Project Co's ability to perform its obligations hereunder; or
  - (D) Project Co shall suffer any event, or any event or set of circumstances occurs or comes about, analogous to the foregoing events or sets of circumstances set out 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 Project Co Event of Default;
- (ii) Project Co failing to achieve Substantial Completion within 180 days after the Scheduled Substantial Completion Date (the "**Longstop Date**");
  - (iii) Project Co either:
    - (A) failing to deliver a rectification plan under Section 13.4(a)(iii)(B);
    - (B) delivering a rectification plan under Section 13.4(a)(iii)(B) which indicates that Project Co will not achieve Substantial Completion by the Longstop Date; or
    - (C) delivering a rectification plan under Section 13.4(a)(iii)(B) that is not acceptable to the Independent Certifier, acting reasonably, as to the matters set out in Section 13.4(a)(iii)(B)(IV);
  - (iv) Project Co making any representation or warranty herein that is false or misleading when made, and that has or will have at any time a material adverse effect on the performance of Works, the SMH Activities, or that 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, and, in the case of a false or misleading representation or warranty that is capable of being remedied, such breach is not remedied within 10 Business Days of receipt of notice of the same from SMH;

- (v) Project Co committing a breach of Sections 40 or 41 ;
- (vi) Project Co committing a breach of its obligations under this Project Agreement 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 SMH of its obligations under this Project Agreement, and upon becoming aware of such breach Project Co failing to remedy such breach in accordance with all of the following:
  - (A) Project Co shall:
    - (I) immediately commence and thereafter diligently continue to remedy the breach and to mitigate any adverse effects on SMH and the performance of SMH operations and the SMH Activities;
    - (II) put forward, within 5 Business Days of receipt of notice of such breach from SMH, 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) Project Co wholly abandoning the Works for a period which exceeds three Business Days from receipt by Project Co of a written request to return to the Site, other than as a consequence of a breach by SMH of its obligations under this Project Agreement;
- (viii) Project Co failing to comply with Sections 47.1 or 47.3;
- (ix) the occurrence of any Change in Ownership or Change in Control which is prohibited by Section 47.4;

- (x) Project Co failing to remove an Encumbrance that arose due to an act or omission of Project Co or any Project Co Party (other than 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 Project Co or any Project Co Party knew, or ought to have known, about the existence of the Encumbrance;
- (xi) Project Co failing to pay any sum or sums due to SMH under this Project Agreement, 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) \$[REDACTED] (index linked), and such failure continues for 30 days from receipt by Project Co of a notice of non-payment from SMH;
- (xii) Project Co failing to comply with Section 48;
- (xiii) Project Co failing to comply with Section 8.3 or Schedule 29 - Refinancing;
- (xiv) Project Co failing to obtain any bond, security or insurance required to be obtained by or on behalf of Project Co pursuant to this Project Agreement or any such bond, security or insurance being vitiated or otherwise ceasing to be in full force and effect or in material compliance with the requirements set out in this Project Agreement, other than as a consequence of a breach by SMH of its obligations under this Project Agreement, and:
  - (A) in respect of insurance, such breach by Project Co is not remedied within 10 Business Days of the occurrence of the breach; and
  - (B) in respect of a bond or security, such breach by Project Co is not remedied within 5 Business Days of Project Co becoming aware of such breach;
- (xv) Project Co failing to comply with any determination, order or award made against Project Co in accordance with Schedule 27 – Dispute Resolution Procedure;
- (xvi) A default by Project Co or any Project Co Party under any of the Ancillary Documents following the expiry of any applicable notice and cure periods thereunder.

#### **34.2 Notification of Occurrence**

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

**34.3 Right to Termination**

- (a) On the occurrence of a Project Co Event of Default, or at any time after SMH becomes aware of a Project Co Event of Default, and, if the occurrence of a Project Co Event of Default is disputed by Project Co in good faith, then following confirmation in accordance with Schedule 27 – Dispute Resolution Procedure that a Project Co Event of Default has occurred, SMH may, subject to Section 34.4, terminate this Project Agreement in its entirety by written notice having immediate effect, such notice to be given to Project Co, and to any person specified in the Lenders' Direct Agreement to receive such notice.

**34.4 Remedy Provisions**

- (a) In the case of a Project Co Event of Default referred to in Sections 34.1(a)(i)(B), 34.1(a)(i)(C), 34.1(a)(i)(D) (where the Project Co Event of Default referred to in Section 34.1(a)(i)(D) is analogous to a Project Co 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)(iv), 34.1(a)(v), 34.1(a)(vii), 34.1(a)(viii), 34.1(a)(ix), (where the Project Co Event of Default referred to in Section 34.1(a)(ix) is capable of being remedied), 34.1(a)(xi), 34.1(a)(xiii), 34.1(a)(xiv) (where the Project Co 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), SMH shall, prior to being entitled to terminate this Project Agreement, give notice of default to Project Co, and to any person specified in the Lenders' Direct Agreement to receive such notice, and Project Co shall:
- (i) within five Business Days of such notice of default, put forward a reasonable plan and schedule for diligently remedying the Project Co Event of Default, which schedule shall specify in reasonable detail the manner in, and the latest date by which, such Project Co 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 SMH, 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 Project Co puts forward a plan and schedule in accordance with Section 34.4(a)(i) that has a date for the Project Co Event of Default to be remedied that is beyond 30 days from the notice of default, SMH shall have 5 Business Days from receipt of the same within which to notify Project Co that SMH does not accept such longer period in the plan and schedule and that the 30 day limit will apply, failing which SMH shall be deemed to have accepted the longer period in the plan and schedule.
- (c) If a Project Co Event of Default, of which a notice of default was given under Section 34.4(a), occurs and:

- (i) Project Co fails to immediately commence and thereafter diligently continue to remedy the Project Co Event of Default and to mitigate any adverse effects on SMH; or
- (ii) Project Co fails to put forward a plan and schedule pursuant to Section 34.4(a)(i); or
- (iii) such Project Co 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 Project Co puts forward a plan and schedule pursuant to Section 34.4(a)(i) and Project Co 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 SMH may terminate this Project Agreement in its entirety by written notice with immediate effect, such notice to be given to Project Co, and to any person specified in the Lenders' Direct Agreement to receive such notice.

- (d) Notwithstanding that SMH may give the notice referred to in Section 34.4(a), and without prejudice to the other rights of SMH in this Section 34.4, at any time during which a Project Co Event of Default is continuing, SMH may, at Project Co's risk and expense, take such steps as SMH considers appropriate, either itself or by engaging others (including a third party) to take such steps, to perform or obtain the performance of Project Co's obligations under this Project Agreement or to remedy such Project Co Event of Default.
- (e) Upon the occurrence of a Project Co Event of Default that Project Co has remedied pursuant to this Section 34.4, such occurrence of a Project Co Event of Default shall thereafter cease to be a Project Co Event of Default and SMH shall not be entitled to terminate this Project Agreement for that occurrence of a Project Co Event of Default.

#### **34.5 SMH's Costs**

- (a) Project Co shall reimburse SMH 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 SMH in exercising its rights under this Section 34, including any relevant increased administrative expenses. SMH shall take commercially reasonable steps to mitigate such costs.

#### **34.6 No Other Rights to Terminate**

- (a) SMH shall have no right or entitlement to terminate this Project Agreement, or to accept any repudiation of this Project Agreement, and shall not purport to exercise any such right or entitlement except as set forth in Sections 34 and 36.

**35. SMH DEFAULT**

**35.1 SMH Events of Default**

(a) For the purposes of this Project Agreement, "SMH Event of Default" means any one or more of the following events or circumstances:

- (i) SMH failing to pay any sum or sums due to Project Co under this Project Agreement, which sum or sums are not being disputed by SMH in accordance with Schedule 27 – Dispute Resolution Procedure and which sum or sums, either singly or in aggregate, exceed(s) \$[REDACTED] (index linked), and:
  - (A) in respect of the Tower Interim Completion Payment or the Substantial Completion Payment, such failure continues for a period of 10 Business Days; or
  - (B) in respect of any other payment due and payable by SMH to Project Co under this Project Agreement, such failure continues for a period of 90 days,

in any such case, from receipt by SMH of a notice of non-payment from or on behalf of Project Co;

- (ii) SMH committing a material breach of its obligations under Section 16 (other than as a consequence of a breach by Project Co of its obligations under this Project Agreement), which breach materially adversely affects the ability of Project Co to perform its obligations under this Project Agreement for a continuous period of not less than 60 days; or
- (iii) an act of any Governmental Authority which renders it impossible for Project Co to perform all or substantially all of its obligations under this Project Agreement (other than as a consequence of a breach by Project Co of its obligations under this Project Agreement) 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 Project Co Permits, Licences, Approvals and Agreements shall not constitute an "act of any Governmental Authority".

**35.2 Project Co's Options**

- (a) On the occurrence of a SMH Event of Default and while the same is continuing, Project Co may give notice to SMH of the occurrence of such SMH Event of Default, which notice will specify the details thereof, and, at Project Co's option and without prejudice to its other rights and remedies under this Project Agreement, may:
  - (i) suspend performance of the Works until such time as SMH has remedied such SMH Event of Default; or

- (ii) if such SMH Event of Default has not been remedied within 30 days of receipt by SMH of notice of the occurrence of such SMH Event of Default, terminate this Project Agreement in its entirety by notice in writing having immediate effect.

**35.3 Project Co's Costs**

- (a) SMH 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 35, including any relevant increased administrative expenses. Project Co shall take commercially reasonable steps to mitigate such costs.

**35.4 No Other Rights to Terminate**

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

**36. RELIEF EVENT AND NON DEFAULT TERMINATION**

**36.1 Termination for Relief Event**

- (a) If a Relief Event occurs and the effects of the Relief Event continue for 180 days from the date on which the Party affected gives notice to the other Party pursuant to Section 32.3(c), either Party may, at any time thereafter, terminate this Project Agreement by written notice to the other Party having immediate effect, provided that the effects of the Relief Event continue during such period to prevent either Party from performing a material part of its obligations under this Project Agreement.

**36.2 Termination for Force Majeure**

- (a) If an event of Force Majeure occurs and the Parties, having used commercially reasonable efforts, have failed to reach agreement on any modification to this Project Agreement pursuant to Section 33.5 within 180 days from the date on which the Party affected gives notice to the other Party as set out therein, either Party may, at any time thereafter, terminate this Project Agreement by written notice to the other Party having immediate effect, provided that the effects of the event of Force Majeure continue during such period to prevent either Party from performing a material part of its obligations under this Project Agreement.

**36.3 Termination for Convenience**

- (a) SMH shall, in its sole discretion and for any reason whatsoever, be entitled to terminate this Project Agreement at any time on 180 days written notice to Project Co. Such written notice shall include confirmation that SMH has, in respect of such termination, obtained the prior written consent of MOHLTC.

- (b) In the event of notice being given by SMH in accordance with this Section 36.3, SMH shall, at any time before the expiration of such notice, be entitled to direct Project Co to refrain from commencing, or allowing any third party to commence, the Works, or any part or parts of the Works where such Works have not yet been commenced.

#### **36.4 Automatic Expiry on Expiry Date**

- (a) This Project Agreement shall terminate automatically on the Expiry Date.
- (b) Project Co shall not be entitled to any compensation due to termination of this Project Agreement on expiry of the Project Term on the Expiry Date.

### **37. EFFECT OF TERMINATION**

#### **37.1 Termination**

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

#### **37.3 Continuing Performance**

- (a) Subject to any exercise by SMH of its rights to perform, or to seek, pursuant to this Project Agreement, a third party to perform, the obligations of Project Co, the Parties shall continue to perform their obligations under this Project Agreement (including, if applicable, pursuant to Schedule 23 – Compensation on Termination) notwithstanding the giving of any notice of default or notice of termination, until the termination of this Project Agreement becomes effective in accordance with this 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, Project Co

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 Works and Facility as shall have been constructed and such items of the Plant and equipment, including Equipment as shall have been procured by Project Co, and, if SMH 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 SMH for the purposes of completing the Works; and
  - (B) all construction plant and equipment shall remain available to SMH for the purposes of completing the Works, subject to payment by SMH of the Construction Contractor's reasonable charges;
- (ii) if termination is prior to the Substantial Completion Date, Project Co shall deliver to SMH (to the extent such items have not already been delivered to SMH) one complete set of all Project Data and Intellectual Property relating to the design, construction and completion of the Works 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), Project Co shall hand over to, and there shall vest in, SMH, 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 Works 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 Project Co to SMH, Project Co shall enter into agreements or make other arrangements in order to permit the use of the assets or rights by SMH in order to enable it, or its designated agents or subcontractors, to continue to perform the activities which would have otherwise been performed by Project Co if this Project Agreement had not been terminated;
  - (iv) if SMH so elects, Project Co shall ensure that any of the Subcontracts between Project Co and a Subcontractor (including the Design and Construction Contract), any other instrument entered into between any such Subcontractor and Project Co for securing the performance by such Subcontractor of its obligations in respect of the Works or to protect the interests of Project Co, shall be novated or assigned to SMH or its nominee, provided that where termination occurs other than as a result of a Project Co Event of Default, the consent of the relevant Subcontractor shall be required, and further provided that any such novation or assignment of the Design and Construction Contract with the Construction Contractor shall be made by SMH pursuant to, and subject to, the terms of the Construction Contractor's Direct Agreement;
  - (v) Project Co shall, or shall ensure that any Project Co Party shall, offer to sell (and if SMH so elects, execute such sale) to 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 Project Co or any Project Co Parties and dedicated to or predominantly used in respect of the Facility, and reasonably required by SMH in connection with the operation of the Facility;

- (vi) Project Co shall use commercially reasonable efforts to assign, or otherwise transfer, to SMH, 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 Project Co under this Project Agreement and included in the Facility; and
- (vii) Project Co shall deliver to SMH 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 Project Co or the Project Co Parties (in which case complete copies shall be delivered to SMH).

### **37.5 Ownership of Information**

- (a) Subject to Section 39, all information obtained by Project Co, 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 Works accumulated over the course of the Project Term shall be the property of SMH and upon termination of this Project Agreement shall be provided or returned to SMH, as applicable, in electronic format acceptable to SMH, acting reasonably, where it exists in electronic format, and in its original format, when not in electronic format.

### **37.6 Provision in Subcontracts**

- (a) Project Co shall make provision in all Subcontracts to which it is a party (including requiring the relevant Project Co Parties to make such provision and to require other Project Co Parties to make such provision) to ensure that SMH shall be in a position to exercise its rights, and Project Co shall be in a position to perform its obligations, under this Section 37.

**37.7 Transitional Arrangements**

- (a) On the termination of this Project Agreement for any reason, for a reasonable period both before and after any such termination, Project Co shall:
  - (i) as soon as practicable remove from the Site all property belonging to Project Co or any Project Co Party that is not acquired by SMH pursuant to Section 37.4 or otherwise, and, if Project Co has not done so within 60 days after any notice from SMH requiring it to do so, SMH 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 Project Co;
  - (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 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 Project Co's obligations pursuant to this Section 37, this Project Agreement shall terminate and, except as provided in Section 37.9, all rights and obligations of SMH and Project Co under this Project Agreement shall cease and be of no further force and effect.

**37.9 Survival**

- (a) Except as otherwise provided in this Project Agreement, termination of this Project Agreement shall be without prejudice to, and shall not affect:
  - (i) all representations, warranties and indemnities under this Project Agreement; and
  - (ii) Sections 1.2, 1.3, 4, 6, 7, 8, 11.15, 11.16, 16A, 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, 42.3, 43, 44, 45, 46, 48.3, 49.1, 50.4, 50.8, 50.9, 50.10, 50.11 and 50.12 of this Project Agreement, Schedule 14 – Outline Commissioning Program, Schedule 23 – Compensation on Termination, Schedule 24 – Financial Model, Sections 1.2 to 1.8 of Schedule 26 – Record Provisions, Schedule 27 – Dispute Resolution Procedure and any other provisions of this Project Agreement 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 this Project Agreement, including for termination on the Expiry Date pursuant to Section 36.4.

- (b) Termination of this Project Agreement shall be without prejudice to, and shall not affect, the Performance Guarantee of Construction Guarantor, which shall survive the termination of this Project Agreement, including termination on the Expiry Date pursuant to Section 36.4, in respect of any and all of such surviving provisions of the Project Agreement.

### **38. COMPENSATION ON TERMINATION**

#### **38.1 Compensation on Termination**

- (a) If this Project Agreement is terminated in accordance with the terms hereof, then Schedule 23 – Compensation on Termination shall apply and SMH shall pay Project Co 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 Project Co and SMH, and each shall be released from all liability to the other in relation to any breaches or other events leading to such termination of this Project Agreement, and the circumstances leading to such breach or termination, and Project Co and SMH 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 this Project Agreement, 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 the SMH Default Termination Sum, Non-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 this Project Agreement, 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) Project Co represents, warrants and covenants to SMH and agrees that:
- (i) Project Co 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 SMH herein;
  - (ii) Project Co has and shall have the right to provide the assignments granted to SMH herein; and
  - (iii) the Project Data and the Intellectual Property Rights and their use by SMH and the 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 this Project Agreement, Project Co 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) Project Co shall make all Project Data and Intellectual Property Rights available to, and upon request shall deliver to, SMH free of charge all Project Data, and shall obtain all necessary licences, permissions and consents to ensure that Project Co shall make the Project Data and Intellectual Property Rights available to and deliver the Project Data to 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) Project Co:
- (i) hereby grants to 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 Project Co's cost, where any Intellectual Property Rights are or become vested in the Construction Contractor, 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 Construction Contractor'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 Project Co'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 Project Co 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 Project Co and SMH pursuant to this Project Agreement or in relation to the Facility, the Site or Works (the "**Jointly Developed Materials**"), then the Parties hereby acknowledge and agree that SMH 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. Project Co shall, at the request of SMH, execute such further agreements and cause the Project Co 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) SMH hereby grants Project Co 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 Project Co or any Subcontractor performing its obligations under this Project Agreement or its Subcontract, as applicable.
- (c) Upon termination of this Project Agreement, all rights and licences whatsoever granted to Project Co in the Jointly Developed Materials shall automatically terminate, and Project Co shall return any and all Jointly Developed Materials in the custody or possession of Project Co to SMH.

#### **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, Project Co shall procure for the benefit of 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 SMH or its nominee to access and otherwise use (as such term is defined in Section 39.3(b), subject to the payment by SMH of any relevant fee) such data, materials and documents for the Approved Purposes.
- (b) Without limiting the obligations of Project Co under Section 39.5(a), Project Co 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. Project Co shall submit to the SMH Representative Project Co's proposals for the back up and storage in

safe custody of such data, materials and documents and SMH shall be entitled to object if the same is not in accordance with Good Industry Practice. Project Co shall comply, and shall cause all Project Co Parties to comply, with all procedures to which the SMH Representative has not objected. Project Co 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 SMH or a 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 SMH or any SMH Party or because the use of any materials, machinery or equipment in connection with the Works 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 SMH otherwise than in accordance with the terms of this Project Agreement, Project Co shall indemnify, defend and hold harmless SMH from and against all such demands, claims, actions and proceedings and Section 44.3 shall apply.

**39.7 SMH Trade-Marks**

- (a) Project Co 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 this Project Agreement that might prohibit or otherwise interfere with MEDEI's, IO's, MOHLTC's or the Province's ability to use this Project Agreement in any manner desired by MEDEI, IO, MOHLTC or the Province.
- (b) Each of the Parties hereby consents to the use by MEDEI, IO, MOHLTC and/or the Province of this Project Agreement, 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 MEDEI, IO, MOHLTC and/or the Province by either Party 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 this Project Agreement to the contrary, Project Co acknowledges and agrees that, in accordance with the transparency and accountability principles of the IPFP Framework, SMH has a right to disclose or publish (including on websites) this Project Agreement, any or all terms hereof, including any or all contractual submissions and other records kept in accordance with this Project Agreement, any information related to the performance of Project Co (or any Project Co Party) or any information derived from this Project Agreement or the information related to the performance of Project Co (or any Project Co Party) as SMH, in its sole discretion, may consider appropriate. In exercising its discretion, SMH will be guided by the principles set out in Sections 40.1(b) and 40.1(c).
- (b) SMH will not disclose portions of this Project Agreement, any terms hereof, including any contractual submissions or other records kept in accordance with this Project Agreement, any information related to the performance of Project Co (or any Project Co Party) or any information derived from this Project Agreement or the information related to the performance of Project Co (or any Project Co Party) which would be exempt from disclosure under 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 Project Co (or any Project Co Party), SMH may disclose such information.

**40.2 Redaction**

- (a) Prior to disclosing or publishing this Project Agreement, any terms hereof, including any contractual submissions or other records kept in accordance with this Project Agreement, any information related to the performance of Project Co (or any Project Co Party) or any information derived from this Project Agreement or the information related to the performance of Project Co (or any Project Co Party), SMH shall provide to Project Co a Redacted Version of this Project Agreement or other documents or information to be disclosed or published, on the basis that the information so redacted constitutes information which should not be disclosed pursuant to Section 40.1(b). The Parties acknowledge and agree that the Guaranteed Price, but not any breakdown thereof, may be disclosed.
- (b) If Project Co, acting in good faith, contends that any of the information not redacted constitutes information that falls within the scope of Section 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 SMH shall not

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disclose any information in dispute until a determination is made. Any such determination shall be made with reference to the text and principles of FIPPA.

**40.3 Disclosure to Government**

- (a) Project Co acknowledges and agrees that SMH will be free to disclose any information, including Confidential Information, to MEDEL, IO, MOHLTC and/or the Province, and, subject to compliance with FIPPA, MEDEL, 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 MEDEL, 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, this Project Agreement, any contractual submissions or other records kept in accordance with this Project Agreement, any information related to the performance of Project Co (or Project Co Party) or any information derived from this Project Agreement or the information related to the performance of Project Co (or any Project Co Party) are public documents and information and, as such, may be disclosed by MEDEL, IO, MOHLTC and/or the Province.

**40.4 Freedom of Information**

- (a) The Parties acknowledge and agree that FIPPA applies to SMH, MEDEL, IO, MOHLTC and the Province, and that SMH, MEDEL, 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 this Project Agreement.
- (b) 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 this Project Agreement.

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

#### **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 this Project Agreement, or becomes at any time thereafter, generally available to or accessible by the public through no fault or wrongdoing of the Confidant;
  - (iii) the information is a matter of public record or in the public domain;
  - (iv) the information was in the possession of the Confidant prior to its disclosure and the Confidant came into possession of such information without being in breach of this Project Agreement;
  - (v) the information is received by the Confidant on a non-confidential basis from a source other than the Proprietor, provided that to the best of the Confidant's knowledge such source is not bound by a confidentiality agreement with the Proprietor or otherwise prohibited from disclosing the information to the Confidant by a contractual, legal or fiduciary obligation;
  - (vi) the information was independently developed by the Confidant without access to the Confidential Information, as evidenced by written records;

- (vii) the information is required to be disclosed pursuant to Applicable Law, provided that the Confidant provides the Proprietor with reasonable notification and an opportunity to contest such requirement prior to disclosure;
- (viii) the information is disclosed to SMH upon a termination of this Project Agreement, pursuant to Section 36 or is otherwise required by 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 Project Agreement.

### **41. PERSONAL INFORMATION**

#### **41.1 General**

- (a) Project Co acknowledges the importance of maintaining the confidentiality and privacy of Personal Information.
- (b) Project Co shall, and shall require each Project Co Party to, only collect, hold, process, use, store and disclose Personal Information with the prior consent of SMH and only to the extent necessary to perform Project Co's obligations under this Project Agreement.
- (c) Project Co shall, and shall require each Project Co Party to, at all times treat Personal Information as strictly confidential and shall comply with all applicable requirements of the Output Specifications and the requirements of Applicable Law, including FIPPA and the *Personal Health Information Protection Act*, 2004 (Ontario).
- (d) Project Co shall take all necessary and appropriate action, and shall require each Project Co Party to take all necessary and appropriate action, against any person who fails to comply with this Section 41.
- (e) Project Co shall allow SMH on reasonable notice to inspect the measures of Project Co and each Project Co Party to protect Personal Information.

#### **41.2 Protection of Patient Information**

- (a) Project Co shall take all necessary steps, including the appropriate technical and organizational and physical security measures, and shall require each Project Co Party to take all necessary steps and to include provisions in Subcontracts to require each Project Co Party and other Project Co Parties to take all necessary steps, such that Project Co, the

Project Co Parties, and its and their staff shall protect, secure and keep confidential any Patient Information.

- (b) Project Co shall keep confidential, and shall require each Project Co Party to keep confidential and to include provisions in all Subcontracts to require all Project Co Parties to keep confidential, all Patient Information that any of them may encounter or obtain during the course of their duties.
- (c) SMH may from time to time require that Project Co or any Project Co Party execute and deliver within 2 Business Days of such request an agreement satisfactory to SMH, 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 this Project Agreement.

### **42. INSURANCE AND PERFORMANCE SECURITY**

#### **42.1 General Requirements**

- (a) Project Co and SMH 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 this Project Agreement shall relieve Project Co or SMH of their respective liabilities and obligations under this Project Agreement.

#### **42.3 Performance Guarantee of Construction Guarantor**

- (a) At all times during the Project Term and, in respect of the provisions described in Section 37.9, following the Project Term, Project Co shall ensure that a valid and binding Performance Guarantee of Construction Guarantor in favour of SMH from the Construction Guarantor (or a party of comparable financial strength, capacity and stability, as determined by SMH acting in its sole discretion) and in the form of guarantee attached as Schedule 12 – Performance Guarantee of Construction Guarantor, is in place and enforceable by SMH.

### **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 Project Co Indemnities to SMH**

- (a) Project Co shall indemnify and save harmless SMH 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 one or more of the following:
- (i) a failure by Project Co to achieve a Phase Completion by the applicable Scheduled Phase Completion Date;
  - (ii) a failure by Project Co to achieve Tower Interim Completion by the Scheduled Tower Interim Completion Date;
  - (iii) a failure by Project Co 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 this Project Agreement 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:

- (x) the breach of this Project Agreement by SMH; 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 SMH or any SMH 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 SMH or any SMH Party.
- (b) Project Co shall indemnify and save harmless SMH 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 Project Co herein.
- (c) Project Co shall indemnify and save harmless SMH 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 Project Co of this Project Agreement 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 Project Co to obtain all necessary Project Co Permits, Licences, Approvals and Agreements in accordance with this Project Agreement; or
  - (ii) any Contamination on, in or under, or migrating to or from, the Site, except for Contamination for which SMH, is responsible pursuant to Section 18.2(a);
- except to the extent that such Direct Losses are caused, or contributed to, by the breach of this Project Agreement by SMH or by any act or omission of SMH or any SMH Party.
- (d) Without prejudice to SMH's rights under Section 34 and any other rights under this Project Agreement, if SMH exercises its step-in rights under the Construction Contractor's Direct Agreement, Project Co shall indemnify SMH for all obligations of Project Co assumed by SMH under the Design and Construction Contract, as the case may be, and for all reasonable costs and expenses incurred by SMH in relation to the exercise of SMH's rights.
- (e) Project Co shall indemnify SMH for damages suffered or incurred on account of (i) any payment not duly made by Project Co pursuant to the terms of this Project Agreement on the due date; (ii) any overpayment to or underpayment by Project Co; or (iii) an amount determined as payable by Project Co to SMH 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 SMH, or from the date identified (if any) applicable to an amount determined as payable by Project Co to SMH under Schedule 27 – Dispute Resolution Procedure, up to and including the date of payment.

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**44.2 SMH Indemnities to Project Co**

- (a) SMH shall indemnify and save harmless Project Co and the Project Co 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 this Project Agreement by SMH or any act or omission of SMH or any SMH Party, except to the extent caused, or contributed to, by the breach of this Project Agreement by Project Co or by any act or omission of Project Co or any Project Co Party;
  - (ii) any physical loss of or damage to all or any part of any property or assets of Project Co or any Project Co Party, arising, directly or indirectly, out of, or in consequence of, or involving or relating to, breach of this Project Agreement by SMH or any deliberate or negligent act or omission of SMH or any SMH Party, except to the extent caused, or contributed to, by the breach of this Project Agreement by Project Co or by any act or omission of Project Co or any Project Co 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 this Project Agreement by SMH or any deliberate or negligent act or omission of SMH or any SMH Party, except to the extent caused, or contributed to, by the breach of this Project Agreement by Project Co or by any act or omission of Project Co or any Project Co Party,

provided that there shall be excluded from the indemnity given by SMH any liability for the occurrence of risks against which Project Co is required to insure under this Project Agreement to the extent of the proceeds available or that should have been available but for a failure by Project Co to comply with its obligations to properly insure under this Project Agreement.

- (b) SMH 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 SMH herein.
- (c) SMH shall indemnify Project Co for damages suffered or incurred on account of (i) any payment not duly made by SMH pursuant to the terms of this Project Agreement on the due date; (ii) any overpayment to or underpayment by SMH; or (iii) an amount determined as payable by SMH 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 SMH to Project Co 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 this Project Agreement. The party having, or claiming to have, the benefit of the indemnity is referred to as the “Beneficiary” and the Party giving the indemnity is referred to as the “Indemnifier”.
- (b) If the Beneficiary receives any notice, demand, letter or other document concerning any claim for which it appears that the Beneficiary is, or may become entitled to, indemnification under this Section 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 this Project Agreement 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, Project Co acknowledges and agrees that where SMH is the Beneficiary, SMH 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 this Project Agreement.

#### **44.4 Mitigation – Indemnity Claims**

- (a) For greater certainty, Section 50.4 applies to any indemnity given under this Project Agreement and any such indemnity shall not extend to Direct Losses which could have been reduced or avoided by the Beneficiary complying with such Section.

### **45. LIMITS ON LIABILITY**

#### **45.1 Indirect Losses**

- (a) Subject to Section 45.1(b) and without prejudice to the Parties' rights in respect of payments provided for herein, the indemnities under this Project Agreement shall not apply and there shall be no right to claim damages for breach of this Project Agreement, in tort or on any other basis whatsoever, to the extent that any loss claimed by either Party is:

- (i) for punitive, exemplary or aggravated damages;
- (ii) for loss of 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) only, the exceptions in Sections 45.1(a)(ii) and (iii) 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), shall be Direct Losses.

**45.2 No Liability in Tort**

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

**45.3 Sole Remedy**

- (a) Nothing in this Project Agreement shall prevent or restrict the right of SMH 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 this Project Agreement, and except to the extent recovered under any of the insurances required pursuant to Schedule 25 – Insurance and Performance Security Requirements, neither Party shall be entitled to recover compensation or make a claim under this Project Agreement, 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 this Project Agreement, or otherwise.

**45.4 Maximum Liability**

- (a) Subject to Section 45.4(b), the maximum aggregate liability of each Party in respect of all claims under Section 44 shall not exceed \$[REDACTED]. 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.
- (b) Project Co's maximum aggregate liability in respect of all claims under Sections 44.1(a)(i), 44.1(a)(ii) and 44.1(a)(iii) shall not exceed \$[REDACTED]. 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 45.4 shall restrict, limit, prejudice or in any other way impair the rights and/or remedies of the Parties under any other provision of this Project Agreement.

**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 Project Co Assignment**

- (a) Project Co shall not sell, assign, transfer, charge, mortgage, encumber, dispose of or otherwise alienate all or any part of any interest, whether legal or beneficial, in this Project Agreement or any Ancillary Document without the prior written consent of SMH, which consent may be withheld in the sole discretion of SMH, 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:
  - (i) the grant of any security for any loan made to Project Co under the Lending Agreements provided that any grantee of such security shall enter into the Lenders' Direct Agreement in relation to the exercise of its rights, if SMH so requires; or
  - (ii) any Subcontract or sub-subcontract entered into by Project Co, the Project Co Parties or any sub-subcontractor in connection with the Project.

**47.2 SMH Assignment**

- (a) SMH may assign, transfer, dispose of or otherwise alienate any interest in this Project Agreement or any agreement in connection with this Project Agreement to which Project Co and SMH are parties:
  - (i) to the Local Health Integration Network;
  - (ii) to any public hospital under the *Public Hospitals Act* (Ontario) to whom MOHLTC, exercising its statutory rights, would be entitled to transfer same;
  - (iii) to any successor of SMH, where such successor arises as a result of a direction or approval under the *Public Hospitals Act* (Ontario) or a reorganization of the delivery of health services initiated by the Province; or
  - (iv) to any person that is regulated and funded by the Province as a healthcare institution and is approved by MOHLTC as a transferee of same,provided that:
  - (v) the person to whom any such assignment, transfer, disposition or other alienation is made has the legal capacity, power and authority to accept such sale, assignment, transfer, disposition or other alienation and agrees in writing with

Project Co to perform, all the obligations of SMH hereunder and under any agreement in connection with this Project Agreement to which Project Co and SMH are parties; and

- (vi) MOHLTC confirms to the assignee its commitment to fund the assignee on terms and conditions no less favourable than those set out in the SMH Development Accountability Agreement.
- (b) SMH shall not be released of any of its obligations under this Project Agreement except upon an assignment, transfer, disposition or other alienation of its interest in this Project Agreement in accordance with this Section 47.2.

#### **47.3 Subcontracting**

- (a) Project Co shall not subcontract any interest in this Project Agreement or the Design and Construction Contract, and shall not permit the Construction Contractor to 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 or integrity or the nature of the Province's health care system, so as to affect public confidence in that system.
- (b) Project Co shall not terminate, agree to the termination of or replace the Construction Contractor unless Project Co has complied with Sections 8.2(a), 47.3(c) and 47.3(d) or received the prior written consent of SMH, not to be unreasonably withheld or delayed.
- (c) Subject to Section 47.3(d), if the Design and Construction Contract shall at any time lapse, terminate or otherwise cease to be in full force and effect, whether by reason of expiry, default or otherwise, with the effect that the Construction Contractor shall cease to act in relation to the Project, Project Co shall forthwith appoint a replacement, subject to SMH's prior written consent, acting reasonably, as to the suitability of the replacement.
- (d) It is a condition of replacement of the Construction Contractor, and Project Co shall require, that any replacement enter into a contract upon the same or substantially similar terms as the Design and Construction Contract so replaced, including the provision of replacement Security and an agreement on the same or substantially similar terms as the Construction Contractor's Direct Agreement unless any material variations are approved by SMH, acting reasonably.

#### **47.4 Changes in Ownership and Control**

- (a) No Change in Ownership of Project Co, or any person owning, directly or indirectly, beneficially or otherwise, any of the shares or units of or any other ownership interest in Project Co 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 Works.
- (b) Subject to Section 47.4(a), no Change in Control of Project Co, or any person owning, directly or indirectly, beneficially or otherwise, any of the shares or units or any other ownership interest in Project Co or any such person, shall be permitted without the prior written consent of SMH, 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 persons whose equity securities or ownership units or any other ownership interests are listed on a recognized stock exchange.
- (d) Whether or not Project Co is required to obtain SMH's consent to a Change in Ownership or Change in Control pursuant to this Section 47.4, Project Co shall provide timely notice to SMH of any proposed Change in Ownership or Change in Control of Project Co, or any person owning, directly or indirectly, beneficially or otherwise, any of the shares or units or any other ownership interest in Project Co 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 Project Co, 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 Project Co Group in relation to the decisions, management, actions or policies of Project Co or in relation to the operation, management and ownership of the Project.

#### **47.5 SMH Due Diligence**

- (a) Project Co shall promptly reimburse SMH for SMH's reasonable due diligence costs (including fees of professional advisors) in connection with any consent required of SMH pursuant to, or SMH's determination of Project Co'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:

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- (i) offering, giving or agreeing to give to SMH or any public body (or anyone employed by or acting on their behalf), or to any family member of such person, any gift or consideration of any kind as an inducement or reward:
  - (A) for doing or not doing, or for having done or not having done, any act in relation to the obtaining or performance of this Project Agreement or any other agreement with SMH or any public body in connection with the Project; or
  - (B) for showing or not showing favour or disfavour to any person in relation to this Project Agreement or any other agreement with SMH or any public body in connection with the Project,

provided that this Section 48.1(a)(i) shall not apply to Project Co or any Project Co Party (or anyone employed by or acting on their behalf) providing consideration to SMH or any public body in the ordinary course, or as reasonably necessary, to fulfill or comply with the obligations and liabilities of Project Co under this Project Agreement or any other agreement with SMH or any public body in connection with the Project;

- (ii) entering into this Project Agreement or any other agreement with SMH 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 Project Co, or on its behalf or to its knowledge, SMH 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, provided that this Section 48.1(a)(ii) shall not apply to a fee or commission paid by Project Co or any Project Co Party (or anyone employed by or acting on their behalf) to SMH or any public body pursuant to an agreement where such fee or commission is paid in the ordinary course, or as reasonably necessary, to fulfill or comply with the obligations and liabilities of Project Co under this Project Agreement or any other agreement with SMH 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 this Project Agreement or any other agreement with SMH or any public body in connection with the Project; or
- (iv) defrauding or attempting to defraud or conspiring to defraud SMH or any other public body.

**48.2 Remedies**

- (a) If Project Co or any Project Co Party (or anyone employed by or acting on their behalf) commits any Prohibited Act, then SMH shall be entitled to act in accordance with the following:
- (i) if the Prohibited Act is committed by Project Co or by an employee acting under the direction of a director or officer of Project Co, then SMH may give written notice to Project Co and Section 34 shall apply;
  - (ii) if the Prohibited Act is committed by an employee of Project Co acting independently of a direction of a director or officer of Project Co, then SMH may give written notice to Project Co and Section 34 shall apply, unless, within 30 days of receipt of such notice, Project Co terminates the employee's employment and ensures that the relevant part of the Works shall be performed by another person;
  - (iii) if a Prohibited Act is committed by a Project Co Party or by an employee of that Project Co Party not acting independently of a direction of a director or officer of that Project Co Party, then SMH may give written notice to Project Co and Section 34 shall apply, unless, within 30 days of receipt of such notice, Project Co terminates the relevant Subcontract and ensures that the relevant part of the Works 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 Project Co Party acting independently of a direction of a director or officer of that Project Co Party, then SMH may give notice to Project Co and Section 34 shall apply, unless, within 30 days of receipt of such notice, Project Co causes the termination of the employee's employment and ensures that the relevant part of the Works shall be performed by another person; and
  - (v) if the Prohibited Act is committed on behalf of Project Co or a Project Co Party by a person not specified in Sections 48.2(a)(i) to 48.2(a)(iv), then SMH may give notice to Project Co and Section 34 shall apply, unless, within 30 days of receipt of such notice, Project Co causes the termination of such person's employment or the appointment of their employer and, if necessary, ensures that the relevant part of the Works 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 SMH believes has committed the Prohibited Act; and

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- (iii) the date of termination in accordance with the applicable provisions of this Project Agreement.
- (c) Without prejudice to its other rights or remedies under this Section 48.2, SMH shall be entitled to recover from Project Co any Direct Loss sustained in consequence of any breach of this Section 48.

**48.3 Permitted Payments**

- (a) Nothing contained in this Section 48 shall prevent Project Co or any other person from paying any proper commission, fee or bonus whether to its employees within the agreed terms of their employment or otherwise, and such commission fee or bonus shall not constitute a Prohibited Act.

**48.4 Notification**

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

**48.5 Replacement of Project Co Party**

- (a) Where Project Co is required to replace any Project Co Party pursuant to this Section 48, the party replacing such Project Co Party shall from the time of the replacement be deemed to be a Project Co Party and the provisions of this Project Agreement shall be construed accordingly.

**49. NOTICES**

**49.1 Notices to Parties**

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

If to Project Co:

[REDACTED]

Fax No.: [REDACTED]

Attn.: [REDACTED]

If to SMH:

[REDACTED]

Fax No.: [REDACTED]

Attn.: [REDACTED]

With a copy to the following [REDACTED]  
addressees (which shall not constitute  
notice): [REDACTED]

Attn.: [REDACTED]

#### **49.2 Notices to Representatives**

- (a) In addition to the notice requirements set out in Section 49.1, where any Notice is to be provided or submitted to the SMH Representative or the Project Co Representative it shall be provided or submitted by sending the same by registered mail, facsimile or by hand, as follows:

If to Project Co Representative: [REDACTED]

Fax No.: [REDACTED]

Attn.: [REDACTED]

If to the SMH Representative: [REDACTED]

Fax No.: [REDACTED]

Attn.: [REDACTED]

#### **49.3 Facsimile**

- (a) Where any Notice is provided or submitted to a Party via facsimile, an original of the Notice sent via facsimile shall promptly be sent by regular mail or registered mail. For greater certainty, a notice given via facsimile shall not be invalid by reason only of a Party's failure to comply with this Section 49.3.

#### **49.4 Change of Address**

- (a) Either Party to this Project Agreement may, from time to time, change any of its contact information set forth in Sections 49.1 or 49.2 by prior Notice to the other Party, and such change shall be effective on the Business Day that next follows the recipient Party's receipt of such Notice unless a later effective date is given in such Notice.

**49.5 Deemed Receipt of Notices**

- (a) Subject to Sections 49.5(b), 49.5(c) and 49.5(d):
  - (i) a Notice given by registered mail shall be deemed to have been received on the third Business Day after mailing;
  - (ii) a Notice given by hand delivery shall be deemed to have been received on the day it is delivered; and
  - (iii) a Notice given by facsimile shall be deemed to have been received on the day it is transmitted by facsimile.
- (b) If the Party giving the Notice knows or ought reasonably to know of difficulties with the postal system which might affect negatively the delivery of mail, any such Notice shall not be mailed but shall be made or given by personal delivery or by facsimile transmission in accordance with this Section 49.
- (c) If any Notice delivered by hand or transmitted by facsimile is so delivered or transmitted, as the case may be, either on a day that is not a Business Day or on a Business Day after 4:00 p.m. (recipient's local time), then such Notice shall be deemed to have been received by such recipient on the next Business Day.
- (d) A Notice given by facsimile shall be deemed to have been received by the recipient on the day it is transmitted only if a facsimile transmission report (maintained by the sender) indicates that the transmission of such Notice was successful.

**49.6 Service on SMH**

- (a) Where any Notice is required to be served on SMH, the obligation to serve such Notice shall be fulfilled by serving it on SMH in accordance with the provisions of this Section 49.

**50. GENERAL**

**50.1 Amendments**

- (a) This Project Agreement 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 Project Agreement.

**50.2 Waiver**

- (a) No waiver made or given by a Party under or in connection with this Project Agreement shall be binding or effective unless the waiver is in writing, signed by an authorized representative of the Party giving such waiver, and delivered by such Party to the other

Parties. No waiver made with respect to any right, power or remedy in one instance will be deemed to be a waiver with respect to any other instance involving the exercise of such right, power, or remedy or with respect to any other right, power, or remedy.

- (b) Failure by either Party 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.

### **50.3 Relationship Between the Parties**

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

**50.4 General Duty to Mitigate**

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

**50.5 Actual Knowledge**

- (a) Without limitation to its actual knowledge and/or such knowledge which it, at law, may from time to time, be deemed to have, Project Co and SMH shall, for all purposes of this Project Agreement, be deemed to have such knowledge in respect of the Project as is actually held (or ought reasonably to be held) by their respective directors, officers, senior management and the Project Co Representative and the SMH Representative, respectively. For clarity, except as expressly set out to the contrary, a reference in this Project Agreement to the "knowledge of" Project Co or SMH, shall be construed in a manner consistent with the foregoing sentence.

**50.6 Entire Agreement**

- (a) Except where provided otherwise in this Project Agreement, this Project Agreement constitutes the entire agreement between the Parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings, whether oral, written, express or implied, concerning the subject matter of this Project Agreement.

**50.7 No Reliance**

- (a) Each of the Parties acknowledges that:
  - (i) it has not entered into this Project Agreement on the basis of and does not rely, and has not relied, upon any statement or representation, whether negligent or innocent, or warranty or other provision, whether oral, written, express or implied, made or agreed to by any person, whether a Party to this Project Agreement or not, except those expressly made, given or repeated in this Project Agreement and the only remedy or remedies available in respect of any misrepresentation or untrue statement made to it shall be those expressly provided for in this Project Agreement; and
  - (ii) this Section 50.7 shall not apply to any statement, representation or warranty made fraudulently, or to any provision of this Project Agreement which was induced by fraud, for which the remedies available shall be all those available under the law governing this Project Agreement.

**50.8 Severability**

- (a) Each provision of this Project Agreement shall be valid and enforceable to the fullest extent permitted by law. If any provision of this Project Agreement is declared invalid,

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

**50.9 Enurement**

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

**50.10 Governing Law and Jurisdiction**

- (a) This Project Agreement, and each of the documents contemplated by or delivered under or in connection with this Project Agreement, shall be governed by and construed in accordance with the laws of Ontario and the laws of Canada applicable therein and shall be treated in all respects as an Ontario contract, without regard to conflict of laws principles.
- (b) Subject to Schedule 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.

**50.11 Cumulative Remedies**

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

**50.12 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 Project Agreement.

**50.13 Costs**

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

**50.14 Language of Agreement**

- (a) Each of the parties acknowledges having requested and being satisfied that this Project Agreement and related documents be drawn in English. Chacune des parties reconnaît avoir demandé que ce document et ses annexes soient rédigés en anglais et s'en declare satisfaite.
- (b) For greater certainty, all correspondence, notices, drawings, test reports, certificates, specifications, information, 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 Project Agreement shall be in English

**50.15 Proof of Authority**

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

**50.16 Counterparts**

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

**50.17 Government Entities as Third Party Beneficiaries**

- (a) The provisions of Sections 2.4, 5.1(b), 7.1, 7.2(a), 7.3(a), 9.1(c), 11.12(a), 39.6, 39.7, 39.9, 40, 44.1 and 45.2 and each other provision of the Project Agreement which is to the benefit of a Government Entity are:
  - (i) intended for the benefit of each Government Entity and, if set out in the relevant Section, each Government 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) SMH shall hold the rights and benefits of Sections 2.4, 5.1(b), 7.1, 7.2(a), 7.3(a), 9.1(c), 11.12(a), 39.6, 39.7, 39.9, 40, 44.1 and 45.2 and each other provision of the Project Agreement which is to the benefit of each Government Entity in trust for and on behalf of

the Third Party Beneficiaries and SMH hereby accepts such trust and agrees to hold the benefit of and enforce performance of such covenants on behalf of the Third Party Beneficiaries.

**50.18 Time is of the Essence**

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

**50.19 Copyright Notice**

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

**[EXECUTION PAGE IMMEDIATELY FOLLOWS]**



**2442931 ONTARIO INC.**

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

Name: John Aquino  
Title: President

I have authority to bind the corporation.

**Confidential**

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MT DOCS 12119590

**Project Agreement  
Execution Version**  
**St. Michael's Hospital Redevelopment Project**

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

**ST. MICHAEL'S HOSPITAL**

Per: Tom C. O'Neill  
Name: Tom O'Neill  
Title: Chair of the Board of  
Directors

Per: Robert Howard  
Name: Robert Howard  
Title: President and Chief  
Executive Officer

I/We have authority to bind the corporation.

## **SCHEDULE 1**

### **DEFINITIONS AND INTERPRETATION**

1. **Definitions.** In the Project Agreement, 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 the Project Agreement.
  - 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, shall include each of the unitholders, shareholders, partners or owners of Project Co, as applicable, and any person or entity controlling, controlled by or under common control with Project Co 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 [REDACTED].
  - 1.8 **"Anticipated Final Completion Date"** has the meaning given in Section 24.11(a) of the Project Agreement.
  - 1.9 **"Anticipated Phase Completion Date"** has the meaning given in Section 23A.7(a) of the Project Agreement.
  - 1.10 **"Anticipated Substantial Completion Date"** has the meaning given in Section 24.7(a) of the Project Agreement.
  - 1.11 **"Anticipated Tower Interim Completion Date"** has the meaning given in Section 23B.7(a) of the Project Agreement.
  - 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 Project Co, any Project Co Party, SMH or any SMH Party and, in particular, shall include the *Public Hospitals Act* (Ontario).
- 1.13 “**Appointed Representative**” has the meaning given in Schedule 4 – Lenders' Direct Agreement.
- 1.14 “**Appointed Representative Notice**” has the meaning given in Schedule 4 – Lenders' Direct Agreement.
- 1.15 “**Apprenticeship Plan**” has the meaning given in Section 11.21(a) of the Project Agreement.
- 1.16 “**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 Project Agreement, the design, construction and/or maintenance of the Facility, and/or the performance of any other operations the same as, or similar to, the Works; and
  - (c) the development by MOHLTC and/or the Province of best practices for healthcare facilities in Ontario.
- 1.17 “**As Built Drawings**” means drawings prepared by Project Co in a format and with content and details that SMH, acting reasonably, considers appropriate.
- 1.18 “**Associated Liabilities**” has the meaning given in Section 4.20(b) of the Project Agreement.
- 1.19 “**ATI**” means the *Access to Information Act* (Canada).
- 1.20 “**Authority Requirements**” means any order, direction, directive, request for information, policy, administrative interpretation, guideline or rule of or by any Governmental Authority.

**St. Michael's Hospital Redevelopment Project**

- 1.21 **"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 Project Co or any Project Co Party by SMH or any SMH Party, or which was obtained from or through any other sources prior to the date of the Project Agreement.
- 1.22 **"Bank"** has the meaning given in Schedule 30 – Insurance Trust Agreement.
- 1.23 **"Beneficiary"** has the meaning given in Section 44.3(a) of the Project Agreement.
- 1.24 **"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.
- 1.25 **"Building"** means a building as defined in the *Building Code Act, 1992* (Ontario).
- 1.26 **"Building Code"** means Ontario Regulation 332/12 made under the *Building Code Act, 1992* (Ontario).
- 1.27 **"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.
- 1.28 **"CaGBC"** means the Canadian Green Building Council.
- 1.29 **"Canadian and Industry Standards"** means, at the applicable time, those standards, practices, methods and procedures applicable to Good Industry Practice.
- 1.30 **"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.
- 1.31 **"Capital Expenditure"** means capital expenditure as interpreted in accordance with Canadian GAAP.
- 1.32 **"Cash Allowance Account"** means [REDACTED].
- 1.33 **"Cash Allowance Amounts"** means [REDACTED].
- 1.34 **"Cash Allowance Amount Shortfall"** has the meaning given in Section 3.2(b) of the Project Agreement.

**1.35 “Cash Allowance Items” [REDACTED]**

1.36 “Cash Allowance Monthly Deposit Amount” has the meaning given in Section 3.2(a) of the Project Agreement.

1.37 “Cash Allowance Monthly Deposit Amount Reconciliation” has the meaning given in Section 3.2(a) of the Project Agreement.

1.38 “Certification Services” has the meaning given in Schedule 6 – Independent Certifier Agreement.

1.39 “Certification Services Variation” has the meaning given in Schedule 6 – Independent Certifier Agreement.

1.40 “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.

1.41 “Change in Law” means the coming into effect or repeal (without re-enactment or consolidation) in Ontario of any Applicable Law, or any amendment or variation of any Applicable Law, including any judgment of a relevant court of law which changes binding precedent in Ontario in each case after the date of the Project Agreement.

1.42 “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.

1.43 “CLA” means the *Construction Lien Act*, R.S.O. 1990, c.C.30.

1.44 “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.

1.45 “Clinical Functionality Report” has the meaning given in Section 11.4(b) of the Project Agreement.

- 1.46 **"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.
- 1.47 **"CMMS"** means SMH's computerized maintenance management system.
- 1.48 **"Commercial Close"** means the date of the Project Agreement.
- 1.49 **"Commissioning Team"** has the meaning given in Section 4.1 of Schedule 14 – Outline Commissioning Program.
- 1.50 **"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 the Project Agreement;
  - (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 the Project Agreement; and
  - (f) required to be included in the Final Commissioning Program by the Independent Certifier, the SMH Commissioning Consultant or the SMH Representative during its development pursuant to Section 24.2 of the Project Agreement.
- 1.51 **"Compensation Event"** has the meaning given in Section 31.1(a) of the Project Agreement.
- 1.52 **"Compensation Payment"** means the SMH Default Termination Sum, the Project Co Default Termination Sum or the Non-Default Termination Sum.
- 1.53 **"Completion Holdback"** has the meaning given in Section 24.8 of the Project Agreement.
- 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 the Project Agreement.
- 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 the Project Agreement, but excluding Patient Information.
- 1.58 **“Construction Contractor”** means Bondfield Construction Company Limited, engaged by Project Co to perform the Works and any substitute building contractor engaged by Project Co as may be permitted by the Project Agreement.
- 1.59 **“Construction Contractor Support Agreement”** means the construction contractor support agreement between Project Co and the Construction Contractor dated the date of the Project Agreement.
- 1.60 **“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.
- 1.61 **“Construction Defect”** means any deficiency, defect or error in the Works or failure of the Works to conform to the Project Agreement, including, for clarity, any deficiency, defect or error in relation to any Product or item of In-Contract Equipment.
- 1.62 **“Construction Document Submittals”** has the meaning given in Section 11.1(d)(ii) of the Project Agreement.
- 1.63 **“Construction Guarantor”** means Bondfield Construction Company Limited.
- 1.64 **“Construction Latent Defect”** has the meaning given in Section 11.15(c).
- 1.65 **“Construction Quality Plan”** means the construction quality plan included in Schedule 11 - Design Quality Plan and Construction Quality Plan.

- 1.66 **"Construction Safety Plan"** has the meaning given to it in Schedule 13 – Project Co Proposal Extracts.
- 1.67 **"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 Project Agreement.
- 1.68 **"Corporations Act"** means the *Corporations Act*, R.S.O. 1990, c. C.38, as amended.
- 1.69 **"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.
- 1.70 **"Cost of the Works"** means the cost to Project Co of performing the Works as set out in Schedule 24 – Financial Model and shall include all amounts to be included in the Cost of the Works set out in the Project Agreement.
- 1.71 **"Countdown Notice"** has the meaning given in Section 24.7(a) of the Project Agreement.
- 1.72 **"CPI"** means, as at the date of the Project Agreement, 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.
- 1.73 **"CPI XFET"** means the Consumer Price Index excluding food, energy and the effect of changes in indirect taxes.
- 1.74 **"CPI<sub>In</sub>"** 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.
- 1.75 **"CPI<sub>o</sub>"** is the value of CPI at Financial Close, to be determined by reference to the relevant index in the month immediately preceding Financial Close.
- 1.76 **"CPM"** has the meaning given in Section 4.1 of Schedule 3 – Works Scheduling Requirements.
- 1.77 **"CSA Standards"** means, at the applicable time, the Canadian Standards Association standards.

- 1.78 **"Debt Service Amount"** means, for any period, the principal and interest payable by Project Co or any Project Co Party to the Lenders in the normal course under the Lending Agreements.
- 1.79 **"Delay Event"** has the meaning given in Section 30.1(a) of the Project Agreement.
- 1.80 **"Demolition"** means the removal of a building or structure, as the case may be, or of any material part of a Building or Structure.
- 1.81 **"Demolition Default Event"** has the meaning given in Section 11.23(b).
- 1.82 **"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.
- 1.83 **"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.
- 1.84 **"Demolition Requirements"** has the meaning given in Section 11.23(a).
- 1.85 **"Demolition Specifications"** means those specifications relating to any Demolition prepared by Project Co in accordance with Section 11.23(a)(iv)(A) of this Project Agreement.
- 1.86 **"Demolition Supervisor"** has the meaning given in Section 11.23(a)(ii).
- 1.87 **"Design and Bid Fee"** has the meaning given in the Request for Proposals.
- 1.88 **"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.
- 1.89 **"Design Data"** means all drawings, reports, documents, plans, software, formulae, calculations, and other data prepared by Project Co 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.
- 1.90 **"Design Development Submittals"** has the meaning given in Section 11.1(d)(i) of the Project Agreement.
- 1.91 **"Design Quality Plan"** means the design quality plan included in Schedule 11 - Design Quality Plan and Construction Quality Plan.

- 1.92 “Design Review Workshops” has the meaning given in Section 11.3(a) of the Project Agreement.
- 1.93 “Design Team” means [REDACTED], engaged by Project Co or a Project Co Party to design the Facility and any substitute design team engaged by Project Co or a Project Co Party as may be permitted by the Project Agreement.
- 1.94 “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.
- 1.95 “Direct Cost” has the meaning given in Schedule 22 -Variation Procedure.
- 1.96 “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.
- 1.97 “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.
- 1.98 “Discretionary SMH Cash Allowance Amount” \$[REDACTED]
- 1.99 “Discretionary SMH Cash Allowance Items” [REDACTED]
- 1.100 “Discretionary SMH Additional In-Contract Equipment and Works Amount” means an aggregate amount of \$[REDACTED] for Discretionary SMH Additional In-Contract Equipment and Works Items.
- 1.101 “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”**.

1.102 **“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.

1.103 **“Dispute”** has the meaning given in Schedule 27 - Dispute Resolution Procedure.

1.104 **“Dispute Resolution Procedure”** has the meaning given in Schedule 27 – Dispute Resolution Procedure.

1.105 **“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.

1.106 **“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 Works and/or the conduct of 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.
- 1.107 **"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.
- 1.108 **"Environmental Reports"** means, collectively, the following reports:
- (a) [REDACTED].
- 1.109 **"Environmental Report (Phase Two Environmental Site Assessment)"** – means [REDACTED].
- 1.110 **"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.
- 1.111 **"Equipment List"** means the equipment list set out in Part 4 of Schedule 15 – Output Specifications.
- 1.112 **"Equipment Steering Committee"** has the meaning given in Section 21.1(a) of the Project Agreement.
- 1.113 **"Equipment Sub-Plan"** has the meaning given to it in Schedule 13 – Project Co Proposal Extracts.
- 1.114 **"Estimate"** has the meaning given in Schedule 22 - Variation Procedure.
- 1.115 **"Existing Equipment"** means the equipment designated as "Existing Equipment"/ transferrable equipment in Part 4 of Schedule 15 – Output Specifications.
- 1.116 **"Existing Facilities"** means the existing buildings of SMH within parts of which and adjoining which the Works will occur.
- 1.117 **"Expert"** has the meaning given in Schedule 27 - Dispute Resolution Procedure.
- 1.118 **"Expiry Date"** means the first anniversary of the Final Completion Date.
- 1.119 **"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.

- 1.120 **"Final Commissioning Program"** means the program to be jointly developed and agreed by SMH and Project Co in accordance with Section 24.2 of the Project Agreement.
- 1.121 **"Final Completion"** means the completion of the Works in accordance with the Project Agreement, including completion of all Minor Deficiencies.
- 1.122 **"Final Completion Certificate"** means the certificate to be issued by the Independent Certifier in accordance with Section 24.12 of the Project Agreement.
- 1.123 **"Final Completion Countdown Notice"** has the meaning given in Section 24.11(a) of the Project Agreement.
- 1.124 **"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.
- 1.125 **"Final Completion Notice"** has the meaning given in Section 24.12(b) of the Project Agreement.
- 1.126 **"Financial Close"** means the first date that funding is available under the Lending Agreements.
- 1.127 **"Financial Close Target Date"** means January 22, 2015, as such date may be extended in accordance with the provisions of the Project Agreement.
- 1.128 **"Financial Model"** means the computer spreadsheet model included in Schedule 24 – Financial Model 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.

- 1.129 **"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.
- 1.130 **"Financing"** means the financing with the Lenders, that is consistent in all material respects with Schedule 24 - Financial Model and the Project Agreement, to finance the Project.
- 1.131 **"FIPPA"** means the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (Ontario).
- 1.132 **"Force Majeure"** has the meaning given in Section 33.1(a) of the Project Agreement.
- 1.133 **"Geotechnical Reports"** [REDACTED]
- 1.134 **"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.
- 1.135 **"Government Entity"** means any one or more of the Province, IO, MEDEI and the MOHLTC.
- 1.136 **"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 Project Agreement 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.
- 1.137 **"Guaranteed Price"** is the amount referred to in Section 3.1(a) of the Project Agreement.
- 1.138 **"Hazardous Materials Survey Reports"** [REDACTED]
- 1.139 **"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.

- 1.140 **"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.
- 1.141 **"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.
- 1.142 **"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.
- 1.143 **"Heritage Guidelines and Protocols"** means those heritage guidelines and protocols mandated by Applicable Laws.
- 1.144 **"HST"** means the value-added tax imposed pursuant to Part IX of the *Excise Tax Act* (Canada), and any successor legislation thereto.
- 1.145 **"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.
- 1.146 **"ICT"** means information and communications technology.
- 1.147 **"Improvements"** means structures, buildings, installations, fixtures, services and other such improvements.
- 1.148 **"In-Contract Equipment"** means all Equipment in respect to which Project Co 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.
- 1.149 **"Indemnifiable Taxes"** has the meaning given in Section 4.20(b) of the Project Agreement.
- 1.150 **"Indemnifier"** has the meaning given in Section 44.3(a) of the Project Agreement.
- 1.151 **"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.

- 1.152 **"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.
- 1.153 **"Indirect Losses"** has the meaning given in Section 45.1 of the Project Agreement.
- 1.154 **"Innovation Proposal"** has the meaning given in Section 29.2(b) of the Project Agreement.
- 1.155 **"Insurance"** means the insurance contemplated in Schedule 25 – Insurance and Performance Security Requirements.
- 1.156 **"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.
- 1.157 **"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.
- 1.158 **"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 Project Agreement created, brought into existence, acquired, used or intended to be used by Project Co, any Project Co Party or by other third parties (for such third parties' use by or on behalf of or for the benefit of Project Co) for any or all of the purposes of:
- (a) the Works, 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 Project Agreement.
- 1.159 **"Interest Reference Rate"** means the reference benchmark rate of interest identified in the Financial Model and used in the calculation of the Project Debt Interest Cost, and for greater clarity, is the base rate of interest exclusive of any stated or imbedded spread, (including credit, swap or other types of spread) or fees.
- 1.160 **"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.

- 1.161 **"IPFP Framework"** has the meaning given in the recitals to the Project Agreement.
- 1.162 **"Jointly Developed Materials"** has the meaning given in Section 39.4(a) of the Project Agreement.
- 1.163 **"Junior Debt Amount"** has the meaning given in Schedule 23 – Compensation on Termination.
- 1.164 **"Junior Debt Service Amount"** means, for any period, the principal and interest payable by Project Co or any Project Co Party to the Junior Lenders in the normal course under the Lending Agreements.
- 1.165 **"Junior Lenders"** for the purpose of the Project Agreement, there are no Junior Lenders and any reference to "Junior Lenders" in the Project Agreement shall have no force and effect whatsoever.
- 1.166 **"Key Individuals"** has the meaning given in Schedule 9 – Key Individuals.
- 1.167 **"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.
- 1.168 **"LEED"** means Leadership in Energy & Environmental Design.
- 1.169 **"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 Project Agreement.
- 1.170 **"LEED Silver Rating"** means the achievement of a 'Silver' rating from the CaGBC, with respect to the LEED Rating System.
- 1.171 **"Legislative Holdback"** means the holdback(s) to be maintained under Part IV of the CLA.
- 1.172 **"Legislative Holdback Payment Date"** means the date for payment of the Legislative Holdback pursuant to Section 4.5(e) of the Project Agreement.
- 1.173 **"Lenders"** means any or all of the persons acting arm's length to Project Co and each Project Co Party 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;

- 1.174 **"Lenders' Agent"** has the meaning given in Schedule 4 - Lenders' Direct Agreement.
- 1.175 **"Lenders' Consultant"** means any consultant appointed from time to time by the Lenders. Nothing contained in the Project Documents and no action taken by the Lenders' Consultant in connection with the Works or the Project Documents shall constitute direction and/or control by SMH, Project Co or the Lenders.
- 1.176 **"Lenders' Direct Agreement"** means the direct agreement to be entered into between SMH, the Lenders' Agent and Project Co in the form set out in Schedule 4 - Lenders' Direct Agreement.
- 1.177 **"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.
- 1.178 **"Letter of Credit Provider"** has the meaning given in Section 2.2(a) of the Project Agreement.
- 1.179 **"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.
- 1.180 **"Local Health Integration Network"** means the Central Local Health Integration Network.
- 1.181 **"Longstop Date"** has the meaning given in Section 34.1(a)(ii) of the Project Agreement.
- 1.182 **"Maintenance Instructions"** means the maintenance data prepared and delivered by Project Co to SMH pursuant to Sections 23A.5A, 23B.5A and 24.5A of the Project Agreement.
- 1.183 **"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 Works as required under the Project Agreement or (b) any existing components disturbed due to the Works to at least the condition existing at the commencement of the Works, 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.
- 1.184 **"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.
- 1.185 **"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 the SMH Commissioning) or the performance of the SMH Activities.
- 1.186 **"Minor Deficiencies List"** has the meaning given in Section 24.8(a) of the Project Agreement.
- 1.187 **"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.
- 1.188 **"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.
- 1.189 **"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.
- 1.190 **"New Shuter Wing"** has the meaning given in Section 1.0.3 of Part 1 of Schedule 15 – Output Specifications.
- 1.191 **"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).
- 1.192 **"NOAC"** has the meaning given in Appendix A to Schedule 1 – Permits, Licences, Approvals and Agreements.
- 1.193 **"No Default Payment Compensation Amount"** means [REDACTED].
- 1.194 **"Non-Default Termination Sum"** has the meaning given in Schedule 23 - Compensation on Termination.
- 1.195 **"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).
- 1.196 **"Non-Shuter Works"** has the meaning given in Appendix A to Schedule 1 – Permits, Licences, Approvals and Agreements.
- 1.197 **"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.
- 1.198 **"Not-In-Contract Equipment Fee"** means \$[REDACTED].

- 1.199 "Notice" has the meaning given in Section 49.1(a) of the Project Agreement.
- 1.200 "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).
- 1.201 "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.
- 1.202 "OCPM" has the meaning given in Section 13.6(b) of the Project Agreement.
- 1.203 "Order" has the meaning given in Schedule 30 - Insurance Trust Agreement.
- 1.204 "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 outlined in Schedule 14 - Outline Commissioning Program.
- 1.205 "Output Specifications" means Schedule 15 – Output Specifications.
- 1.206 "Party" means either SMH or Project Co, and "Parties" means both SMH and Project Co, but, for greater certainty, such definitions do not include IO, MOHLTC or MEDEI.
- 1.207 "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*).
- 1.208 "Payment Compensation Amount" means [REDACTED].
- 1.209 "PDC Team" means the team of consultants led by Diamond Schmitt Architects.
- 1.210 "Performance Bond" means collectively, the Performance Bond and the Multiple Obligor Rider to the Performance Bond in the form attached as Appendix B to Schedule 25 – Insurance and Performance Security Requirements.
- 1.211 "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 Construction Guarantor.
- 1.212 "Performance Standards Regulation" means Ontario Regulation 260/08 made under the *Professional Engineers Act* (Ontario).
- 1.213 "Permits, Licences, Approvals and Agreements" means the SMH Permits, Licences, Approvals and Agreements and the Project Co Permits, Licences, Approvals and Agreements.
- 1.214 Permitted Borrowing" means:

- (a) any advance to Project Co under the Lending Agreements;
  - (b) any additional financing approved by SMH in accordance with Section 1.9 of Schedule 22 - Variation Procedure to the Project Agreement; and
  - (c) any amendment, waiver or exercise of a right under the Lending Agreements made during the Step-In Period that does not increase SMH's liabilities under the Project Agreement whether actual or contingent, present or future, known or unknown.
- 1.215 **"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 Project Co or a Project Co Party other than personal information of the employees of Project Co or a Project Co Party and other than personal information that is wholly unrelated to the Works and not derived directly or indirectly from SMH in respect of the Project.
- 1.216 **"Phase Commissioning Program"** means each program to be jointly developed and agreed by SMH and Project Co in accordance with Section 23A.2 of the Project Agreement.
- 1.217 **"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.
- 1.218 **"Phase Completion Certificate"** means the certificate to be issued by the Independent Certifier in accordance with Section 24.4A(d) of the Project Agreement.
- 1.219 **"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.
- 1.220 **"Phase Completion Notice"** has the meaning given in Section 23A.4(b) of the Project Agreement.
- 1.221 **"Phase Countdown Notice"** has the meaning given in Section 24.7A(a) of the Project Agreement.
- 1.222 **"Phase of the Works"** means each phase of the Works identified in Section 3.9.2 of Part 3 of the Output Specifications; and **"Phases of the Works"** means greater than one Phase of the Works.
- 1.223 **"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 SMH Activities.

- 1.224 **"Phase Minor Deficiencies List"** has the meaning given in Section 23A.8(a) of the Project Agreement.
- 1.225 **"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.
- 1.226 **"Phase Project Co Commissioning"** means the commissioning activities to be carried out by Project Co prior to the issuance of a Phase Completion Certificate in accordance with each Phase Commissioning Program.
- 1.227 **"Phase Project Co Commissioning Tests"** means all Commissioning Tests required to be performed by Project Co pursuant to each Phase Commissioning Program.
- 1.228 **"Phase SMH Commissioning"** means the commissioning activities to be carried out by SMH in accordance with each Phase Commissioning Program.
- 1.229 **"Phase SMH Commissioning Period"** means each period during which SMH is performing Phase SMH Commissioning.
- 1.230 **"Phase SMH Commissioning Tests"** means all Commissioning Tests required to be performed by SMH pursuant to each Phase Commissioning Program.
- 1.231 **"Phasing Requirements"** means the requirements for the phasing and sequencing of the Works set out in Section 3.9 of Part 3 of the Output Specifications.
- 1.232 **"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.
- 1.233 **"Procurement Monitoring and Implementation Plan"** has the meaning given in Section 11.22(a) of the Project Agreement.
- 1.234 **"Product"** means or **"Products"** mean material, machinery, equipment and fixtures forming the Works but does not include Equipment or machinery and equipment used to prepare, fabricate, convey or erect the Works, which is referred to as construction machinery and equipment.
- 1.235 **"Prohibited Act"** has the meaning given in Section 48.1(a) of the Project Agreement.
- 1.236 **"Project"** has the meaning given in the recitals to the Project Agreement.
- 1.237 **"Project Agreement"** has the meaning given in the recitals to the Project Agreement.
- 1.238 **"Project Co"** has the meaning given in the introductory paragraph of the Project Agreement.

- 1.239 **"Project Co Amount"** has the meaning given in Schedule 23 – Compensation on Termination.
- 1.240 **"Project Co Commissioning"** means the commissioning activities to be carried out by Project Co prior to the issuance of the Substantial Completion Certificate in accordance with the Final Commissioning Program.
- 1.241 **"Project Co Commissioning Authority"** has the meaning given in Section 2 of Schedule 14 – Outline Commissioning Program.
- 1.242 **"Project Co Commissioning Tests"** means all Commissioning Tests required to be performed by Project Co pursuant to the Final Commissioning Program.
- 1.243 **"Project Co Construction Event of Default"** means a Project Co Event of Default relating to a failure or breach by Project Co to perform, observe or comply with any covenants, agreements, obligations or liabilities with respect to the Works, excluding a default by the Construction Guarantor under the Performance Guarantee of Construction Guarantor.
- 1.244 **"Project Co Default Termination Sum"** has the meaning given in Schedule 23 – Compensation on Termination.
- 1.245 **"Project Co Event of Default"** has the meaning given in Section 34.1(a) of the Project Agreement.
- 1.246 **"Project Co Group"** means [REDACTED].
- 1.247 **"Project Co Party"** means:
- (a) the Construction Contractor;
  - (b) any person engaged by Project Co and/or the Construction Contractor from time to time as may be permitted by the Project Agreement to procure or manage the provision of the Works (or any of them); and
  - (c) in respect of each of the above, their subcontractors of any tier, agents, employees, officers and directors,
- and **"Project Co Parties"** shall be construed accordingly.
- 1.248 **"Project Co Permits, Licences, Approvals and Agreements"** means all permissions, consents, approvals, certificates, permits, licences, agreements and authorizations to be obtained by Project Co in accordance with the Project Agreement 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 Works in accordance with the Project Agreement, and including those permits, licenses, approvals and agreements which are the responsibility of Project Co 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 Project Co to obtain as set out in the Output Specifications, but other than any SMH Permits, Licences, Approvals and Agreements.

1.249 **"Project Co Proposal Extracts"** has the meaning given to it in Schedule 13 – Project Co Proposal Extracts.

1.250 **"Project Co Representative"** means the person designated as such by Project Co on or prior to Commercial Close and any permitted replacement.

1.251 **"Project Co Variation Notice"** has the meaning given in Schedule 22 - Variation Procedure.

1.252 **"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 Works or the Project Agreement,

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.

1.253 **"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.

1.254 **"Project Documents"** means the Ancillary Documents and the Lending Agreements.

1.255 **"Project Term"** means the period commencing on the date of the Project Agreement and expiring at midnight on the Termination Date.

1.256 **"Proprietor"** has the meaning given in Section 40.6(a) of the Project Agreement.

1.257 **"Province"** means Her Majesty the Queen in Right of Ontario.

1.258 **"Quality Plans"** has the meaning given in Section 15.1(a) of the Project Agreement.

1.259 **"Recovery Amount"** has the meaning given in Section 44.3(g) of the Project Agreement.

1.260 **"Refinancing"** has the meaning given in Schedule 29 – Refinancing.

1.261 **"Reimbursement Event"** has the meaning given in Section 25A.5(a) of the Project Agreement.

1.262 **"Relevant Change in Law"** means a Discriminatory Change in Law or a Health Specific Change in Law.

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- 1.263 **"Relevant Conviction"** means a conviction under the *Criminal Code* (Canada) for which no pardon has been granted.
- 1.264 **"Relief Event"** has the meaning given in Section 32.1(a) of the Project Agreement.
- 1.265 **"Remainder Works"** means all Works other than Phases of the Works and Tower Interim Completion Works, which are identified in Section 3.9 of Part 3 of the Output Specifications.
- 1.266 **"Remaining Cash Allowance Amount"** has the meaning given in Section 3.2(b) of the Project Agreement.
- 1.267 **"Request for Payment Approval"** has the meaning given in Section 3.2(d) of the Project Agreement.
- 1.268 **"Request for Proposals" or "RFP"** means the request for proposals issued in respect of the Project on August 2, 2013.
- 1.269 **"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.

1.270 **"Review Procedure"** means the procedure set out in Schedule 10 - Review Procedure.

1.271 **"RFP Submission Deadline"** means May 21, 2014.

1.272 **"Schedule Cushion"** means a schedule contingency added to the last activity on the critical path of the Works Schedule and consisting of a 30 day duration. The Schedule Cushion shall be included in the Works 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 Works in any manner whatsoever. SMH 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 Project Co 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 SMH prior to the Substantial Completion Date will be given to Project Co. Use of the Schedule Cushion by SMH shall not result in any right of Project Co to a claim for an increase in the Cost of the Financing.

1.273 **"Scheduled Final Completion Date"** means [REDACTED].

1.274 **"Scheduled Phase Completion Date"** means each Scheduled Phase Completion Date set out in the Works Schedule, as such date may be extended pursuant to Section 30 of the Project Agreement. For clarity, any change to a Scheduled Phase Completion Date initiated by Project Co other than an extension to such date pursuant to Section 30 of the Project Agreement must be approved in writing by SMH and, subject to the terms of Schedule 22 – Variation Procedure, any SMH approval of any such change does not entitle Project Co to a Variation, an extension of time or an addition to the Guaranteed Price.

1.275 **"Scheduled Substantial Completion Date"** means [REDACTED], as such date may be extended pursuant to Section 30 of the Project Agreement.

1.276 **"Scheduled Tower Interim Completion Date"** means [REDACTED], as such date may be extended pursuant to Section 30 of the Project Agreement.

1.277 **"Security"** means the Bonds, the Insurance and any other security interests granted by Project Co to the Lenders' Agent pursuant to the Security Documents.

1.278 **"Security Documents"** means [REDACTED].

1.279 **"Senior Debt Amount"** has the meaning given in Schedule 23 – Compensation on Termination.

1.280 **"Senior Debt Service Amount"** means [REDACTED].

1.281 **"Senior Lenders"** means [REDACTED].

- 1.282 **"Sensitive Information"** means financial or commercial information which would, if disclosed to a competitor of Project Co or any Project Co Party, give that competitor a competitive advantage over Project Co or such Project Co Party and thereby prejudice the business of Project Co or such Project Co Party.
- 1.283 **"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.
- 1.284 **"Shop Drawings"** means drawings, diagrams, illustrations, schedules, performance charts, brochures and other data which are to be provided by Project Co to illustrate details of a portion of the Works, indicating materials, methods of construction and attachment or anchorage, erection diagrams, connections, explanatory notes and other information necessary for completion of the Works.
- 1.285 **"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.
- 1.286 **"Site Conditions"** means the condition of the Site, including the physical, geophysical, climatic, ecological, environmental, geotechnical and archaeological conditions.
- 1.287 **"SMH"** means St. Michael's Hospital.
- 1.288 **"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.
- 1.289 **"SMH Commissioning"** means the commissioning activities to be carried out by SMH in accordance with the Final Commissioning Program.
- 1.290 **"SMH Commissioning Consultant"** means the person appointed by SMH as its commissioning consultant.

- 1.291 **"SMH Commissioning Period"** means the period during which SMH is performing the SMH Commissioning.
- 1.292 **"SMH Commissioning Tests"** means all commissioning tests required to be performed by SMH pursuant to the Final Commissioning Program.
- 1.293 **"SMH Default Termination Sum"** has the meaning given in Schedule 23 – Compensation on Termination.
- 1.294 **"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.
- 1.295 **"SMH Development Accountability Agreement"** means the development accountability agreement between MOHLTC and SMH dated January 8, 2015 with respect to, among other things, the terms and conditions of funding for SMH's obligations related to the Project.
- 1.296 **"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.
- 1.297 **"SMH Early Procured In-Contract Equipment Assignment"** has the meaning given in Section 21.3(a).
- 1.298 **"SMH Early Procured In-Contract Equipment Assumption"** has the meaning given in Section 21.3(a).
- 1.299 **"SMH Early Procured In-Contract Equipment Reimbursement Amount"** means \$[REDACTED].
- 1.300 **"SMH Event of Default"** has the meaning given in Section 35.1(a) of the Project Agreement.
- 1.301 **"SMH Funding and Approval Letter"** means the funding and approval letter from MOHLTC to SMH dated January 8, 2014 with respect to, among other things, the terms and conditions of funding by MOHLTC of certain of SMH's obligations related to the Project and MOHLTC's approval of the Project.
- 1.302 **"SMH Mortgages"** means, collectively, the Sisters First Mortgage and the Sisters Second Mortgage, which are both defined and described in Schedule 16 – Title Encumbrances;
- 1.303 **"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, and the “SMH Parties” shall be construed accordingly.

- 1.304 “**SMH Permits, Licences, Approvals and Agreements**” means only those SMH permits, licences, approvals and agreements which are the responsibility of SMH to obtain as set out in Appendix “A” to this Schedule 1 - Definitions and Interpretation.
- 1.305 “**SMH Representative**” means the person designated as such by SMH on or prior to the date of the Project Agreement and any permitted replacement.
- 1.306 “**SMH Taxes**” means taxes, or payments in lieu of taxes, imposed on SMH and HST and property taxes for which SMH is responsible pursuant to Section 4.15 of the Project Agreement.
- 1.307 “**SMH Trade-Marks**” means any and all Trade-Marks used by SMH in any manner whatsoever.
- 1.308 “**Standby Letter of Credit**” has the meaning given in Section 2.2(a) of the Project Agreement.
- 1.309 “**Start-Up Meeting**” has the meaning given in Section 11.2(a) of the Project Agreement.
- 1.310 “**Step-in Period**” has the meaning given in Schedule 4 – Lenders' Direct Agreement.
- 1.311 “**Structure**” means any permanent structure other than a building, including a bridge, dam or lock.
- 1.312 “**Subcontractor**” means any subcontractor of Project Co engaged by or through Project Co to perform any of the Works, including the Construction Contractor, any Supplier or consultant, and any subcontractor of any other subcontractor at any tier.
- 1.313 “**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 in the form set out in Schedule 7 – Subcontractor's Direct Agreement.
- 1.314 “**Subcontracts**” means the contracts entered into by or between Project Co and any Subcontractor or between any Subcontractor at any tier, including the Construction Contractor, and any other Subcontractor at any tier in relation to any aspect of the Works.
- 1.315 “**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.

- 1.316 **"Substantial Completion Certificate"** means the certificate to be issued by the Independent Certifier in accordance with Section 24.4(d) of the Project Agreement.
- 1.317 **"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.
- 1.318 **"Substantial Completion Notice"** has the meaning given in Section 24.4(b) of the Project Agreement.
- 1.319 **"Substantial Completion Payment"** means [REDACTED].
- 1.320 **"Substantial Completion Payment Date"** means the date that is 2 Business Days after the Substantial Completion Date.
- 1.321 **"Supplier"** means a person who supplies to Project Co, or to any Subcontractor, any equipment, materials, supplies or services as part of, or for, the Works.
- 1.322 **"Surety"** means the person issuing the Bonds.
- 1.323 **"Tax" or "Taxes"** means any and all taxes, levies, imposts, duties, fees, withholdings, assessments, deductions or charges whatsoever, imposed, assessed, levied or collected by any Governmental Authority, together with interest thereon and penalties with respect thereto, and includes all HST except where stated to the contrary, provided however that "Taxes" shall not include the SMH Taxes.
- 1.324 **"Technical Reports"** means the Environmental Reports, the Geotechnical Reports and the Hazardous Materials Survey Reports.
- 1.325 **"Termination Date"** means the earlier of the Expiry Date and such earlier date, if any, on which termination of the Project Agreement takes effect in accordance with its terms.
- 1.326 **"Third Party Beneficiaries"** has the meaning given at Section 51.17(a)(i) of the Project Agreement.
- 1.327 **"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 Works.
- 1.328 **"Tower"** means the "Patient Care Tower" described in Section 1.03 of Part 1 of Schedule 15 – Output Specifications.
- 1.329 **"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.

- 1.330 **"Tower Interim Completion Certificate"** means the certificate to be issued by the Independent Certifier in accordance with Section 23B.4(d) of the Project Agreement.
- 1.331 **"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 the Project Agreement.
- 1.332 **"Tower Interim Completion Countdown Notice"** has the meaning given in Section 23B.7(a) of the Project Agreement.
- 1.333 **"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.
- 1.334 **"Tower Interim Completion Holdback"** has the meaning given in Section 23B.8 of the Project Agreement.
- 1.335 **"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.
- 1.336 **"Tower Interim Completion Minor Deficiencies List"** has the meaning given in Section 23B.8(a) of the Project Agreement.
- 1.337 **"Tower Interim Completion Notice"** has the meaning given in Section 23B.4(b) of the Project Agreement.
- 1.338 **"Tower Interim Completion Payment"** means \$[REDACTED].
- 1.339 **"Tower Interim Completion Payment Date"** means the date that is 2 Business Days after the Tower Interim Completion Date.
- 1.340 **"Tower Interim Completion Project Co Commissioning"** means the commissioning activities to be carried out by Project Co prior to the issuance of the Tower Interim Completion Certificate in accordance with the Tower Interim Completion Commissioning Program.
- 1.341 **"Tower Interim Completion Project Co Commissioning Tests"** means all commissioning tests required to be performed by Project Co pursuant to the Tower Interim Completion Commissioning Program.
- 1.342 **"Tower Interim Completion SMH Commissioning"** means the commissioning activities to be carried out by SMH in accordance with the Final Commissioning Program.
- 1.343 **"Tower Interim Completion SMH Commissioning Period"** means the period during which SMH is performing the Tower Interim Completion SMH Commissioning.

- 1.344 **"Tower Interim Completion SMH Commissioning Tests"** means all commissioning tests required to be performed by SMH pursuant to the Tower Interim Completion Commissioning Program.
- 1.345 **"Tower Interim Completion Works"** means the portion of the Works in respect of the design, construction, installation, testing, commissioning and completion of the Tower and rectification of any Tower Interim Completion Minor Deficiencies described in Section 3.9 of Part 3 of the Output Specifications.
- 1.346 **"Tower Occupancy Permit"** means all Permits, Licences, Approvals and Agreements required for the occupancy of the Tower in compliance with Applicable Law.
- 1.347 **"Trade-Marks"** means any registered or unregistered mark, trade-mark, service mark, distinguishing guise, logo, insignia, seal, design or symbol.
- 1.348 **"Transition"** and **"Transitions"** have the meanings respectively given in Section 24.14(a) of the Project Agreement.
- 1.349 **"Transition Advisor"** has the meaning given in Section 21.14(c).
- 1.350 **"Transition Advisor Candidate"** has the meaning given in Section 24.14(c) of the Project Agreement.
- 1.351 **"Transition Parameters"** has the meaning given in Section 24.14(a) of the Project Agreement.
- 1.352 **"Transition Services Fee"** means \$[REDACTED].
- 1.353 **"Transition Subcommittee"** has the meaning given in Section 24.14(a) of the Project Agreement.
- 1.354 **"Trust Account"** has the meaning given in the Trust Account Agreement.
- 1.355 **"Trust Account Agreement"** means the trust account agreement to be entered into between SMH, Project Co and the Trustee in the form set out in Schedule 32 - Trust Account Agreement.
- 1.356 **"Trustee"** has the meaning given in Schedule 32 - Trust Account Agreement.
- 1.357 **"Utilities"** means energy/power supplies and waste recovery, including electricity, natural gas/fuel oil, water, sanitary waste and storm water.
- 1.358 **"Utility Company"** means any company or companies designated by Project Co to provide Utilities.
- 1.359 **"Variation"** has the meaning given in Schedule 22 - Variation Procedure.
- 1.360 **"Variation Confirmation"** has the meaning given in Schedule 22 - Variation Procedure.

- 1.361 **"Variation Directive"** has the meaning given in Schedule 22 - Variation Procedure.
- 1.362 **"Variation Enquiry"** has the meaning given in Schedule 22 - Variation Procedure.
- 1.363 **"Variation Procedure"** means the procedure set out in Schedule 22 - Variation Procedure.
- 1.364 **"VOR"** has the meaning given in Section 21.6(a)(iv) of the Project Agreement.
- 1.365 **"Warranty Cash Amount"** has the meaning given in Section 4.3(b) of the Project Agreement.
- 1.366 **"Warranty Letter of Credit"** has the meaning given in Section 11.16A of the Project Agreement.
- 1.367 **"Warranty Period"** means (i) with respect to each Phase of the Works which has achieved Phase Completion, a period beginning on the applicable Phase Completion Date and expiring on the date that is two years following the Substantial Completion Date, (ii) with respect to all Tower Interim Completion Works which have achieved Tower Interim Completion, a period beginning on the Tower Interim Completion Date and expiring on the date that is two years following the Substantial Completion Date, and (iii) with respect to the Remainder Works which has achieved Substantial Completion, a period beginning on the Substantial Completion Date and expiring on the date that is two years following the Substantial Completion Date.
- 1.368 **"Works"** 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 Works and the rectification of any Phase Minor Deficiencies, Tower Interim Completion Minor Deficiencies and Minor Deficiencies and the performance of all other obligations of Project Co under the Project Agreement.
- 1.369 **"Works Change in Law"** means any Change in Law that:
- (a) is not a Relevant Change in Law;
  - (b) occurs after the date of the Project Agreement;
  - (c) requires Project Co to perform any work of alteration, addition, Demolition, extension or variation in the quality or function of the Facility which is not Works or capital replacement work which Project Co would otherwise be required to perform in order to comply with its obligations under the Project Agreement; and
  - (d) was not reasonably foreseeable at the date of the Project Agreement 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 Project Co Party in relation to the Project.
- 1.370 **"Works Committee"** has the meaning given in Section 14.1(a) of the Project Agreement.

- 1.371 “**Works Milestones**” has the meaning given in Schedule 3 – Works Scheduling Requirements.
- 1.372 “**Works Report**” has the meaning given in Section 13.6 of the Project Agreement.
- 1.373 “**Works Schedule**” means the works schedule developed pursuant to and in accordance with Section 13.2(a) of the Project Agreement and Schedule 3 – Works Scheduling Requirements.
- 1.374 “**Works Submittals**” has the meaning given in Section 1.1 of Schedule 10 - Review Procedure.
- 1.375 “**WSIB**” means the Ontario Workplace Safety and Insurance Board that is responsible for administering the *Workplace Safety and Insurance Act, 1997* (Ontario).
2. **Interpretation.** The Project Agreement shall be interpreted according to the following provisions, unless the context requires a different meaning:
- 2.1 The tables of contents, headings, marginal notes and references to them in the Project Agreement are for convenience of reference only, shall not constitute a part of the Project Agreement, and shall not be taken into consideration in the interpretation of, or affect the meaning of, the Project Agreement.
- 2.2 Except where the context requires otherwise (irrespective of whether some, but not all, references in a Schedule specifically refer to that Schedule or to other portions of the Project Agreement) references to specific Sections, Articles, Clauses, Paragraphs, Subparagraphs, Schedules, and other divisions of the Project Agreement are references to such Sections, Articles, Clauses, Paragraphs, or Subparagraphs of, Schedules to, or divisions of the Project Agreement and the terms “Section”, “Article” and “Clause” are used interchangeably and are synonymous.
- 2.3 Except where the context requires otherwise, references to specific Sections, Articles, Clauses, Paragraphs, Subparagraphs, Schedules, and other divisions of the Project Agreement followed by a number are references to the whole of the Section, Article, Clause, Paragraph, Subparagraphs, Schedule or other division of the Project Agreement as applicable, bearing that number, including all subsidiary provisions containing that same number as a prefix.
- 2.4 Except where the context requires otherwise, references in the Output Specifications to specific Parts, Sections, Articles, Clauses, Paragraphs, Subparagraphs, Schedules, and other divisions of the Output Specifications shall be construed such that each such reference on a page of the Output Specifications will be read to be preceded by and to include the prefix Section number or other reference at the top of the applicable page, and all cross-references to any Section in Schedule 15 - Output Specifications shall be interpreted to include the applicable prefix Section number or other reference.
- 2.5 The Schedules to the Project Agreement are an integral part of the Project Agreement and a reference to the Project Agreement includes a reference to the Schedules.

- 2.6 All references in the Project Agreement to a Schedule shall be to a Schedule of the Project Agreement.
- 2.7 All capitalized terms used in a Schedule shall have the meanings given to such terms in Schedule 1, unless stated otherwise in a particular Schedule in which case such definition shall have the meaning given to it in that Schedule solely for the purposes of that Schedule.
- 2.8 The language of the Output Specifications and other documents comprising the Project Agreement is in many cases written in the imperative for brevity. Clauses containing instructions, directions or obligations are directed to Project Co and shall be construed and interpreted as if the words "Project Co shall" immediately preceded the instructions, directions or obligations.
- 2.9 Words importing persons or parties are to be broadly interpreted and include an individual, corporation, limited liability company, joint stock company, firm, partnership, joint venture, trust, unincorporated organization, Governmental Authority, unincorporated body of persons or association and any other entity having legal capacity, and the heirs, beneficiaries, executors, administrators or other legal representatives of a person in such capacity.
- 2.10 Unless the context otherwise requires, wherever used herein the plural includes the singular, the singular includes the plural, and each of the masculine, feminine and neuter genders include all other genders.
- 2.11 Unless otherwise provided in the Project Agreement, all accounting and financial terms used in the Project Agreement shall be interpreted and applied in accordance with Canadian GAAP.
- 2.12 References to any standard, principle, agreement or document include (subject to all relevant approvals and any other provisions of the Project Agreement concerning amendments) a reference to that standard, principle, agreement or document as amended, supplemented, restated, substituted, replaced, novated or assigned.
- 2.13 References to any Applicable Law, including any statutes or other Applicable Law specifically referred to herein, whether or not amendments or successors to such Applicable Law are referred to herein, are to be construed as references to that Applicable Law as from time to time amended or to any Applicable Law covering the same or similar subject matter from time to time replacing, extending, consolidating or amending the same.
- 2.14 References to a statute shall include all regulations, by-laws, ordinances and orders made under or pursuant to the statute.
- 2.15 References to persons shall include their successors and assigns. References to a public organization shall include their successors and assigns, and if a public organization ceases to exist or ceases to perform its functions without a successor or assign, references to such public organization shall be deemed to include a reference to any public

organization or any organization or entity which has taken over either or both the functions and responsibilities of such public organization.

- 2.16 A reference in the Project Agreement or in any Project Document to any right, power, obligation or responsibility of any Governmental Authority shall be deemed to be a reference to the Governmental Authority that, pursuant to Applicable Laws has such right, power, obligation or responsibility at the relevant time.
- 2.17 References to a deliberate act or omission or deliberate or negligent act or omission of SMH or any SMH Party shall be construed having regard to the interactive nature of the activities of SMH, SMH Parties and Project Co and further having regard to:
- (a) acts contemplated by the Output Specifications; or
  - (b) acts otherwise provided for in the Project Agreement.
- 2.18 The words in the Project Agreement shall bear their natural meaning.
- 2.19 Each of Project Co's and SMH's respective obligations shall be construed as separate obligations owed to the other.
- 2.20 References containing terms such as:
- (a) "hereof", "herein", "hereto", "hereinafter", and other terms of like import are not limited in applicability to the specific provision within which such references are set forth but instead refer to the Project Agreement taken as a whole; and
  - (b) "includes" and "including", whether or not used with the words "without limitation" or "but not limited to", shall not be deemed limited by the specific enumeration of items but shall, in all cases, be deemed to be without limitation and construed and interpreted to mean "includes without limitation" and "including without limitation".
- 2.21 In construing the Project Agreement, the rule known as the *ejusdem generis* rule shall not apply nor shall any similar rule or approach apply to the construction of the Project Agreement and, accordingly, general words introduced or followed by the word "other" or "including" or "in particular" shall not be given a restrictive meaning because they are followed or preceded (as the case may be) by particular examples intended to fall within the meaning of the general words.
- 2.22 Where the Project Agreement states that an obligation shall be performed "no later than" or "within" or "by" a stipulated date or event which is a prescribed number of days after a stipulated date or event, the latest time for performance shall be 5:00 p.m. on the last day for performance of the obligation concerned, or, if that day is not a Business Day, 5:00 p.m. on the next Business Day.
- 2.23 Where the Project Agreement states that an obligation shall be performed "no later than" or "by" a prescribed number of days before a stipulated date or event or "by" a date

- which is a prescribed number of days before a stipulated date or event, the latest time for performance shall be 5:00 p.m. on the last day for performance of the obligation concerned, or if that day is not a Business Day, 5:00 p.m. on the next Business Day.
- 2.24 Where the Project Agreement states that an obligation shall be performed "on" a stipulated date, the latest time for performance shall be 5:00 p.m. on that day, or, if that day is not a Business Day, 5:00 p.m. on the next Business Day.
- 2.25 Any reference to time of day or date means the local time or date in Toronto, Ontario.
- 2.26 Unless otherwise indicated, time periods will be strictly construed.
- 2.27 Whenever the terms "will" or "shall" are used in the Project Agreement in relation to Project Co or SMH they shall be construed and interpreted as synonymous and to read "Project Co shall" or "SMH shall" as the case may be.
- 2.28 Any reference to currency is to Canadian currency and any amount advanced, paid or calculated is to be advanced, paid or calculated in Canadian currency.
- 2.29 Unless otherwise identified in the Project Agreement, all units of measurement in any documents submitted by Project Co to SMH shall be in accordance with the SI system of units.
- 2.30 Terms not defined herein and used in the Project Agreement which have a technical meaning commonly understood by the health care sector in Ontario will be construed as having that meaning unless the context otherwise requires.
- 2.31 Save where expressly stated otherwise, references to amounts or sums expressed to be "indexed" or "index linked" are references to amounts or sums which require adjustment to reflect the effects of inflation. Such adjustment shall be calculated in accordance with the following formula:
- $$\text{Adjusted amount or sum} = \text{Amount or sum} \times \frac{\text{CPI}_n}{\text{CPI}_o}$$
- 2.32 The terms "properly inferable", "readily apparent" and "readily discoverable" as used in this Project Agreement, shall be interpreted by taking into consideration Project Co's and any Project Co Party's experience and the investigations, inspections and examinations of the Background Information and of the Site, including the Existing Facilities, carried out by Project Co or by any Project Co Party during the Request for Proposals process or other due diligence; and by taking into consideration reasonable, normal course and industry standard investigations, inspections or other due diligence; in each case in accordance with Good Industry Practice.

**TAB B**

This is Exhibit B referred to in the  
affidavit of Michael Keen  
sworn before me, this 19<sup>th</sup>  
day of December 2019

## DESIGN AND CONSTRUCTION CONTRACT

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

BETWEEN:

Laura Christine Alford, a Commissioner, etc.,  
Province of Ontario, while a Student-at-Law.  
Expires May 14, 2021.

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	- <b>INTENTIONALLY DELETED</b>
Schedule 3	- Design and Construction Work Scheduling Requirements
Schedule 4	- <b>INTENTIONALLY DELETED</b>
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	- <b>INTENTIONALLY DELETED</b>
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	- <b>INTENTIONALLY DELETED</b>
Schedule 20	- Procurement Monitoring and Implementation Plan
Schedule 21	- <b>INTENTIONALLY DELETED</b>
Schedule 22	- Variation Procedure
Schedule 23	- Compensation on Termination
Schedule 24	- <b>INTENTIONALLY DELETED</b>
Schedule 25	- Insurance and Performance Security Requirements
Schedule 26	- Record Provisions
Schedule 27	- Dispute Resolution Procedure
Schedule 28	- <b>INTENTIONALLY DELETED</b>
Schedule 29	- <b>INTENTIONALLY DELETED</b>
Schedule 30	- Insurance Trust Agreement
Schedule 31	- <b>INTENTIONALLY DELETED</b>
Schedule 32	- <b>INTENTIONALLY DELETED</b>
Schedule 33	- <b>INTENTIONALLY DELETED</b>

## 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.

(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.

- (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

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

- (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

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

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 déclare 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

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.
- (iii) 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.

- (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

**TAB C**

This is Exhibit C referred to in the  
affidavit of Michael Keen  
sworn before me, on 19  
day of December, 2019

## PUBLIC PRIVATE PARTNERSHIP PERFORMANCE BOND

With Attached Multiple Obligor Rider and Credit Downgrade Rider

Bond No: 6343517

Bond Amount: \$ 156,325,362.60

Bondfield Construction Company Limited as Principal, ("Principal"), and Zurich Insurance Company Ltd, a corporation created and existing under the laws of Switzerland having a place of business in Canada and duly authorized to transact the business of Suretyship in the Province of Ontario, Canada as Surety, ("Surety"), are bound unto 2442931 Ontario Inc. as Obligor, ("Obligor"), in the amount of \$156,325,362.60 lawful money of Canada (the "Bond Amount", as further defined below), for the payment of which sum the Principal and the Surety jointly and severally bind themselves, their heirs, executors, administrators, successors and assigns.

Laura Christine Afford, a Commissioner, etc.,  
Province of Ontario, while a Student-at-Law,  
Expires May 14, 2021.

### WHEREAS,

- (a) The Principal has entered into a written contract with the Obligor (the "Design and Construction Contract") dated the 27th day of January in the year 2015 for the design and construction of St. Michael's Hospital (the "Project");
- (b) The Surety has agreed to enter into this Public Private Partnership Performance Bond ("Bond") to guarantee the performance of all of the obligations of the Principal under the Design and Construction Contract, subject to the Excluded Liabilities (as defined below) and all other terms and conditions herein (the "Bonded Obligations");
- (c) The Principal and the Surety have agreed that a maximum of fourteen million, two hundred and eleven thousand, three hundred and ninety six dollars and sixty cents (\$14,211,396.60) of the Bond Amount (the "Advance Payment", as more fully defined below) will be available to the Obligor upon demand and receipt of the Obligor's Advance Payment Demand (as defined below) which shall include the Obligor's certification of the Principal's liability for Liquidated Damages (as defined in the Design and Construction Contract), and with the balance of the Bond Amount to remain available pursuant and subject to the terms and conditions herein.

Now, the condition of this obligation is such that if the Principal shall promptly and faithfully perform the Bonded Obligations of the Design and Construction Contract then this Bond shall be null and void; otherwise it shall remain in full force subject to the terms hereof.

### Advance Payment

1. The Surety and Principal agree that the Surety will make an Advance Payment(s) to the Obligor for Liquidated Damages, up to an aggregate maximum of fourteen million, two hundred and eleven thousand, three hundred and ninety six dollars and sixty cents (\$14,211,396.60) of the Bond Amount (the "Advance Payment Maximum"), no later than 5 business days after Surety's receipt of a demand from any of the Obligors for the Advance Payment (the "Advance Payment Demand"), provided that the Obligor's Advance Payment Demand is received by the Surety at its Office (as defined below) by hand or courier before the Expiry Date (as defined below) and includes:

1.1 (a) The Obligor's written declaration of the Principal's default in performance of the Bonded Obligations and consequent liability for Liquidated Damages arising from such default in performance of the Bonded Obligations (the "Advance Payment Declaration of Default"); and

1.1 (b) The Obligor's certification, executed by two authorized signing officers of the Obligor, that the Principal is thus liable for Liquidated Damages in the amount set out in the Advance Payment Demand.

1.2. The Advance Payment Demand shall be accepted by the Principal and the Surety as conclusive evidence that the amount of the Advance Payment Demand is payable to the Obligee; and all payments shall be made free and clear without deduction, setoff or withholding unless and to the extent required by law.

1.3 The Advance Payment(s) made by the Surety can be made in increments up to the Advance Payment Maximum specified above, and the sum of the Advance Payment(s) shall reduce the Advance Payment Maximum and the Bond Amount accordingly such that the Surety's remaining obligations under the Bond shall be limited to the balance of the Advance Payment Maximum with respect to Advance Payments, and the Bond Amount with respect to the Surety's aggregate maximum liability. There can be no Advance Payment Demand from any of the Obligees after the date that is thirty days following Substantial Completion of the Design and Construction Contract).

1.4 The Surety will make the Advance Payment upon compliance by the Obligee with this section 1, notwithstanding any other then current dispute between the Surety and the Obligee or the Principal related to provisions of this Bond apart from section 1.

#### **Performance Obligation**

2. Whenever the Principal shall be and is declared by the Obligee to be in default in the performance of the Bonded Obligations under the Design and Construction Contract, ("**Performance Obligation Declaration of Default**") and the Obligee, not being in Material Default under the Design and Construction Contract including the agreement to pay the balance of the Design and Construction Contract price (herein defined as the total amount payable by the Obligee to the Principal under the Design and Construction Contract less the amount properly paid by the Obligee to the Principal in accordance with the terms of the Design and Construction Contract, the "**Balance of the Bonded Design and Construction Contract Price**"), the Surety shall within twenty-one (21) days of the Surety's receipt of the Performance Obligation Declaration of Default, elect one of the following four options:

2.1 Arrange to remedy the default where such default is capable of remedy; or

2.2. Complete the Bonded Obligations in accordance with the Design and Construction Contract through its agents or through independent contractors; or

2.3 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 Design and Construction Contract and to pay Obligee's expenses incurred as a result of the Principal's default, relating directly to the performance of said Bonded Obligations, less the Balance of the Bonded Design and Construction Contract Price; but not exceeding the remaining Bond Amount; or

2.4 Pay the Obligee the lesser of (a) the remaining balance of the Bond Amount (subject to the limitation in Section 10); or (b) the Obligee's reasonable estimate of the cost to complete the Bonded Obligations under the Design and Construction Contract in accordance with its terms and conditions, less the Balance of the Bonded Design and Construction Contract Price.

**Waiver**

3. The Surety shall not be discharged or released from liability hereunder and such liability shall not be in any way affected by any changes, alterations, additions or variations to the Design and Construction Contract, the taking or receiving of security between the Principal and the Obligor, the extension of time or by the exercise by the Obligor of any of the rights or powers reserved to it under the Design and Construction Contract, or by its forbearance to exercise any such rights or powers, provided that foregoing is provided for in, or reasonably contemplated and permitted under the terms of the Design and Construction Contract and that the Obligor has promptly given notice to the Surety of any variation that results, individually or when aggregated with other variations, in an increase to the contract price under the Design and Construction Contract in excess of twenty-five per cent (25%) of the original contract price under the Design and Construction Contract.

**Expiry Date**

4. This Bond shall cease to have effect and be terminated and the Surety shall be released and discharged except in respect of any outstanding suits or actions, upon the expiration of twenty-four months which shall begin on the earlier of: (a) the date of substantial completion of the Bonded Obligations of the Design and Construction Contract or (b) the date of the Performance Obligation Declaration of Default (the "Expiry Date").

**5. NOT USED****Excluded Liabilities**

6. This Bond shall not respond to nor shall the Surety under this Bond be liable for any sums payable by the Principal to the Obligor in respect of claims relating to any of the following (the "Excluded Liabilities"):

- (i) Financing obligations of the Obligor under any and all credit or loan agreements, and, for greater certainty, any debt obligations under any loan agreement or any obligations under any hedging agreements or to the hedge providers, credit enhancements, funding arrangements, the fixing of interest rates or for any other variable rate or variable cost of financing;
- (ii) Liabilities of the Principal under any other collateral or ancillary agreements or in respect of any obligation to procure the entry into any ancillary or collateral agreements by any third parties;
- (iii) Liabilities of the Principal to pay or provide any indemnity in respect of sums due following a failure to procure or the non-availability of any insurance contemplated by the Design and Construction Contract;
- (iv) Liabilities of the Principal arising from any credit downgrade or rating revision of any person or entity including, but not limited to, the Surety (except, for greater certainty, with respect to the Advance Payment, as otherwise set out in the Credit Downgrade Rider attached hereto).

Liquidated Damages under the Design and Construction Contract and the obligation of the Principal to post the Warranty Letter of Credit (as defined in the Design and Construction Contract) pursuant to and in accordance with Section 11.16A of the Design and Construction Contract shall not be Excluded Liabilities; provided that, if the nature of the default by the Principal under the Design and Construction Contract is a failure to deliver the Warranty Letter of Credit pursuant to and in accordance with Section 11.16A of the Design and Construction Contract, then the Surety will

(provided that the Performance Obligation Declaration of Default is received by the Surety at least sixty (60) days prior to "Substantial Completion" under the Project Agreement (as defined in the Design and Construction Contract)), either (i) by the "Substantial Completion Date" under the Project Agreement, issue a warranty bond in an amount and in a form acceptable to SMH (as defined in the Design and Construction Contract) in satisfaction of the Principal's obligation to deliver the Warranty Letter of Credit, or (ii) twenty-five (25) days after SMH makes the "Substantial Completion Payment" under the Project Agreement, pay to the Obligor the amount withheld from the "Substantial Completion Payment" under the Project Agreement by SMH up to a maximum of the amount of the Warranty Letter of Credit that the Principal has failed to deliver.

#### **Surety Office**

7. Surety's Office for notice and service: ZURICH INSURANCE COMPANY LTD FIRST CANADIAN PLACE, 100 KING STREET WEST, SUITE 5500, TORONTO, ON M5X 1C9

#### **Suit Limitation**

8. It is a condition of this Bond that any suit or action under this Bond must be commenced before the Expiry Date.

#### **No Third Party Beneficiaries**

9. No right of action shall accrue on this Bond, to or for the use of, any person or corporation other than the Obligor named herein, or the heirs, executors, administrators, successors of the Obligor and the parties to the Multiple Obligor Rider and their respective successors and assigns.

#### **Reduction of Bond Amount and Advance Payment Maximum Amount**

10. The Bond Amount shall be reduced to \$147,661,655.10 and the Advance Payment Maximum reduced to \$5,547,689.10 upon execution by the Obligor and the applicable parties to the Multiple Obligor Rider of a Step-Down Rider in the form attached as Rider 1 hereto (the "Step-Down Rider"). It is a condition of this Bond that, upon execution of the Step-Down Rider by the Obligor and the applicable parties to the Multiple Obligor Rider, the Surety shall promptly execute and deliver the Step-Down Rider. Following execution of the Step-Down Rider, all references to the Bond Amount herein shall be deemed to be referenced to the reduced Bond Amount set out in this section 10 and all references to the Advance Payment Maximum shall be deemed to be references to the reduced Advance Payment Maximum set out in this Section 10, and the executed Step-Down Rider shall form a part of this Bond.

#### **Aggregate Liability**

11. For the purpose of greater certainty, in no event shall the Surety be liable in the aggregate for a greater sum than the Bond Amount, which is further limited as follows: in no event shall the Surety be liable for an Advance Payment for a greater sum than the Advance Payment Maximum, and in no event shall the Surety be liable for a Performance Obligation (other than the Advance Payment) for a greater sum than the Bond Amount less the Advance Payment Maximum.

#### **Choice of Law**

12. This Bond shall be governed and construed in accordance with the laws of Ontario and the laws of Canada applicable thereto and shall be treated, in all respects, as a contract entered into in the Province of Ontario without regard to conflict of laws principles.

#### **Counterparts**

13. This Bond may be executed in counterparts, all of which when taken together shall constitute the Bond.

IN WITNESS WHEREOF, the Principal and the Surety have signed this Bond dated  
as of January 27, in the year 2015

SIGNED AND DELIVERED:

BONDFIELD CONSTRUCTION COMPANY  
LIMITED

By:

Signature

Name of person signing on behalf of Principal

10/10/13

**ZURICH INSURANCE COMPANY LTD**

By: Karen Ramsey  
Signature

**KAREN RAMSEY, ATTORNEY-IN-FACT**

**Name of person signing on behalf of Surety**

**Zurich Insurance Company Ltd**  
100 King Street W., Suite 5500, P.O. Box 290  
Toronto, Ontario M5X 1C9



Bond Number: 6343517

**Zurich Insurance Company Ltd**

**RE: Notice under Part XIII of the Insurance Companies Act (Canada)**

For purposes of the Insurance Companies Act (Canada), this document was issued in the course of Zurich Insurance Company Ltd's insurance business in Canada.

**RIDER NO. 1 TO PUBLIC PRIVATE PARTNERSHIP  
PERFORMANCE BOND**

**BOND AMOUNT STEP-DOWN RIDER**

TO BE ATTACHED TO AND FORM A PART OF  
**BOND NO. 6343517**

TO BE ATTACHED TO AND FORM PART OF THE PUBLIC PRIVATE PARTNERSHIP PERFORMANCE BOND NO. 6343517 dated January 27, 2015 (the "Bond"), issued by ZURICH INSURANCE COMPANY LTD, as Surety (the "Surety"), on behalf of Bondfield Construction Company Limited, as Principal (the "Principal"), and in favour of 2442931 Ontario Inc., St. Michael's Hospital and Bank of Montreal, as Obligees, (the "Obligees").

NOW THEREFORE, in consideration of Ten (\$10.00) Dollars and other good and valuable consideration, receipt of which is hereby acknowledged by each of the parties hereto, the undersigned hereby agree as follows:

1. Effective [Step-Down Date] [NTD: Insert date upon which the Agent has received the Tower Interim Completion Payment] the Bond Amount shall be and is hereby reduced from \$156,325,362.60 to \$147,661,655.10 and the Advance Payment Maximum shall be and is hereby reduced from \$14,211,396.60 to \$5,547,689.10.
2. Effective [Step-Down Date] [NTD: Insert date upon which the Agent has received the Tower Interim Completion Payment] the past, present and future aggregate liability of the Surety with respect to the Bond Amount is reduced to \$147,661,655.10, and the past, present and future aggregate liability of the Surety in respect of the Advance Payment is reduced to \$5,547,689.10.
3. Capitalized terms used in this Step-Down Rider without definition shall have the respective meanings attributed to them in the Bond and the Design and Construction Contract.
4. All of the terms, conditions and provisions of the Bond including the Multiple Obligee Rider and Credit Downgrade Rider are hereby incorporated herein by reference as if fully set forth herein.
5. In the event of any ambiguity, conflict or inconsistency, the Bond and this Step-Down Rider shall prevail over the Design and Construction Contract and/or any other project documents.
6. This Step-Down Rider may be executed in counterpart, all of which when taken together shall constitute the Step-Down Rider.

**[signature pages follow]**

IN WITNESS WHEREOF, the Principal, Surety and applicable Obligees have signed and sealed this Step-Down Rider dated this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_.

SIGNED, SEALED AND DELIVERED in the presence of:

Contractor/Principal:  
BONDFIELD  
COMPANY LIMITED

Obligee:  
CONSTRUCTION 2442931 ONTARIO INC.

By: \_\_\_\_\_

[Signature]

By: \_\_\_\_\_

[Signature]

\_\_\_\_\_  
Name and Title of Person signing

\_\_\_\_\_  
Name and Title of Person signing

Surety:  
ZURICH INSURANCE COMPANY LTD

By: \_\_\_\_\_

[Signature]

\_\_\_\_\_  
Name and Title of Person signing

**Lender/ Co-Obligor:**  
**BANK OF MONTREAL**

**By:** [Signature]

**[Signature]**

**Name and Title of Person signing**

**By:** [Signature]

**[Signature]**

**Name and Title of Person signing**

**RIDER NO. 2 TO PUBLIC PRIVATE PARTNERSHIP  
PERFORMANCE BOND**

**CREDIT DOWNGRADE RIDER**

TO BE ATTACHED TO AND FORM PART OF  
BOND NO. 6343517

TO BE ATTACHED TO AND FORM PART OF THE PUBLIC PRIVATE PARTNERSHIP PERFORMANCE BOND NO. 6343517 dated January 27, 2015 (the "Bond") concurrently with the execution of this Credit Downgrade Rider, issued by ZURICH INSURANCE COMPANY LTD, as Surety (hereinafter called the "Surety"), on behalf of BONDFIELD CONSTRUCTION COMPANY LIMITED, as Principal (hereinafter called the "Principal"), and in favour of 2442931 ONTARIO INC., as Obligor (hereinafter called the "Obligor").

WHEREAS the Surety been requested to provide the Bond for the above referenced Construction Contract; and

WHEREAS the Parties have asked that the Surety acknowledge possible rights of the Obligor(s) as to an Advance Payment under the Bond if the Surety's credit rating is downgraded in accordance with the terms of this Rider; and

NOW THEREFORE, in consideration of Ten (\$10.00) Dollars and other good and valuable consideration, receipt of which is hereby acknowledged by each of the parties hereto, the undersigned hereby agree as follows:

1. In the event that the Surety's Standard & Poors Long Term Insurer Financial Strength Rating is downgraded to an A- or lower or the Moody's Investors Service Long Term Insurance Financial Strength Rating is downgraded to an A3 or lower then, pursuant to the terms of the Design and Construction Contract, the downgrade will be a default under said Design and Construction Contract, thereby giving the Obligor the right to make a demand upon the Principal for a replacement letter of credit in the maximum amount of the Advance Payment under the Bond within five days; and, if the letter of credit in said amount is not provided, the Obligor may make demand upon the Surety for an immediate draw on the Bond in an amount equal to the Advance Payment (as defined in the Bond), and the Surety will accept an Advance Payment Demand for the whole of the Advance Payment (without any requirement to deliver an Advance Payment Declaration of Default or any certification that the Principal is liable for Liquidated Damages notwithstanding Section 1.1(a) and Section 1.1(b) of the Bond) and the Surety will pay the Advance Payment to the Obligor in accordance with the Bond.
2. Capitalized terms used in this Credit Downgrade Rider without definition shall have the respective meanings attributed to them in the Bond and the Design and Construction Contract.

**RIDER NO. 2 TO PUBLIC PRIVATE PARTNERSHIP  
PERFORMANCE BOND**

**CREDIT DOWNGRADE RIDER**

**TO BE ATTACHED TO AND FORM PART OF  
BOND NO. 6343517**

3. All of the terms, conditions and provisions of the Bond including the Multiple Obligee Rider attached thereto are hereby incorporated herein by reference as if fully set forth herein.
4. In the event of any ambiguity, conflict or inconsistency, the Bond and this Credit Downgrade Rider shall prevail over the Design and Construction Contract and the other Project Documents.
5. Nothing herein shall alter or affect the amount of the aggregate liability of the Surety with respect to the Bond Amount, or the sub-limits of liability of the Surety with respect to the Advance Payment and with respect to the Performance Obligation other than the Advance Payment, all as described in the Bond.
6. This Credit Downgrade Rider may be executed in counterpart, all of which when taken together shall constitute the Credit Downgrade Rider.

*[signature page follows]*

IN WITNESS WHEREOF, the Principal and the Surety have signed and sealed this Credit Downgrade Rider dated this 27 day of January, 2015.

SIGNED, SEALED AND DELIVERED in the presence of:

Principal:  
BONDFIELD CONSTRUCTION COMPANY  
LIMITED

By: 

[Signature]

\_\_\_\_\_  
Name and Title of Person signing

**ZURICH INSURANCE COMPANY LTD**

**[Signatür]**

**KAREN RAMSEY, ATTORNEY-IN-FACT**

Name and Title of Person signing

**RIDER NO. 3 TO PUBLIC PRIVATE PARTNERSHIP  
PERFORMANCE BOND**

**MULTIPLE OBLIGEE RIDER**

TO BE ATTACHED TO AND FORM A PART OF  
BOND NO. 6343517

TO BE ATTACHED TO AND FORM PART OF THE PUBLIC PRIVATE PARTNERSHIP PERFORMANCE BOND NO. 6343517 dated January 27, 2015 (the "Bond") concurrently with the execution of this Multiple Obligor Rider, issued by **ZURICH INSURANCE COMPANY LTD.** as Surety (the "Surety"), on behalf of Bondfield Construction Company Limited, as Principal (the "Principal"), and in favour of 2442931 Ontario Inc., as Obligor, hereinafter called the "Obligor".

NOW THEREFORE, in consideration of Ten (\$10.00) Dollars and other good and valuable consideration, receipt of which is hereby acknowledged by each of the parties hereto, the undersigned hereby agree as follows:

1. The Bond shall be and is hereby amended to add St. Michael's Hospital and Bank of Montreal in their respective capacities as assignees of the Design and Construction Contract, as Additional Named Obligees, which Additional Named Obligees (hereinafter may be referred to simply as "Obligor(s)") or either of them, shall, subject to the terms of the Bond and this Multiple Obligor Rider, be entitled to enforce the obligations of the Principal and the Surety under the Bond and this Multiple Obligor Rider, as though such Additional Named Obligees were named as an Obligor in the Bond.
2. Capitalized terms used in this Multiple Obligor Rider without definition shall have the respective meanings attributed to them in the Bond and the Design and Construction Contract.
3. If there is an event of default of the Principal in the performance of the Bonded Obligations under the Design and Construction Contract (a "Bonded Obligations Event of Default") and Bank of Montreal or St. Michael's Hospital makes a claim under the Bond other than in respect of the Advance Payment, Bank of Montreal or St. Michael's Hospital, as the case may be, shall make available to the Surety in accordance with the terms of the Design and Construction Contract the Balance of the Bonded Design and Construction Contract Price. Bank of Montreal and St. Michael's Hospital shall have no obligations under this paragraph in respect of a claim for all or part of the Advance Payment.
4. All of the terms, conditions and provisions of the Bond are hereby incorporated herein by reference as if fully set forth herein.
5. No alteration or material change in the Design and Construction Contract or any conduct of the Principal, Obligor or Bank of Montreal, prior to the Principal being declared in default, shall prejudice the rights or interest of St. Michael's Hospital

**RIDER NO. 3 TO PUBLIC PRIVATE PARTNERSHIP  
PERFORMANCE BOND**

**MULTIPLE OBLIGEE RIDER**

TO BE ATTACHED TO AND FORM A PART OF  
BOND NO. 6343517

under the Bond or this Multiple Obligor Rider provided that St. Michael's Hospital has not caused such alteration or material change without the prior written consent of the Surety.

6. The Obligor, Principal, Surety and Bank of Montreal acknowledge and agree that they will not remedy any default, settle, waive, reduce or otherwise compromise any claims under the Bond without the prior written approval of St. Michael's Hospital, acting reasonably, and the Surety shall provide reasonable notice to St. Michael's Hospital and the Lender prior to remedying any default, settling, waiving, reducing or otherwise compromising any claim or making any payment under the Bond (other than an Advance Payment) and provided in respect of demands or claims under the Bond other than Advance Payment Demands that the Surety shall not be precluded from tendering upon the Obligor(s) performance pursuant to one of the four numbered options in the Bond.
7. The Surety acknowledges the process in the Lender's Direct Agreement for making a claim against the Bond, including, but not limited to, the Lender's Step In Period (as defined in the Lender's Direct Agreement); provided that such acknowledgement shall in no way limit or otherwise abrogate the Surety's rights under the Bond or this Multiple Obligor Rider.
8. St. Michael's Hospital acknowledges and agrees that (i) the provisions of Section 1 of the Bond are solely for the benefit of 2442931 Ontario Inc. and Bank of Montreal, (ii) St. Michael's Hospital shall have no right to make any Advance Payment Demands and (iii) the portion of the Bond Amount equal to the Advance Payment shall not otherwise be available to St. Michael's Hospital in respect of any demand or claim by St. Michael's Hospital under the Bond. The Parties to this Multiple Obligor Rider agree that the Bond Amount and the Advance Payment Maximum may, by execution of a Step-Down Rider by the Obligor, Principal, Bank of Montreal and the Surety only, be reduced as set out in Section 10 of the Bond, without requirement for any execution of the Step-Down Rider by St. Michael's Hospital or any further consent or approval of St. Michael's Hospital, provided, for greater certainty, that any reduction in any amount in respect of the Bond or other modification to the Bond other than as expressly set out in Section 10 of the Bond and the Step-Down Rider would require a written amendment to the Bond signed by all parties to this Multiple Obligor Rider.
9. In the event of any ambiguity, conflict or inconsistency, the Bond and this Multiple Obligor Rider shall prevail over the Design and Construction Contract and/or any other project documents.

**RIDER NO. 3 TO PUBLIC PRIVATE PARTNERSHIP  
PERFORMANCE BOND**

**MULTIPLE OBLIGEE RIDER**

**TO BE ATTACHED TO AND FORM A PART OF  
BOND NO. 6343517**

10. Nothing herein shall alter or affect the aggregate liability of the Surety with respect to the Bond Amount, or the sub-limits of liability of the Surety with respect to the Advance Payment and with respect to the Performance Obligation other than the Advance Payment, all as described in the Bond.

***[signature page follows]***

IN WITNESS WHEREOF, the Principal, Surety, Obligor, Owner and Lender have signed and sealed this Multiple Obligor Rider dated this 27 day of January, 2015.

SIGNED, SEALED AND DELIVERED in the presence of:

Contractor/Principal:  
BONDFIELD CONSTRUCTION  
COMPANY LIMITED

By: 

[Signature]

\_\_\_\_\_  
Name and Title of Person signing

Surety:  
ZURICH INSURANCE COMPANY LTD

By: Karen Ramsey

[Signature]

KAREN RAMSEY, ATTORNEY-IN-FACT

Name and Title of Person signing

Obligee:  
2442931 ONTARIO INC.

By: \_\_\_\_\_

[Signature]

\_\_\_\_\_  
Name and Title of Person signing

Lender/ Co-Obligee:  
THE BANK OF MONTREAL, AS AGENT

By: 

[Signature]

\_\_\_\_\_  
Name and Title of Person signing

By: \_\_\_\_\_

[Signature]

\_\_\_\_\_  
Name and Title of Person signing

Owner/ Co-Obligee:  
ST. MICHAEL'S HOSPITAL

By: Tom C. O'Neill

[Signature]

TOM O'NEILL

CHAIR OF THE BOARD OF DIRECTORS

Name and Title of Person signing

By: Robert Howard

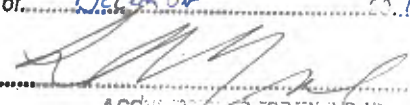
[Signature]

ROBERT HOWARD

PRESIDENT + CHIEF EXECUTIVE OFFICER

Name and Title of Person signing

**TAB D**

This is Exhibit D referred to in the  
affidavit of Michael Keen  
sworn before me, this 19<sup>th</sup>  
day of December 2019  
  
ACCOMPLISHED FOR TAKING AFFIDAVITS

### LABOUR AND MATERIAL PAYMENT BOND

**NOTE:** This Bond is issued simultaneously with a Performance Bond and Multiple Obligee Rider and is subject to the terms and conditions of the Labour and Material Payment Bond Multiple Obligee Rider attached hereto

**Bond No.** 6343517

**Bond Amount:** \$142,113,966.00

**BONDFIELD CONSTRUCTION COMPANY LIMITED** as Principal (hereinafter called the "Principal"), and **ZURICH INSURANCE COMPANY LTD** a corporation created and existing under the laws of Canada and duly authorized to transact the business of Suretyship in Canada as Surety, (hereinafter called the "Surety") are subject to the conditions hereinafter contained, held and firmly bound unto **2442931 ONTARIO INC.**, as Trustee (hereinafter called the "Obligee"), for the use and benefit of the Claimants, their and each of their heirs, executors, administrators, successors and assigns, in the amount of ONE HUNDRED AND FORTY TWO MILLION, ONE HUNDRED AND THIRTEEN THOUSAND, NINE HUNDRED AND SIXTY SIX DOLLARS (\$142,113,966.00) of lawful money of Canada for the payment of which sum well and truly to be made, the Principal and the Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

**WHEREAS**, the Principal has entered into a written contract entitled Design and Construction Contract with Obligee dated January 27, 2015 for the St. Michael's Hospital Redevelopment Project (such contract as so amended, and as the same may hereinafter be further amended, whether by way of change, alteration, addition or other modification, and including all of its terms and provisions without limitation, is hereinafter called the Design and Construction Contract and by reference made part hereof). Capitalized terms used in this Bond without definition shall have their respective meanings attributed thereto in the Design and Construction Contract.

**NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION** is such that, if the Principal shall make payment to all Claimants for all labour and material used or reasonably required for use in the performance of the Design and Construction Contract, then this obligation shall be null and void; and otherwise it shall remain in full force and effect, subject, however, to the following conditions:

1. A Claimant for the purpose of this Bond is defined as one having a direct contract with the Principal for labour, material, or both, used or reasonably required for use in the performance of the Design and Construction Contract, labour and material being construed to include that part of water, gas, power, light, heat, oil, gasoline, telephone service or rental equipment directly applicable to the Design and Construction Contract provided that a person, firm or corporation who rents equipment to the Principal to be used in the performance of the Design and Construction Contract under a contract which provides that all or any part of the rent is to be applied towards the purchase price thereof, shall only be a Claimant to the extent of the prevailing industrial rental value of such equipment for the period during which the equipment was used in the performance of the Design and Construction Contract. The prevailing industrial rental value of equipment shall be determined, insofar as it is practical to do so, in accordance with and in the

Laura Christine Afford, a Commissioner, etc.,  
Province of Ontario, while a Student-at-Law,  
Expires May 14, 2021.

manner provided for in the latest revised edition of the publication of the Canadian Construction Association titled "Rental Rates on Construction Equipment" published prior to the period during which the equipment was used in the performance of the Design and Construction Contract.

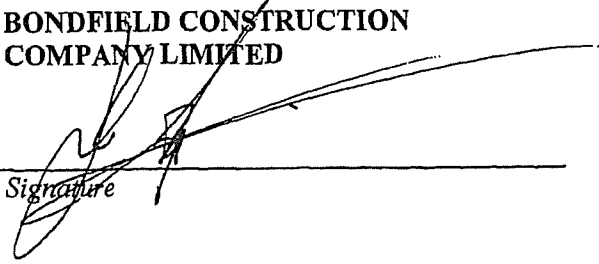
2. The Principal and the Surety hereby jointly and severally agree with the Oblige, as Trustee, that every Claimant who has not been paid as provided for under the terms of his or her contract with the Principal, before the expiration of a period of ninety (90) days after the date on which the last of such Claimant's work or labour was done or performed or materials were furnished by such Claimant, may as a beneficiary of the trust herein provided for, sue on this Bond, prosecute the suit to final judgment for such sum or sums as may be justly due to such Claimant under the terms of his or her contract with the Principal and have execution thereon. Provided that the Oblige is not obliged to do or take any act, action or proceeding against the Surety on behalf of the Claimants, or any of them, to enforce the provisions of this Bond. If any act, action or proceeding is taken either in the name of the Oblige or by joining the Oblige as a party to such proceeding, then such act, action or proceeding, shall be taken on the understanding and basis that the Claimants or any of them, who take such act, action or proceeding shall indemnify and save harmless the Oblige against all costs, charges and expenses or liabilities incurred thereon and any loss or damage resulting to the Oblige by reason thereof. Provided still further that, subject to the foregoing terms and conditions, the Claimants, or any of them may use the name of the Oblige to sue on and enforce the provisions of this Bond.
3. It is a condition precedent to the liability of the Surety under this Bond that such Claimant shall have given written notice as hereinafter set forth to each of the Principal, the Surety and the Oblige, stating with substantial accuracy the amount claimed, and that such Claimant shall have brought suit or action in accordance with this Bond, as set out in sub-clauses 3(b) and 3(c) below. Accordingly, no suit or action shall be commenced hereunder by any Claimant:
  - (a) unless such Claimant shall have given written notice within the time limits hereinafter set forth to each of the Principal, the Surety and the Oblige, stating with substantial accuracy the amount claimed. Such notice shall be served by mailing the same by registered mail to the Principal, the Surety and the Oblige, at any place where an office is regularly maintained for the transaction of business by such persons or served in any manner in which legal process may be served in the Province or other part of Canada in which the subject matter of the Design and Construction Contract is located. Such notice shall be given:
    - (i) in respect of any claim for the amount or any portion thereof, required to be held back from the Claimant by the Principal, under either the terms of the Claimant's contract with the Principal, or under the construction lien legislation applicable to the Claimant's contract with the Principal, whichever is greater, within one hundred and twenty (120) days after such Claimant should have been paid in full under the Claimant's contract with the Principal;

- (ii) in respect of any claim other than for the holdback, or portion thereof, referred to above, within one hundred and twenty (120) days after the date upon which such Claimant did, or performed, the last of the work or labour or furnished the last of the materials for which such claim is made under the Claimant's contract with the Principal;
  - (b) after the expiration of one (1) year following the date on which the Principal ceased work on the Design and Construction Contract, including work performed under the guarantees provided in the Design and Construction Contract;
  - (c) other than in a Court of competent jurisdiction in the Province or District of Canada in which the subject matter of the Design and Construction Contract, or any part thereof, is situated and not elsewhere, and the parties hereto agree to submit to the jurisdiction of such Court.
4. The Surety agrees not to take advantage of Article 1959 of the Civil Code of the Province of Quebec in the event that, by an act or an omission of a Claimant, the Surety can no longer be subrogated in the rights, hypothecs and privileges of said Claimant.
  5. Any material change in the Design and Construction Contract between the Principal and the Obligeé shall not prejudice the rights or interest of any Claimant under this Bond, who is not instrumental in bringing about or has not caused such change.
  6. The amount of this Bond shall be reduced by and to the extent of any payment or payments made in good faith and in accordance with the provisions hereof, inclusive of the payment by the Surety of construction liens which may be filed of record against the subject matter of the Design and Construction Contract, whether or not claim for the amount of such lien be presented under and against this Bond.
  7. The Surety shall not be liable for a greater sum than the specified penalty of this Bond.
  8. This Bond may be executed in counterpart, all of which when taken together shall constitute the Labour and Material Payment Bond.

IN WITNESS WHEREOF, the Principal and the Surety have signed and sealed this Bond this  
27 day of January, 2015.

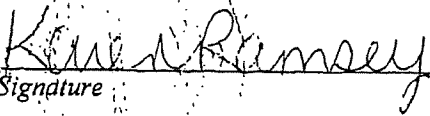
**SIGNED, SEALED AND DELIVERED** in the presence of:

**BONDFIELD CONSTRUCTION  
COMPANY LIMITED**

  
\_\_\_\_\_  
Signature

\_\_\_\_\_  
Name of person signing

ZURICE INSURANCE COMPANY LTD

  
Signature

KAREN RAMSEY, ATTORNEY-IN-FACT

Name of person signing

**Zurich Insurance Company Ltd**

100 King Street W., Suite 5500, P.O. Box 290  
Toronto, Ontario M5X 1C9



**ZURICH**

Bond Number: 6343517

**Zurich Insurance Company Ltd**

**RE: Notice under Part XIII of the Insurance Companies Act (Canada)**

**For purposes of the Insurance Companies Act (Canada), this document was issued in the course of Zurich Insurance Company Ltd's insurance business in Canada.**

**LABOUR AND MATERIAL PAYMENT BOND**  
**MULTIPLE OBLIGEE RIDER**

No. **6343517**

TO BE ATTACHED TO AND FORM PART OF THE LABOUR AND MATERIAL PAYMENT BOND NO. **6343517** dated January 27, 2015 (the "**L&M Bond**") concurrently with the execution of this Labour and Material Payment Bond Multiple Obligee Rider ("**L&M Multiple Obligee Rider**") issued by **ZURICH INSURANCE COMPANY LTD.**, as Surety (hereinafter called the "**Surety**"), on behalf of **BONDFIELD CONSTRUCTION COMPANY LIMITED**, as Principal (hereinafter called the "**Principal**"), and in favour of **2442931 ONTARIO INC.**, as Obligee (hereinafter called the "**Obligee**").

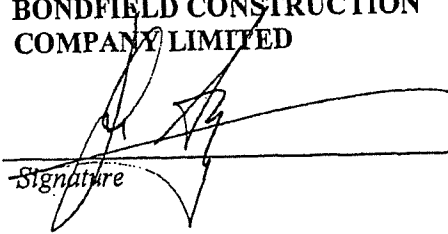
**NOW THEREFORE**, in consideration of Ten (\$10.00) Dollars and other good and valuable consideration, receipt of which is hereby acknowledged by each of the parties hereto, the undersigned hereby agree as follows:

1. The L&M Bond shall and is hereby amended to add **ST. MICHAEL'S HOSPITAL** (hereinafter called the "**Owner**") and **BANK OF MONTREAL** (hereinafter called the "**Lender**") as additional named Obligees, in their respective capacities as assignees of the Design and Construction Contract.
2. Capitalized terms used in this L&M Multiple Obligee Rider without definition shall have the respective meanings attributed to them in the L&M Bond and the Design and Construction Contract.
3. All of the terms, conditions and provisions of the L&M Bond are hereby incorporated herein by reference as if fully set forth herein.
4. No alteration or material change in the Design and Construction Contract or any conduct of the Principal, Obligee or Lender, shall prejudice the rights or interest of Owner or Claimant under the L&M Bond or this L&M Multiple Obligee Rider provided that Owner or Claimant have not caused such alteration or material change without the prior written consent of the Surety.
5. In the event of any ambiguity, conflict or inconsistency, the L&M Bond and the L&M Multiple Obligee Rider shall prevail over the Project Agreement and the other Project Documents.
6. Nothing herein shall alter or affect the aggregate liability of the Surety as described in the L&M Bond.
7. This L&M Multiple Obligee Rider may be executed in counterpart, all of which when taken together shall constitute the L&M Multiple Obligee Rider.

IN WITNESS WHEREOF, the Principal, Surety, Obligee, Owner and Lender have signed and sealed this L&M Multiple Obligee Rider dated the 27 day of January, 2015.

SIGNED, SEALED AND DELIVERED in the presence of:

**BONDFIELD CONSTRUCTION  
COMPANY LIMITED**

  
\_\_\_\_\_  
Signature

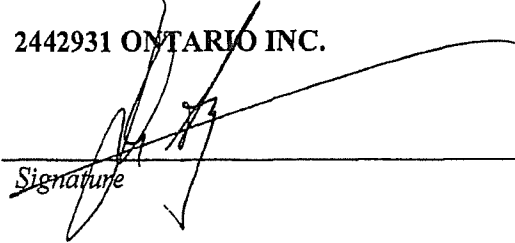
\_\_\_\_\_  
Name of person signing

**ZURICH INSURANCE COMPANY LTD**

Karen Ramsey  
*Signature*


KAREN RAMSEY, ATTORNEY-IN-FACT  
Name of person signing

2442931 ONTARIO INC.

  
Signature

Name of person signing

THE BANK OF MONTREAL, AS AGENT

  
Signature

\_\_\_\_\_  
Name of person signing

**ST. MICHAEL'S HOSPITAL**

*Tom C O'Neill*

*Signature*

*TOM O'NEILL*

Name of person signing

*Robert Howard*

*Signature*

*ROBERT HOWARD*

Name of person signing

# TAB E

**OUR SHARED  
PURPOSE**

**PROVIDENCE**  
Healthcare

**ST  
JOSEPH'S**  
HEALTH CENTRE TORONTO

**St. Michael's**  
Inspired Care.  
Inspiring Science.

**Bank of Montreal**  
Corporate Finance Division  
1 First Canadian Place, 11<sup>th</sup> Floor  
Toronto, ON M5X 1A1

**VIA: REGISTERED MAIL & FACSIMILE: (416) 360-7168**

**November 2<sup>nd</sup> 2018**

**Attention: James Di Giacomo, Managing Director, Underwriting and Syndications  
Corporate Finance Division, Lenders Agent**

Dear Mr. Di Giacomo:

**RE: Project Agreement (the "Project Agreement") dated January 27, 2015 between 2442931 Ontario Inc. ("Project Co"), a wholly owned subsidiary of Bondfield Construction Company ("Bondfield") and St. Michael's Hospital, now Providence St. Joseph's and St. Michael's Healthcare ("SMH") in respect of the St. Michael's Hospital Redevelopment Project (the "Project").**

**AND RE: Default Notice pursuant the Lenders' Direct Agreement dated January 27, 2015 (the "LDA")**

Any capitalized term not defined in this letter shall have the meaning given to it in the LDA.

SMH hereby notifies the Lenders' Agent that Project Co Events of Default have occurred and are continuing. Enclosed are copies of the Notices of Default issued to Project Co detailing the Project Co Events of Default.

This letter serves as the Default Notice pursuant to section 7(b)(i) of the LDA, upon the delivery of which the Notice Period commences.

Sincerely,



**Michael Keen**  
Interim Vice President, Chief Planning and Redevelopment Officer  
PROVIDENCE, ST. JOSEPH'S AND ST. MICHAEL'S HEALTHCARE

This is Exhibit E referred to in the  
affidavit of Michael Keen  
sworn before me, this 19<sup>th</sup>  
day of December, 2019



APPROSSIONED FOR THE LIAISON OFFICE

Laura Christine Alford, a Commissioner, etc.,  
Province of Ontario, while a Student-at-Law.  
Expires May 14, 2021.

## OUR SHARED PURPOSE

**PROVIDENCE**  
Healthcare

**ST  
JOSEPH'S**  
HEALTH CENTRE TORONTO

**St. Michael's**  
Inspired Care.  
Inspiring Science.

cc:  
Bank of Montreal  
Corporate Finance Division  
1 First Canadian Place, 11<sup>th</sup> Floor  
Toronto, ON M5X 1A1  
Paul Findlay, Senior Manager Bank of Montreal

2442931 Ontario Inc.  
Attn: Steven Aquino  
C/o Bondfield Construction Company Limited  
407 Basaltic Road  
Concord, ON L4K 4W8

Infrastructure Ontario  
Attn: Bruce Gray  
777 Bay Street, Suite 900  
Toronto, ON M5G 2C8

McCarthy Tetrault  
Attn: Julie K. Parla  
Suite 5300  
TD Bank Tower  
Box 48, 66 Wellington Street West  
Toronto ON M5K 1E6

St. Michael's Hospital  
Attn: Tim Rutledge  
30 Bond St.  
M5B 1W8

## OUR SHARED PURPOSE

PROVIDENCE  
Healthcare

ST  
JOSEPH'S  
HEALTH CENTRE TORONTO

St. Michael's  
Inspired Care.  
Inspiring Science.

2442931 Ontario Inc.  
407 Basaltic Road  
Concord, ON L4K 4W8  
Fax No. (416) 667-8462  
Delivered by Facsimile

Attention: John Aquino, President

Dear John:

RE: Project Agreement (the "Project Agreement") dated January 27, 2015 between 2442931 Ontario Inc. ("Project Co"), a wholly owned subsidiary of Bondfield Construction Company ("Bondfield") and St. Michael's Hospital, now Providence St. Joseph's and St. Michael's Healthcare ("SMH") in respect of the St. Michael's Hospital Redevelopment Project (the "Project").

Any capitalized term not defined in this letter shall have the meaning given to it in the Project Agreement.

This letter serves as a written notice to Project Co that:

1. In failing to achieve Tower Interim Completion by November 27, 2017, the Scheduled Tower Interim Completion Date, Project Co has committed a breach of its obligations under Section 34.1(a)(vi) of the Project Agreement which has or will have a material adverse effect on the performance of the SMH operations and/or SMH Activities. Further, having agreed on a reasonable plan and schedule for remedying such breach, which plan was set out in the Tower Interim Completion Agreement between Project Co and SMH dated as of December 5, 2017, Project Co has failed to perform its obligations and achieve all elements of such plan in accordance with its terms; and
2. Project Co has committed a breach of its obligations under Section 34.1(a)(x) of the Project Agreement by failing to remove a number of Encumbrances filed against the Site, which Encumbrances arose due to the actions and omissions of Project Co or a Project Co Party, within 45 days of the earlier of (A) registration of such Encumbrances against title to the Site and (B) the date on which Project Co or a Project Co Party knew, or ought to have known, of the existence of such Encumbrances. Please see the attached PIN search which lists all Encumbrances currently filed against title to the Site and the dates such Encumbrances were filed.

## OUR SHARED PURPOSE

**PROVIDENCE**  
Healthcare

**ST  
JOSEPH'S**  
HEALTH CENTRE TORONTO

**St. Michael's**  
Inspired Care.  
Inspiring Science.

Accordingly, a Project Co Event of Default has occurred pursuant to each of Sections 34.1(a)(vi) and 34.1(a)(x), respectively, of the Project Agreement.

Project Co is hereby instructed to correct the above noted Project Co Events of Default immediately.

Nothing herein shall prejudice any other right or remedy SMH may have under the Project Agreement or at law, and all such rights and remedies are expressly reserved by SMH.

Please contact the undersigned if you wish to discuss this notice.

Sincerely,

**PROVIDENCE ST. JOSEPH'S AND ST. MICHAEL'S  
HEALTHCARE**

Per: 

Name:

Michael Keen

Title:

Interim Vice-President, Chief Planning &  
Redevelopment Officer

cc: Tim Rutledge – Providence St. Joseph's and St. Michael's Healthcare  
Tom Parker – Providence St. Joseph's and St. Michael's Healthcare  
Michael Mendonca  
Julie Parla – McCarthy Tetrault LLP  
Gordon Willcocks – McCarthy Tetrault LLP  
Bruce Gray – Ontario Infrastructure and Lands Corporation

**TAB F**

This is Exhibit F referred to in the  
affidavit of Michael Keen  
sworn before me, this 19<sup>th</sup>  
day of December 2018

Laura Christine Alford, a Commissioner, etc.,  
Province of Ontario, while a Student-at-Law.  
Expires May 14, 2021.

Court File No. CY-18-00610995-00CL1

ACCOMPLISHED FOR THE COURT BY

ONTARIO

## SUPERIOR COURT OF JUSTICE

### COMMERCIAL LIST



THE HONOURABLE MR.  
JUSTICE HADLEY

)  
)  
)

FRIDAY, THE 21<sup>ST</sup>  
DAY OF DECEMBER, 2018

IN THE MATTER OF THE RECEIVERSHIP OF  
2442931 ONTARIO INC.

BANK OF MONTREAL, AS ADMINISTRATIVE AGENT

Applicant

- and -

2442931 ONTARIO INC.

Respondent

### ORDER (appointing Receiver)

THIS APPLICATION made by the Applicant for an Order pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA") and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "CJA") appointing Alvarez & Marsal Canada Inc. ("A&M") as receiver (in such capacity, the "Receiver") without security, of all of the assets, undertakings and properties of 2442931 Ontario Inc. (the "Debtor") acquired for, or used in relation to a business carried on by the Debtor, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Eden Orbach sworn December 17, 2018 and the Exhibits thereto (collectively, the "Affidavit") and on hearing the submissions of counsel for each of the Applicant, A&M, St. Michael's Hospital ("SMH"), Infrastructure Ontario ("IO"), Zurich

Insurance Company Ltd. (the "Surety"), and the Debtor, and on reading the consent of A&M to act as the Receiver,

### SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Application and the Application is hereby abridged and validated so that this application is properly returnable today and hereby dispenses with further service thereof.

### APPOINTMENT

2. THIS COURT ORDERS that pursuant to section 243(1) of the BIA and section 101 of the CJA, A&M is hereby appointed Receiver, without security, of all of the assets, undertakings and properties of the Debtor acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (the "Property") for the sole purpose of carrying out the terms of this Order and without taking possession or control of such Property.

### RECEIVER'S POWERS

3. THIS COURT ORDERS that the directors and officers of Project Co are not to take any action in respect of Project Co out of the ordinary course of business without the consent of the Applicant, SMH and the Surety or order of the Court.

4. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property without taking possession or control of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized, but not obligated, to do any of the following where the Receiver considers it necessary or desirable:

- (a) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

- (b) with the consent of the Applicant and in consultation with SMH and IO, to enter into any agreements for and on behalf of the Debtor or cease to perform any contracts of the Debtor;
- (c) engage consultants, contractors, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis to assist with the exercise of the Receiver's powers and duties as conferred by this Order;
- (d) to settle, extend or compromise any indebtedness owing to the Debtor except in respect of the Performance Bond and the L&M Bond;
- (e) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order; and
- (f) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtor, and without interference from any other Person.

#### **DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER**

5. THIS COURT ORDERS that (i) the Debtor, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, (iii) Bondfield Construction Company Limited ("Bondfield"), and (iv) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "Persons" and each being a "Person") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, and shall grant immediate and continued access

to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.

6. THIS COURT ORDERS that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtor, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure. The Receiver is authorized and empowered to access and make, retain and take away copies of the Records of the Debtor located at the offices of Bondfield and Bondfield shall cooperate and shall provide reasonable assistance to the Receiver with respect to such Records and information contained in such Records with respect to the Property, including the Project (as defined in the Affidavit).

7. THIS COURT ORDERS that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and

providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

#### **NO PROCEEDINGS AGAINST THE RECEIVER**

8. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

#### **NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY**

9. THIS COURT ORDERS that no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court. Nothing in this Order shall limit or restrict the rights of the Applicant to take action against Bondfield or to enforce any security granted by Bondfield in favour of the Applicant.

#### **NO EXERCISE OF RIGHTS OR REMEDIES**

10. THIS COURT ORDERS that all rights and remedies against the Debtor, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (ii) exempt the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, (iv) prevent the registration of a claim for lien; or (v) prevent SMH from asserting set-off rights against the Debtor arising under the Project Agreement, if any.

#### **NO INTERFERENCE WITH THE RECEIVER**

11. THIS COURT ORDERS that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement,

licence or permit in favour of or held by the Debtor, without written consent of the Receiver or leave of this Court.

#### **CONTINUATION OF SERVICES**

12. THIS COURT ORDERS that all Persons having oral or written agreements with the Debtor or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtor are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Debtor.

#### **EMPLOYEES**

13. THIS COURT ORDERS that all employees of the Debtor shall remain the employees of the Debtor and not of the Receiver. The Receiver shall not be liable for any employee-related responsibilities or liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA.

#### **LIMITATION ON ENVIRONMENTAL LIABILITIES**

14. THIS COURT ORDERS that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "Environmental Legislation"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of

any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

#### **LIMITATION ON THE RECEIVER'S LIABILITY**

15. THIS COURT ORDERS that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, and it shall have no obligations or liability (i) under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*, the *Construction Act* (Ontario) or any other applicable legislation, or (ii) in respect of any of the Debtor's obligations or Property, including, without limitation, the Construction Agreement attached as Exhibit "B" to the Affidavit or the Project Agreement attached as Exhibit "C" to the Affidavit. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation. Unless further ordered by the Court, the Receiver will not be and shall not be deemed to be, in possession and control of any Property, including, without limitation, for the purpose of the BIA, the *Wage Earner Protection Program Act*, the *Construction Act* (Ontario) or any other applicable legislation.

#### **RECEIVER'S ACCOUNTS**

16. THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts, and that the Receiver and counsel to the Receiver shall be entitled to the benefit of and are hereby granted a charge (the "Receiver's Charge") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts (statutory or otherwise), liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

17. THIS COURT ORDERS that the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

18. THIS COURT ORDERS that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the standard rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

#### FUNDING OF THE RECEIVERSHIP

19. THIS COURT ORDERS that the Receiver be at liberty and it is hereby empowered to (a) with the consent of the Applicant to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed \$200,000 (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order; and (b) open one or more new accounts to hold any amounts borrowed pursuant to the foregoing paragraph (a). The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "Receiver's Borrowings Charge") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts (statutory or otherwise), liens, construction liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

20. THIS COURT ORDERS that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

21. THIS COURT ORDERS that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "A" hereto (the "Receiver's Certificates") for any amount borrowed by it pursuant to this Order.

22. THIS COURT ORDERS that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates

evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

#### SERVICE AND NOTICE

23. THIS COURT ORDERS that the E-Service Protocol of the Commercial List (the "Protocol") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/eservice-commercial/>) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL '<https://www.alvarezandmarsal.com/SMH>'.

24. THIS COURT ORDERS that if the service or distribution of documents in accordance with the Protocol is not practicable, the Receiver is at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery, electronic or facsimile transmission to the Debtor's creditors or other interested parties and their advisors at their respective addresses as last shown on the records of the Debtor and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing. For greater certainty, any such distribution or service shall be deemed to be in satisfaction of a legal or juridical obligation, and notice requirements within the meaning of clause 3(c) of the *Electronic Commerce Protection Regulations*, Reg. 81000-2-175 (SOR/DORS).

#### GENERAL

25. THIS COURT ORDERS that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

26. THIS COURT ORDERS that nothing in this Order shall:

- (a) prevent the Receiver from acting as a trustee in bankruptcy of the Debtor;
- (b) constitute or be deemed to constitute an exercise of "step-in rights" by the Applicant under Section 8 of the agreement dated January 27, 2015 between SMH, the Applicant and the Debtor (the "Lender's Direct Agreement"); or
- (c) prevent the Applicant from appointing the Receiver as its Appointed Representative (as such term is defined in the Lender's Direct Agreement) or taking steps pursuant to the Lender's Direct Agreement.

27. THIS COURT ORDERS that nothing in the Order shall (i) affect the Debtor's ability to perform its obligations under the Project Agreement or the agreement between the Debtor and Bondfield dated January 27, 2015 (the "Design and Construction Contract") or (ii) alter, amend or otherwise affect the liability of the Surety to any Person pursuant to Performance Bond No. 6343517 (the "Performance Bond") or Labour and Material Payment Bond No. 6343517 (the "L&M Bond") issued by the Surety.

28. THIS COURT ORDERS that the Receiver shall make a demand under the Performance Bond for and on behalf of the Debtor as soon as reasonably practical and shall be empowered and authorized to execute, issue and endorse any agreements or documentation for and on behalf of the Debtor as the Receiver considers necessary or advisable to facilitate making such demand.

29. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

30. THIS COURT ORDERS that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

31. THIS COURT ORDERS that the Applicant shall have its costs of this application, up to and including entry and service of this Order, provided for by the terms of the Applicant's security or, if not so provided by the Applicant's security, then on a substantial indemnity basis to be paid from the Debtor's estate with such priority and at such time as this Court may determine.

32. THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

ENTERED AT / INSCRIT A TORONTO  
ON / BOOK NO:  
LE / DANS LE REGISTRE NO:

DEC 21 2018

PER / PAR:

*PER / PAR: [Signature]*  
*Padra 33 is attached,*

*[Signature]*

*[Signature]*

THIS COURT ORDERS that, notwithstanding anything to the contrary in this Order, neither the appointment of the Receiver nor the terms of this Order shall prejudice, affect, or waive any of the Surety's rights and entitlements under the terms of the Performance and L&M Bonds, respectively, except as those rights have been stayed herein. For clarity, the Surety has not provided its approval for the Receiver's appointment and the appointment of the Receiver shall not constitute or be deemed to constitute a waiver of the Surety's rights and defences under the Performance and L&M Bonds, respectively.

ENTERED AT / INSCRIT À TORONTO  
ON / BOOK NO:  
LE / DANS LE REGISTRE NO:

DEC 21 2018

PER / PAR:

*ra*

*Hainey J.*

## SCHEDULE "A"

### RECEIVER CERTIFICATE

CERTIFICATE NO. \_\_\_\_\_

AMOUNT \$ \_\_\_\_\_

1. THIS IS TO CERTIFY that ALVAREZ & MARSAL CANADA INC., the receiver (in such capacity and not in its personal or corporate capacity, the "Receiver") of the assets, undertakings and properties 2442931 ONTARIO INC. (the "Debtor") acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (collectively, the "Property") appointed by Order of the Ontario Superior Court of Justice (Commercial List) (the "Court") dated the 21st day of December, 2018 (the "Order") made in an action having Court file number CV-18-00610995-00CL, has received as such Receiver from the holder of this certificate (the "Lender") the principal sum of \$ \_\_\_\_\_, being part of the total principal sum of \$ \_\_\_\_\_ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily][monthly not in advance on the \_\_\_\_\_ day of each month] after the date hereof at a notional rate per annum equal to the rate of \_\_\_\_\_ per cent above the prime commercial lending rate of Bank of \_\_\_\_\_ from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver

to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

ALVAREZ & MARSAL CANADA INC.,  
solely in its capacity as Receiver of the Property  
and not in its personal or corporate capacity

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

Name:

Title:

IN THE MATTER OF THE RECEIVERSHIP OF 2442931 ONTARIO INC.

BANK OF MONTREAL, AS ADMINISTRATIVE AGENT

Applicant:

and

Respondent

2442931 ONTARIO INC.

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

ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

Proceedings commenced at TORONTO

ORDER  
(APPOINTING RECEIVER)

CHAITONS LLP  
5000 Yonge Street, 10<sup>th</sup> Floor  
Toronto, ON M2N 7E9

Harvey Chaiton (LSO No. 21952F)  
Tel: (416) 218-1129  
Fax: (416) 218-1849  
Email: harvey@chaitons.com

Lawyers for the Applicant, Bank of Montreal,  
as Administrative Agent


**TAB G**

**CONFIDENTIAL**

December 21, 2018

**VIA COURIER**

Zurich Insurance Company Ltd.  
First Canadian Place,  
100 King Street West  
Suite 5500  
Toronto, ON  
M5X 1C9

THIS LETTER IS REFERRED TO IN THE  
LETTER OF Michael Keen  
SWORN BEFORE ME, ON 19th  
DAY OF December 2018  
  
A Commissioner for the Province of Ontario

Attention: Karen Ramsey

**Re: Demand Upon Performance Bond No. #6343517 dated January 27, 2015, together with the Multiple Obligee Rider thereto (collectively, the "Bond")**

Reference is made to the Bond. Capitalized terms not otherwise defined herein shall have the respective meanings assigned to them in the Bond.

**Appointment as Receiver**

As you are aware, pursuant to an order of the Honourable Mr. Justice Hainey of the Ontario Superior Court of Justice (Commercial List) dated December 21, 2018 (as may be amended, restated or modified from time to time, the "**Appointment Order**"), Alvarez & Marsal Canada Inc. was appointed receiver (in such capacity, the "**Receiver**"), without security, of all of the assets, undertakings and properties of 2442931 Ontario Inc. ("**Project Co**") acquired for, or used in relation to a business carried on by Project Co (the "**Property**") for the sole purpose of carrying out the terms of the Appointment Order and without taking possession or control of the Property. A copy of the Appointment Order is enclosed with this letter.

**Contractor Performance Bond**

As you are further aware, Project Co is an Obligee under the Bond. Pursuant to paragraph 28 of the Appointment Order, the Receiver was ordered to make a demand under the Bond for and on behalf of Project Co as soon as reasonably practicable and is empowered and authorized to execute, issue and endorse any agreements or documentation for and on behalf of Project Co as the Receiver considers necessary or advisable to facilitate making such demand.

Please find enclosed a copy of a letter dated December 21, 2018 from the Receiver to the Principal, pursuant to which the Receiver notified the Principal of the occurrence of numerous events of default under the Design and Construction Contract (the "**Construction Contract**") including, without limitation, failure to remove numerous encumbrances registered against title to the Site (as defined in the Construction Contract). The occurrence of each such event of default constitutes a Contractor Event of Default under the Bond.

The Principal is, and has been declared by the Obligee to be, in default in respect of its obligations to the Obligee under the Construction Contract, and the Obligee has duly performed all of its obligations thereunder. Accordingly, we hereby demand that the Surety promptly remedy the above-referenced Contractor Event of Default and all other Contractor Events of Default set out in the attached letter, or promptly select and carry out one of the other specified options available to the Surety pursuant to the Bond.

Laura Christine Alford, a Commissioner, etc.,  
Province of Ontario, while a Student-at-Law.  
Expires May 14, 2021.

Yours very truly,

**ALVAREZ & MARSAL CANADA INC.**, solely in its capacity as receiver, without security, of all of the assets, undertakings and properties of 2442931 Ontario Inc., and not in its personal or corporate capacity

By:



Stephen Ferguson

Title: Senior Vice-President

cc: Osler, Hoskin & Harcourt LLP, Attn: Michael De Lellis/Jeremy Dacks  
Lawyers for Bondfield Construction Company Limited

Goldman Sloan Nash & Haber LLP, Attn: Brendan Bissell/Mario Forte  
Lawyers for to Zurich Insurance Company Ltd.

Chaitons LLP, Attn: Harvey Chaiton  
Lawyers for Bank of Montreal, in its capacity as administrative agent

McCarthy Tetrault LLP, Attn: Gordon Willcocks/Julie Parla/Sharon Kour  
Lawyers for St. Michael's Hospital

Blake, Cassels & Graydon LLP, Attn: Linc Rogers/Aryo Shalviri  
Lawyers for Alvarez & Marsal Canada Inc.

Zurich Insurance Company Limited, Attention: Adrian Braganza

Bondfield Construction Company Limited  
407 Basaltic Road  
Concord, Ontario  
L4K 4W8  
Fax No: 416-667-8462

December 21, 2018

Attn: John Aquino, President  
Steve Aquino, Vice President

Dear Sirs:

**Notice of Events of Default - St. Michael's Hospital Project**

Reference is made to the Design and Construction Contract made as of January 27, 2015 (the "DCC"), between 2442931 Ontario Inc. ("Project Co") and Bondfield Construction Company Limited (the "Contractor"). Capitalized terms used but not otherwise defined herein shall bear the respective meanings given to them in DCC.

***Appointment as Receiver***

As you are aware, pursuant to an order of the Honourable Mr. Justice Hainey of the Ontario Superior Court of Justice (Commercial List) dated December 21, 2018 (as may be amended, restated or modified from time to time, the "Appointment Order"), Alvarez & Marsal Canada Inc. was appointed receiver (in such capacity, the "Receiver" ), without security, of all of the assets, undertakings and properties of 2442931 Ontario Inc. ("Project Co") acquired for, or used in relation to a business carried on by Project Co (the "Property") for the sole purpose of carrying out the terms of the Appointment Order and without taking possession or control of the Property. A copy of the Appointment Order is enclosed with this letter.

The Receiver, for and on behalf of Project Co writes to advise of the occurrence and continuation of various Construction Contractor Events of Default. The reference to the matters set out below does not preclude the current existence of other Construction Contractor Events of Default.

***Abandonment***

The Receiver understands that the Contractor has not dedicated required resources to the work under the DCC for a substantial period of time. As a result, a Construction Contractor Event of Default (the "Abandonment EOD") under section 34.1(a)(vii) of Appendix A - General Conditions of the Design and Construction Contract to the DCC ("Appendix A") has occurred and is continuing.

***Construction Liens***

Based on a recent property subsearch dated December 14, 2018, there were 18 liens registered against the Site.

The liens have not been duly discharged or vacated as required by section 17.3(f) and (g) of Appendix A. As a result, a Construction Contractor Event of Default under section 34.1(a)(x) of Appendix A (the "**Liens EOD**" and, together with the Abandonment EOD, the "**Outstanding EODs**") has occurred and is continuing.

Accordingly, the Receiver hereby confirms and declares on behalf of Project Co that the Construction Contractor is in default of its obligations under the Construction Contract.

Project Co has not waived (or granted any additional extension of time with respect to) any of the Outstanding EODs or any other Construction Contractor Event of Default that may exist now or at any time hereafter. Project Co has not agreed to forbear from enforcing any of its rights and remedies under the DCC or otherwise. Project Co hereby expressly reserves all of its rights and remedies of any nature whatsoever with respect to the Outstanding EODs and all other Construction Contractor Events of Default that may exist now or at any time hereafter.

Yours truly,

**ALVAREZ & MARSAL CANADA**  
INC., solely in its capacity as  
receiver, without security, of all of the  
assets, undertakings and properties of  
2442931 Ontario Inc., and not in its  
personal or corporate capacity

Per:



Stephen Ferguson

Title: Senior Vice President

cc: Osler, Hoskin & Harcourt LLP, Attn: Michael De Lellis/Jeremy Dacks  
Lawyers for Bondfield Construction Company Limited

Goldman Sloan Nash & Haber LLP, Attn: Brendan Bissell/Mario Forte  
Lawyers for to Zurich Insurance Company Ltd.

Chaitons LLP, Attn: Harvey Chaiton  
Lawyers for Bank of Montreal, in its capacity as administrative agent

McCarthy Tetrault LLP, Attn: Gordon Willcocks/Julie Parla/Sharon Kour  
Lawyers for St. Michael's Hospital

Blake, Cassels & Graydon LLP, Attn: Linc Rogers/Aryo Shalviri  
Lawyers for Alvarez & Marsal Canada Inc.

**ТАВ Н**

*dedicated to your success*

August 22, 2019

DELIVERED BY EMAIL


Stephen Ferguson, Senior Vice President  
Alvarez & Marsal Canada Inc.,  
Royal Bank Plaza, South Tower  
200 Bay Street, Suite 2900  
Toronto, ON M5J 2J1

Dear Mr. Ferguson:

**RE: Demand Upon Performance Bond No. 6343517 dated January 27, 2015 together with the Multiple Obligatee Rider thereto (the "Bond") issued by Zurich Insurance Company Ltd. ("Zurich") by Alvarez & Marsal Canada Inc. (the "Receiver") in its capacity as the court appointed receiver of 2442931 Ontario Inc. ("ProjectCo")**

As you know, we act for Zurich. We refer to the Receiver's demand on behalf of ProjectCo dated December 21, 2018 on the Bond issued in respect of the contract between ProjectCo and Bondfield Construction Company Limited ("Bondfield") for the St. Michael's Hospital project (the "SMH Project").

Discussions about arrangements under which performance by Zurich under the Bond might be possible have been ongoing for some time among St. Michael's Hospital ("SMH"), Bank of Montreal as administrative agent for the lenders and Zurich. Zurich became involved in the SMH Project in October 2018 when it became apparent that Bondfield was unable to complete the work, the Bondfield subcontractors and suppliers had stopped attending and the Project was in serious jeopardy. Pursuant to its obligations under the Payment Bond issued for the Project, Zurich satisfied the outstanding debts of Bondfield to the subcontractors and suppliers which resulted in its return to the Project. In a gesture of good faith, Zurich engaged Perini Management Services Inc. ("Perini") to provide Bondfield with additional resources and provided funds to Bondfield to remedy any default in Bondfield's performance. At the same time, Zurich proposed engaging a completion contractor, Multiplex Construction, to begin pricing out the completion of the work to facilitate a transition of the Project to a new contractor. SMH, however, refused to allow Zurich to engage Multiplex Construction and instead insisted that Zurich only engage EllisDon as a potential completion contractor.

This is Exhibit H referred to in the  
affidavit of Michael Keen  
sworn before me, this 19th  
day of December 2019  
  
A COMMISSIONER FOR TAKING AFFIDAVITS

Laura Christine Alford, a Commissioner, etc.,  
Province of Ontario, while a Student-at-Law.  
Expires May 14, 2021.

Over the last ten months, Zurich has been fully engaged with SMH, Bondfield, EllisDon and Perini, in not only advancing the completion of the work, but also in having EllisDon prepare a completion proposal responsive to the status and complexity of the Project.

Recent information provided to Zurich has made it clear that, notwithstanding that the Receiver has not complied with the requirements under the Bond, including committing to pay the balance of the construction contract price payable by ProjectCo to Bondfield and the payment of amounts already certified and owing to Bondfield, Zurich is now in a position to elect option 2.4 under the performance options available to Zurich under the Bond and hereby does so.

The information that Zurich has obtained is an estimate from EllisDon dated August 2, 2019, (attached), which was sent to SMH on Friday August 9, 2019. EllisDon's estimate to complete phases 3 and 4 of the project is in excess of [REDACTED] million. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

These deviations from the contract and standard construction practices have resulted in the completion of the work being very different than was originally contemplated at the time of tender of the Project.

Zurich has prepared a calculation of the amounts it has expended pursuant to the Bond through July 31, 2019, a copy of which is also attached and amounts to \$19,831,688. This amount plus any additional amounts expended to date will reduce the Performance Bond amount on a dollar for dollar basis. These amounts are separate from and in addition to the amounts that Zurich has paid under other obligations, such as any applicable demand bond or labour and material payment bond on this project, which are also reflected in the attachment.

In these circumstances it is appropriate that Zurich discontinue its involvement in completion efforts, including the engagement of Perini as consultant for completion arrangements. We would suggest that ProjectCo make direct arrangements with EllisDon to continue its involvement as Zurich will also be terminating the Construction Services Agreement with that company.


In order to assist with an orderly transition of the project Zurich is prepared to continue to provide project oversight services through Perini for another one month period provided that the Receiver, the hospital and the bank agree that Zurich's calculation of amounts already expended pursuant to the Bond is correct and Bondfield is paid the \$9,138,681.36 due for approved progress billings. Any additional payments by Zurich in this effort will be added to its completion costs and will serve to reduce the penal limit of the Bond.

Unless arrangements based on the above offer can be finalized by the end of day on August 28, it is Zurich's intention to begin notifying the interested parties on August 31, 2019 that Zurich will end its involvement with the project and stop funding Bondfield at that time. In that case, upon final verification of the amounts expended for completion Zurich will tender the remaining amount of the Performance Bond to Project Co in exchange for the delivery of the Performance Bond for cancellation, and Zurich reserves its position as to calculation of the remaining amount of the Performance Bond if the offer noted above is not accepted by its terms. Zurich will also provide appropriate notice that its labour and material payment bond and demand bond obligations will end as well.

Yours truly,

**GOLDMAN SLOAN NASH & HABER LLP**

Per:



R. Brendan Bissell

RBB:kj  
Encls.

c.c. Linc Rogers (counsel for the Receiver)  
Harvey Chaiton (counsel for Bank of Montreal)  
Gordon Willcocks, and Julie Parla (counsel for St. Michael's Hospital)  
Rocco Sebastiano (counsel to Bondfield Construction Company Limited)  
Adrian Braganza (Zurich Insurance Company Ltd.)  
Sam Poteet  
Mario Forte

**St. Michael's Hospital Redevelopment Project**  
**Project Accounting as of July 31, 2019**

<u>Category</u>	<u>Amount</u>
<b>Performance Bond Payments</b>	
Performance Bond payments - Paid by BBCG	(8,010,673) <b>Note 1</b>
BBCG Payments made to Ellis Don	(1,031,245)
Trade, Material & Supplier Disbursements - Paid by BCCL	(5,253,591) <b>Note 2</b>
Payroll, Benefits, Current Source Deductions and Union Dues - Paid by BCCL	(4,208,523) <b>Note 3</b>
Allocated Pre-filing Overhead - Paid by BCCL	(1,327,655) <b>Note 4</b>
<b>Total Performance Bond Payments</b>	<u>(19,831,688)</u>
<b>Demand Bond Payments</b>	
BBCG Payments made to BMO	(6,866,650)
<b>Total Demand Bond Payments</b>	<u>(6,866,650)</u>
<b>Payment Bond Payments</b>	
Payment Bond payments - Paid by BBCG	(14,575,908) <b>Note 5</b>
Payment Bond payments - Paid by Zurich	(10,877,636)
Trade, Material & Supplier Disbursements - Paid by BCCL	(2,167,705) <b>Note 2</b>
<b>Total Payment Bond Payments</b>	<u>(27,621,250)</u>
<b>Grand Total</b>	<u><u>\$ (54,319,588)</u></u>

**Note 1:** These are performance bond payments made to Ozz Electric, Urban Mechanical and Perini Management Services.

**Note 2:** These are subtrade, material, and supplier payments made by BCCL that are directly attributable to the SMH project.

**Note 3:** These are payroll costs, source deductions, and union dues attributable to the SMH project.

**Note 4:** These are G&A expenditures that have been allocated to the SMH project based on revenue left to bill.

**Note 5:** These are payment bond payments made to subtrades, suppliers who have made claims on the SMH project.

BANK OF MONTREAL, AS ADMINISTRATIVE AGENT

2442931  
and      ONTARIO INC.  
Respondent

Applicant

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

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**(Commercial List)**

Proceeding commenced at Toronto

**MOTION RECORD OF UNITY HEALTH**  
**TORONTO**

**(for the motion returnable on  
December 20, 2019)**

**MCCARTHY TÉTRAULT LLP**  
Suite 5300,  
Toronto Dominion Bank Tower  
Toronto ON M5K 1E6

**Julie K. Parla** LSUC#: 45763L  
Tel: (416) 601-8190  
Email: jparla@mccarthy.ca

**Andrew Kalamut** LSUC#: 59838E  
Tel: (416) 601-7726  
Email: akalamut@mccarthy.ca

Lawyers for Unity Health Toronto

DOCS 19934059