



**Public-Private Partnership for**

**GO Rail Expansion – On Corridor Project**

**REQUEST FOR PROPOSALS**

**RFP No. 18-194**

**(RFP Version 1.0)**

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**Confidential – Economic interests of Ontario**

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**REQUEST FOR PROPOSALS**

*[Note to Proponents: These RFP Documents are subject to continuous review and revision by the Sponsors to reflect the development and finalization of the RFP submission requirements and the Project Agreement.]*

**1. INTRODUCTION****1.1 General**

- (1) This Request for Proposals (“**RFP**”) is issued by Her Majesty the Queen in Right of Ontario, as represented by the Minister of Infrastructure, as represented by the Ontario Infrastructure and Lands Corporation (“**Infrastructure Ontario**”, also known as “**OILC**” and “**IO**”) in conjunction with the client or clients (referred to collectively as the “**Client**”) named in the RFP Data Sheet. Infrastructure Ontario and the Client are collectively referred to as the “**Sponsors**” for the purposes of this RFP.
- (2) In this RFP, Prequalified Parties that submit documents in response to this RFP are referred to as “**Proponents**” and their submissions, as may be revised by RFP Sections 5.3 and 5.5, if applicable, are referred to as “**Proposals**”. Each Proposal is comprised of a Technical Submission and a Financial Submission. The entity that is selected by the Sponsors to enter into the Project Agreement is referred to as the “**Preferred Proponent**”. For the purposes of convenience, in this RFP the expression “**Proponents**” also includes Prequalified Parties prior to the submission of their Proposals.
- (3) Except as provided in RFP Section 1.1(3)(a), the procurement process to select a Preferred Proponent shall commence with the issuance of this RFP and shall terminate on Financial Close or on the expiration of the Proposal Validity Period (or extended Proposal Validity Period, if applicable) whichever is first (the “**RFP Process**”). Except as provided in RFP Sections 10.3.2 and 10.3.3, only Proponents that submit a Proposal in accordance with this RFP will acquire any rights under the RFP. Except as provided in RFP Sections 3.8.2 and 3.8.3 and except for the Sponsors’ obligation to pay a Break Fee, a Proposal Submission Fee Advance Payment or a Proposal Submission Fee Payment, as applicable, all rights and obligations arising out of the RFP (the bidding contract or “**Contract A**”) terminate either on the cancellation of this RFP Process by the Sponsors, if such cancellation occurs, or,
  - (a) for the Preferred Proponent, on Financial Close (providing Commercial Close is reached prior to the expiration of the Proposal Validity Period, or extended Proposal Validity Period if applicable); and
  - (b) for the Proponents that are not the Preferred Proponent, on the expiration of the Proposal Validity Period (or extended Proposal Validity Period, if applicable) or Financial Close, whichever occurs first.
- (4) Infrastructure Ontario will manage the RFP Process on behalf of the Sponsors and Infrastructure Ontario shall be the single point of contact for Proponents on behalf of the Sponsors. During the RFP Process, Proponents shall contact Infrastructure Ontario only through the Contact Person as set out in RFP Section 3.2.1.

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- (5) The Project to which this RFP applies has been approved by the Ministry of Infrastructure (“**MOI**”) to proceed as a public-private partnership project. As a result, the Project shall follow 5 fundamental principles for the procurement of public infrastructure, which include:
- (a) The public interest is paramount;
  - (b) Value for the investment of public money must be demonstrated;
  - (c) Appropriate public control and ownership must be maintained;
  - (d) Accountability must be maintained; and
  - (e) Fair, transparent and efficient processes must be used.
- (6) A brief description of the project that is the subject of this RFP (the “**Project**”) is set out in the RFP Data Sheet. A detailed description of the Project is contained in the documentation in the E-Builder Data Room and the PEARL Data Room as Background Information.
- (7) While the Sponsors will manage the procurement process in respect of the Project, the Preferred Proponent, subject to the requirements and conditions of the RFP Documents, would actually enter into the Project Agreement with the party or parties named as the signing party or parties in the RFP Data Sheet (the “**Signing Parties**”). Unless listed as Signing Parties to the Project Agreement in the RFP Data Sheet, neither Infrastructure Ontario nor the Government of Ontario will be parties to the Project Agreement.

### 1.2 Prequalified Parties and Proponent Representatives

- (1) Subject to RFP Section 3.6, only those parties that were prequalified through the Project’s Request for Qualifications (“**RFQ**”) process that preceded this RFP are eligible to participate in the RFP Process. The prequalified parties are listed in the RFP Data Sheet (“**Prequalified Parties**”). The prequalification documents submitted by each of the Prequalified Parties in the RFQ process that preceded and was with respect to this RFP Process are referred to as a Prequalified Party’s “**Prequalification Submission**”.
- (2) All correspondence from the Sponsors to a Proponent will be sent to the person identified, in the Proponent’s Prequalification Submission, to receive information and notices on behalf of the Proponent (the “**Proponent Representative**”). Each Proponent is solely responsible to ensure that all contact information of the Proponent Representative is accurate and updated at all times during the RFP Process. Proponents may update or revise their Proponent Representatives’ information by notifying the Contact Person, in writing.

### 1.3 Overview of the Stages of Project Procurement and Implementation

- (1) The Sponsors will carry out the procurement and implementation of the Project in accordance with the following stages:
- (a) Stage 1 – Prequalification Stage

The prequalification stage (“**Prequalification Stage**”) preceded the RFP Process and identified the Prequalified Parties. The Prequalification Stage is a stand-alone

independent stage and is complete once the Prequalified Parties are identified by the Sponsors (whether identified initially as Prequalified Parties or added subsequently in accordance with the RFQ documents) and have received notification by the Sponsors that they are prequalified for the RFP Process.

(b) Stage 2 – Post RFQ Process

The post RFQ process (the “**Post RFQ Process**”) is the consultation process that follows the Prequalification Stage and precedes the RFP Process. The Post RFQ Process is not a procurement process but is a process of organized consultation on the Project prior to the RFP Process.

(c) Stage 3 – RFP Procurement Process

The RFP procurement process is the consultation process and the competitive procurement process described in detail in this RFP.

(d) Stage 4 – Implementation of the Project Agreement

Once the Signing Parties have executed the Project Agreement, the terms and conditions of the Project Agreement shall determine how the Project is to proceed.

#### 1.4 Fairness Monitor

- (1) The Sponsors have retained the Fairness Monitor named in the RFP Data Sheet to monitor the RFP Process.

## 2. THE RFP DOCUMENTS AND THE DATA ROOMS

### 2.1 RFP Documents

- (1) The RFP Documents (the “**RFP Documents**”) are:
- (a) this RFP;
  - (b) Schedule 1 – RFP Data Sheet;
  - (c) Schedule 2 – Proponent Consultation Process;
  - (d) Schedule 3 – Submission Requirements and Evaluation Criteria consisting of:
    - (i) Part 1 – Technical Submission Requirements;
    - (ii) Part 2 – Financial Submission Requirements; and
    - (iii) Part 3 – Proposal Format and Evaluation;
  - (e) Schedule 4 – Proposal Submission Forms;
  - (f) Schedule 5 – Participant Conflict Screening List



- (g) Schedule 6 – Proponent Team Member Declaration;
  - (h) Schedule 7 – Certificate of Officer;
  - (i) Schedule 8 – Price Submission Form;
  - (j) Schedule 9 – Letter of Credit;
  - (k) Schedule 10 – Project Agreement, including all related Schedules, appendices and attachments; and
  - (l) Addenda to the RFP Documents, if any.
- (2) Subject to RFP Section 2.2(1), the RFP Documents shall be read as a whole. The Schedules and Addenda, if any, constitute an integral part of this RFP and are incorporated by reference. For greater clarity, Background Information documents and responses to RFIs are not RFP Documents.

## **2.2 Conflicts or Inconsistencies in Documents**

- (1) For the purpose of the RFP Process, if there are any conflicts or inconsistencies among the terms and conditions of the documents comprising RFP Documents the following shall apply:
- (a) in respect of matters of interpretation related to the RFP Process and all competitive procurement process matters, this RFP shall prevail over the Schedules to this RFP during the RFP Process;
  - (b) in respect of all matters of interpretation of the Project and the Project Agreement during the RFP Process, the Project Agreement shall prevail over this RFP and all other Schedules to this RFP; and
  - (c) for the purpose of resolving conflicts or inconsistencies among the documents that constitute the Project Agreement, the provisions of the Project Agreement dealing with conflicts or inconsistencies shall govern.
- (2) Despite RFP Section 2.2(1), if the Proponent believes that there is any term or condition in any RFP Document that is ambiguous, or that conflicts or is inconsistent with any other term or condition in the RFP Documents, the Proponent shall notify the Sponsors of that ambiguity, conflict or inconsistency in accordance with RFP Section 3.2.2 and, for greater clarity, by the deadline set out in the RFP Data Sheet for the submission of RFIs.
- (3) If there is a conflict or inconsistency between:
- (a) the Sponsors' electronic version of an RFP Document as contained in the AWARD Data Room; and
  - (b) any other version of the same RFP Document (whether in electronic or hard copy),
- the Sponsors' electronic version as contained in the AWARD Data Room shall govern.

- (4) If there is any conflict or inconsistency between documents, including RFP Documents, contained in any Data Room and documents that are downloaded by the Proponent, the documents contained in the applicable Data Room shall govern.
- (5) If there is any conflict or inconsistency between two versions of the same RFP Document contained in the AWARD Data Room, the RFP Document of the later date or version number shall prevail over the same RFP Document of an earlier date or version number. Unless otherwise indicated, for the purposes of this RFP Section 2.2(5), the date of each RFP Document shall be determined by the date and time when that document was placed in the AWARD Data Room by Infrastructure Ontario.

### 2.3 Distribution of Documents to Proponents

- (1) Except as provided in RFP Section 2.3(2), Infrastructure Ontario will circulate this RFP and all other RFP Documents, including Addenda, by placing them in the AWARD Data Room and notifying the Proponent Representatives by e-mail that RFP Documents or Addenda, as applicable, have been added to the AWARD Data Room. Notification to Proponents by Infrastructure Ontario that documents have been added to a Data Room is a courtesy only and Proponents are solely responsible to ensure that they review all documents in all Data Rooms in accordance with RFP Section 2.4(3) and, in particular, have reviewed all documents in all Data Rooms immediately prior to submitting Proposals.
- (2) The Sponsors may circulate some RFP Documents in paper copy. If the Sponsors circulate any RFP Documents in paper copy, Proponents will be notified of a paper copy circulation by way of a notice in the AWARD Data Room.

### 2.4 Data Rooms

- (1) The Sponsors have established electronic data rooms (the “**Data Rooms**”) at secure website addresses as follows:
  - (a) the Sponsors have established the AWARD Data Room for the purpose of,
    - (i) distribution of RFP Documents and Addenda (including “black-lined” RFP Documents revised by Addenda);
    - (ii) distribution of notices with respect to the RFP Process or the RFP Documents; and
    - (iii) the receipt of RFIs from Proponents and the posting of responses to RFIs,(the “**AWARD Data Room**”); and
  - (b) the Sponsors have established the E-Builder Data Room and the PEARL Data Room for the provision of various types of background information (“**Background Information**”) for the Proponents’ review (the “**E-Builder Data Room**” and the “**PEARL Data Room**”, respectively).

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- (2) The Data Rooms will be accessible on approximately the date set out in the Timetable. The Sponsors may add, delete or amend documents in the Data Rooms at any time.
  - (3) Each Proponent is solely responsible to ensure that it:
    - (a) contacts the Contact Person at the coordinates set out in the RFP Data Sheet to arrange access to the Data Rooms and receipt of password(s) to the Data Rooms;
    - (b) has the appropriate software which allows the Proponent to access and download RFP Documents and Background Information from the Data Rooms; and
    - (c) checks all Data Rooms frequently for the addition, deletion or amendment of RFP Documents, Background Information and the posting of responses to RFIs and, at all times during the RFP Process, keeps itself informed of and takes into account the most current RFP Documents, Background Information and responses to RFIs.
  - (4) Each Proponent is solely responsible to ensure that it promptly informs the Contact Person of any departure of individuals from the Proponent team or any other circumstances in which an individual is no longer involved in this RFP Process so that the Sponsors can remove the access rights to all Data Rooms of such individuals.

## 2.5 Proponent Investigations

- (1) Each Proponent and each of its Proponent Team Members is solely responsible, at its own cost and expense, to carry out its own independent research and due diligence and to perform any other investigations, including seeking independent advice, considered necessary by the Proponent to satisfy itself as to all existing conditions affecting the Project or the Project Agreement. The Proponents' and Proponent Team Members' obligations set out in this RFP Section 2.5 apply irrespective of any Background Information in any Data Room or information contained in the RFP Documents or in responses to RFIs. The Proponents' and Proponent Team Members' obligation to carry out independent research, investigations, due diligence or to seek independent advice or, if applicable, their ability to rely on information provided by the Sponsors is more particularly set out in the Project Agreement.
- (2) Except as explicitly provided in the Project Agreement, the Sponsors do not represent or warrant the accuracy or completeness of any information set out in the RFP Documents or made available to Proponents or Proponent Team Members in any Data Room as Background Information or of any other background or reference information or documents prepared by the Government of Ontario or by third parties and which may be made available to Proponents or Proponent Team Members by or through the Sponsors. Proponents and Proponent Team Members shall make such independent assessments as they consider necessary to verify and confirm the accuracy and completeness of all such information as any use of or reliance by Proponents or Proponent Team Members on any and all such information shall be at the Proponents' and Proponent Team Members' sole risk and without recourse against the Sponsors or the Government of Ontario.

### 3. THE RFP PROCESS

#### 3.1 RFP Process Timetable

- (1) The deadline for the submission of the Technical Submission (the “**Technical Submission Deadline**”), the deadline for the submission of the Financial Submission (the “**Financial Submission Deadline**”), and the general timetable for the RFP Process (the “**Timetable**”) are set out in the RFP Data Sheet.
- (2) The Sponsors may amend the Timetable in their sole discretion:
  - (a) at any time prior to the Technical Submission Deadline for events that are to occur prior to the Technical Submission Deadline;
  - (b) at any time prior to the Financial Submission Deadline for events that are to occur prior to the Financial Submission Deadline; and
  - (c) at any time in the RFP Process for events that are to occur after the Financial Submission Deadline.

#### 3.2 Questions and RFP Documents Comments

##### 3.2.1 Contact Person

- (1) Except as set out in RFP Section 3.4.2, the Proponents shall submit all questions and other communications regarding the RFP Documents, the RFP Process and their Proposals to the contact person or contact persons named in the RFP Data Sheet (the “**Contact Person**” or “**Contact Persons**”, as applicable) electronically at the coordinates listed in the RFP Data Sheet and the questions shall be submitted in accordance with RFP Section 3.2.2 and shall be submitted in the form provided in the AWARD Data Room.

##### 3.2.2 Clarification/RFI Submission Process

- (1) In addition to the requirement set out in RFP Section 3.2.1, the following rules shall apply to Proponents when submitting questions or requests for information (“**RFIs**”) to the Sponsors during the RFP Process:
  - (a) Proponents are permitted to submit RFIs categorized as follows:
    - (i) RFIs that are of general application and that would apply to other Proponents (“**General RFIs**”); and
    - (ii) RFIs that the Proponent considers to be commercially sensitive or confidential to that particular Proponent (“**Commercially Confidential RFIs**”);
  - (b) If the Sponsors disagree with the Proponent’s categorization of an RFI as a Commercially Confidential RFI, the Sponsors will give the Proponent an opportunity to either categorize the RFI as a General RFI or to withdraw the RFI;

- (c) If the Sponsors determine, in their sole discretion, that a Commercially Confidential RFI, even if it is withdrawn by a Proponent, is of general application or would provide a significant clarification of the RFP Documents or RFP Process to Proponents, the Sponsors may issue a clarification to Proponents that deals with the same subject matter as the withdrawn Commercially Confidential RFI; and
  - (d) If the Sponsors agree with the Proponent’s categorization of a Commercially Confidential RFI, then the Sponsors will provide a response to that RFI to only the Proponent that submitted the RFI.
- (2) Responses to RFIs prepared and circulated by the Sponsors are not RFP Documents and do not amend the RFP Documents. If, in the Sponsors’ sole discretion, responses to RFIs require an amendment to the RFP Documents, such amendment will be prepared and circulated by Addendum in accordance with RFP Section 3.7. Only a response to an RFI that has been incorporated into or issued as an Addendum will modify or amend the RFP Documents and, otherwise, RFIs will have no force or effect whatsoever and shall not be relied upon by any Proponent.
  - (3) Proponents shall submit RFIs in accordance with the deadlines set out in the Timetable.
  - (4) Proponents shall submit all RFIs to the Contact Person electronically in accordance with the instructions set out in the RFP Data Sheet.
  - (5) The Sponsors will respond to RFIs in written responses circulated to Proponents in accordance with the schedule set out in the Timetable. The Sponsors may, in their sole discretion, distribute responses to RFIs of a minor or administrative nature to only the Proponent who submitted the minor or administrative RFI.
  - (6) It is the Proponent’s obligation to seek clarification from the Sponsors of any matter it considers to be unclear in accordance with RFP Section 3.2.2 and, for greater clarity, by the deadline set out in the Timetable for the submission of RFIs. Neither the Sponsors nor the Government of Ontario are responsible in any way whatsoever for any misunderstanding by the Proponent or any of its Proponent Team Members of the RFP Documents, Background Information, responses to RFIs, any documents placed in any Data Room or any other type of information provided by or communication made by the Sponsors or the Government of Ontario.

### 3.2.3 RFP Documents Comments

- (1) The Sponsors may, in their sole discretion, request Proponents to submit comments on the RFP Documents and, in particular, comments on the Project Agreement. Whether the Sponsors intend to permit or require the submission of such comments and the schedule and format for the submission of those comments is set out in the RFP Data Sheet. The Sponsors are not obliged to respond to each comment made by Proponents under this RFP Section 3.2.3(1). If the Sponsors accept a comment, or part of a comment, and that acceptance requires a change to the RFP Documents, the Sponsors shall implement that change by Addendum.
- (2) The Sponsors may, in their sole discretion, request Proponents to submit comments on particular technical or financial issues arising out of the Project and reflected in the RFP Documents. Whether the Sponsors intend to permit or require the submission of such comments and the schedule and format for the submission of those comments is set out in the RFP Data Sheet. The

Sponsors are not obliged to respond to submissions made by Proponents under this RFP Section 3.2.3(2).

### 3.3 Communications Restrictions

#### 3.3.1 Communications with Municipalities, Other Government Authorities, Utilities and Legacy O/M Contractors

- (1) Subject to the restrictions in RFP Section 3.3.2 and any special rules set out in the RFP Data Sheet, Proponents, Proponent Team Members and their respective Advisors are permitted to communicate directly with any municipality, government authority or utility with respect to municipal, utility or other types of governmental requirements related to the Project. Under no circumstances will any special rules set out in the RFP Data Sheet in accordance with this RFP Section 3.3.1(1) override the provisions of RFP Section 3.3.2.
- (2) Neither the Sponsors nor the Government of Ontario are, in any way whatsoever, responsible for any representations, statements, assurances, commitments or agreements which Proponents, Proponent Team Members or their respective Advisors receive or believe they may have received from a municipality, a government authority, or a utility. Proponents, Proponent Team Members and their respective Advisors rely on any such representations, assurances, commitments or agreements at their sole risk without recourse against the Sponsors or the Government of Ontario.
- (3) Proponents, Proponent Team Members and their respective Advisors are not permitted to communicate directly with any of the entities that currently provide operations and maintenance services to Metrolinx under an existing contract with Metrolinx, including those entities listed on the RFP Data Sheet (collectively, the “**Legacy O/M Contractors**”). For clarity, this prohibition shall not apply to communications within a Proponent team involving a Legacy O/M Contractor that is part of such Proponent team.

#### 3.3.2 Prohibited Contacts and Lobbying Prohibition

- (1) Proponents and Proponent Team Members and all of their respective Advisors, employees and representatives are prohibited from engaging in any form of political or other lobbying, of any kind whatsoever, to influence the outcome of the RFP Process.
- (2) Without limiting the generality of RFP Section 3.3.2(1), neither Proponents or Proponent Team Members or any of their respective Advisors, employees or representatives shall contact or attempt to contact, either directly or indirectly, at any time during the RFP Process, any of the following persons or organizations on matters related to the RFP Process, the RFP Documents, or the Proposals:
  - (a) any member of the Evaluation Committee;
  - (b) any Advisor to the Sponsors or the Evaluation Committee;
  - (c) any employee or representative of:
    - (i) the Sponsors;
    - (ii) MOI or any other Ministry, agency or entity listed in the RFP Data Sheet; or

- (iii) the Premier of Ontario’s office or the Ontario Cabinet office;
  - (d) any Member of the Provincial Parliament (including the Premier) or his or her staff or representatives; or
  - (e) any directors, officers or consultants of any entity listed in RFP Sections 3.3.2(2)(a) to 3.3.2(2)(d).
- (3) If a Proponent or a Proponent Team Member or any of their respective Advisors, employees or representatives, in the opinion of the Sponsors, contravenes RFP Section 3.3.2(1) or 3.3.2(2), the Sponsors may, in their sole discretion:
- (a) disqualify the Proponent, a Proponent Team Member or a Proposal or reverse their decision to make an award (even if the award has already been made to a Preferred Proponent under this RFP) at any time prior to Commercial Close with respect to the Preferred Proponent and at any time prior to Financial Close with respect to the remaining Proponents in accordance with RFP Section 7.2; or
  - (b) impose conditions on the Proponent’s or Proponent Team Member’s continued participation in the RFP Process that the Sponsors consider, in their sole discretion, to be appropriate.

For clarity, the Sponsors are not obliged to take the actions set out in RFP Section 3.3.2(3)(a) or 3.3.2(3)(b).

### **3.3.3 Media Releases, Public Disclosures and Public Announcements**

- (1) A Proponent shall not, and shall ensure that its Advisors, employees, representatives and Proponent Team Members, and their respective Advisors, employees and representatives do not, issue or disseminate any media release, public announcement or public disclosure (whether for publication in the press, on the radio, television, internet or any other medium) that relates to the RFP Process, the RFP Documents or the Project or any matters related thereto, without the prior written consent of the Sponsors.
- (2) Neither the Proponents or the Proponent Team Members or any of their respective Advisors, employees or representatives shall make any public comment, respond to questions in a public forum, or carry out any activities to either criticize another Proponent or Proposal or to publicly promote or advertise their own qualifications, interest in or participation in the RFP Process without the Sponsors’ prior written consent, which consent may be withheld in the Sponsors’ sole discretion. Notwithstanding this RFP Section 3.3.3(2), Proponents, Proponent Team Members and their respective Advisors, employees and representatives are permitted to state publicly that they are participating in the RFP Process.
- (3) For the purpose of greater clarity, RFP Section 3.3.3(2) does not prohibit disclosures necessary to permit the Proponent to discuss the Project with prospective subcontractors, including in respect of New Fleet or Signalling Works, but such disclosure is permitted only to the extent necessary to solicit those subcontractors’ participation in the Project.

### 3.3.4 Restrictions on Communications between Proponents – No Collusion

- (1) A Proponent shall not discuss or communicate, directly or indirectly, with any other Proponent, any information whatsoever regarding the preparation of its own Proposal or the Proposal of the other Proponent in a fashion that would contravene Applicable Law. Proponents shall prepare and submit Proposals independently and without any connection, knowledge, comparison of information or arrangement, direct or indirect, with any other Proponent.
- (2) For clarity, Proponents are permitted to communicate with one another for the purpose of consolidating or adjusting their original Proponent Team Members, providing that they do not contravene the Applicable Law. If Proponents wish to revise their original Proponent Team Members, the process for achieving approval for such consolidation or adjustment is set out in RFP Section 3.6.
- (3) For greater clarity, RFP Section 3.3.4(1) applies to Proponents and Proponent Team Members and their respective Advisors, employees and representatives.

## 3.4 Meetings with Proponents

### 3.4.1 General Proponents Meeting(s)

- (1) The Sponsors may, in their sole discretion, convene general Proponents meetings (each, a **“Proponents Meeting”**) on the dates and at the times set out in the Timetable and at the location and for the purposes set out in the RFP Data Sheet. The Sponsors may elect to hold Proponents Meetings by webinar. While attendance at a Proponents Meeting is not mandatory, Proponents are strongly encouraged to attend. A Proponent’s failure to attend a Proponents Meeting is at the Proponent’s sole risk and responsibility.
- (2) Proponents may ask questions and seek clarifications at a Proponents Meeting. Notwithstanding that the Sponsors may give oral answers at a Proponents Meeting, those answers shall not amend or waive any provision of the RFP Documents, or be binding on the Sponsors or be relied upon in any way by Proponents, Proponent Team Members or their Advisors, except when and only to the extent expressly confirmed in an Addendum to the RFP Documents issued in accordance with RFP Section 3.7. Proponents are strongly encouraged to submit these questions in accordance with RFP Sections 3.2.1 and 3.2.2 for response in accordance with RFP Section 3.2.2.
- (3) No statement, consent, waiver, acceptance, approval or anything else said or done in any Proponents Meeting by the Sponsors or any of their respective Advisors, employees or representatives shall amend or waive any provision of the RFP Documents, or be binding on the Sponsors or be relied upon in any way by Proponents, Proponent Team Members or their Advisors, except when and only to the extent expressly confirmed in an Addendum to the RFP Documents issued in accordance with RFP Section 3.7.

### 3.4.2 Commercially Confidential Proponent Meetings

- (1) The Sponsors may, in their sole discretion, convene commercially confidential meetings with individual Proponents (**“Commercially Confidential Meetings”**), which may include the Consultation Sessions described in Schedule 2 to this RFP and additional Commercially Confidential Meetings between the Sponsors (and their representatives and Advisors) and



- individual Proponents (and their representatives and Advisors), to discuss other matters related to the RFP Process or the Proponents' Proposals.
- (2) Whether the Sponsors intend to hold Commercially Confidential Meetings and the location of those meetings is set out in Schedule 2 to this RFP and in the RFP Data Sheet. The approximate date and time of Commercially Confidential Meetings is described in Schedule 2 to this RFP and, if applicable, set out in the Timetable. While attendance at Commercially Confidential Meetings by Proponents is not mandatory, Proponents are strongly encouraged to attend. A Proponent's failure to attend a Commercially Confidential Meeting is at the Proponent's sole risk and responsibility.
  - (3) If the Sponsors hold Commercially Confidential Meetings, the Fairness Monitor may be present during some or all of those meetings.
  - (4) No oral or written statement, consent, waiver, acceptance, approval or anything else said or done by the Sponsors or any of their respective Advisors, employees or representatives or by any Stakeholder of the Project during an Commercially Confidential Meeting or otherwise pursuant to Schedule 2 to this RFP shall amend or waive any provision of the RFP Documents, or be binding on the Sponsors or be relied upon in any way by Proponents, Proponent Team Members or their Advisors, except when and only to the extent expressly confirmed in an Addendum to the RFP Documents issued in accordance with RFP Section 3.7.
  - (5) The Proponent, its Proponent Team Members and their respective Advisors and representatives and any of their attendees at Commercially Confidential Meetings acknowledge and agree that:
    - (a) any oral or written statement made by the Sponsors or any of their Advisors or representatives or by any Stakeholder of the Project during any Commercially Confidential Meeting or otherwise pursuant to Schedule 2 to this RFP is not and shall not be deemed or considered to be an indication of a preference by the Sponsors or the Government of Ontario or a rejection by the Sponsors or the Government of Ontario of anything said or done by the Proponent, Proponent Team Member or any of their respective Advisors or representatives;
    - (b) any oral or written statement made by the Sponsors or any of their Advisors or representatives or by any Stakeholder of the Project during any Commercially Confidential Meeting or otherwise pursuant to Schedule 2 to this RFP shall not and will not be relied upon in any way by the Proponent, Proponent Team Member or any of their respective Advisors or representatives for any purpose, including any purpose in connection with the RFP, the Project Agreement, the Project or otherwise, except and only to the extent expressly confirmed by Addendum in accordance with RFP Section 3.7, provided that the Sponsors shall not be under any obligation to confirm any information by Addendum;
    - (c) the Sponsors may share process-related information, including clarifying information, with all Proponents during Commercially Confidential Meetings, if the need arises; and
    - (d) the Proponent, its Proponent Team Members and their respective Advisors and representatives:

- (i) shall participate in the Commercially Confidential Meetings in accordance with the guidelines, procedures and processes set out in the RFP;
- (ii) waive any and all rights to contest and/or protest the RFP Process, the RFP Documents or the rules with respect to Commercially Confidential Meetings, including the Commercially Confidential Meetings themselves, based on the fact that such Commercially Confidential Meetings occurred or on the basis that information may have been received during a Commercially Confidential Meeting by another Proponent, another Proponent's Proponent Team Member, or their respective Advisors or representatives that was not received by the Proponent, its own Proponent Team Member(s) or any of their respective Advisors or representatives; and
- (iii) agree that the Proponent, its Proponent Team Members and their respective Advisors and representatives must treat information received at a Commercially Confidential Meeting as Confidential Information.

### **3.5 Proponent Visits and Inspections and Additional Geotechnical, Environmental and Subsurface Utility Investigations**

#### **3.5.1 Proponent Visits and Inspections**

- (1) The Sponsors have established in the RFP Data Sheet scheduled dates and rules for visits to and inspections of the Lands, existing Metrolinx Infrastructure, existing Metrolinx facilities, and Legacy Fleet ("**Proponent Visits and Inspections**").
- (2) Except for Proponent Visits and Inspections, Proponents are not permitted to access any of the Lands, existing Metrolinx Infrastructure, existing Metrolinx facilities, or Legacy Fleet which are not accessible by the general public, except by prior written arrangement with the Contact Person.
- (3) The Proponent acknowledges and agrees that, as of the date of the issuance of this RFP, the Client owns or has access to some, but not all, of the Metrolinx Lands that will ultimately be owned by the Client or to which the Client will ultimately have access for the Project. The Client's acquisition of and access to all of the Metrolinx Lands will not be completed until after Financial Close. The Sponsors will only be able to provide the Proponents with access to those Lands that have been acquired by the Client or to which the Client has access.

#### **3.5.2 Additional Geotechnical, Environmental and Subsurface Utility Investigations**

- (1) If Proponents are permitted to request changes or additions to the geotechnical, environmental and subsurface utility investigations that have been conducted by the Sponsors, the process for submitting such requests for changes or additions for consideration by the Sponsors is set out in the RFP Data Sheet.

### **3.6 Formation of Proponent Teams and Changes to Identified Proponent Parties**

#### **3.6.1 Formation of Proponent Teams**

- (1) If, on the issuance date of these RFP Documents, the Proponent no longer has the full complement of its original team members that were Prequalified Parties, that Proponent must

have submitted and received approval pursuant to this RFP Section 3.6 to replace its original team member, no later than the date set out in the Timetable.

- (2) Proponents are advised that, notwithstanding any other provision in these RFP Documents, until a Proponent has complied with RFP Section 3.6.1(1), the Proponent shall not be eligible to,
  - (a) attend Proponent Visits and Inspections; or
  - (b) participate in CCMs,

unless the Proponent has obtained the Sponsors' prior consent to attend a Proponent Visit and Inspection or participate in a CCM.

### 3.6.2 Changes to Identified Proponent Parties

- (1) A Proponent shall not change its shareholders (unless the Proponent is a company whose equity securities are listed on a recognized stock exchange), Proponent Team Members, proposed subcontractors, those individuals identified in the Proponent's Prequalification Submission as Key Individuals, or other parties identified in the Proponent's Prequalification Submission (the "**Identified Proponent Parties**") without the prior written consent of the Sponsors.
- (2) Without limiting the generality of RFP Section 3.6.2(1), Proponents are permitted to request a change in their Identified Proponent Parties in accordance with this RFP Section 3.6.
- (3) No later than the deadline set out in the Timetable, a Proponent may request a change in its Identified Proponent Parties, including any proposed withdrawal from, addition to, or substitution of the Identified Proponent Parties (each, a "**Proposed Change in Identified Proponent Party**") by delivering a notice to the Contact Person, requesting the Sponsors' consent to such Proposed Change in Identified Proponent Party.
- (4) If an Identified Proponent Party withdraws from the RFP Process in a manner that does not make it possible for the Proponent to obtain the Sponsors' prior consent, the Proponent shall notify the Sponsors of the withdrawal as soon as the Proponent becomes aware of the withdrawal and shall deliver a notice to the Contact Person, requesting the Sponsors' consent to a Proposed Change in Identified Proponent Party, either by substituting, or by proceeding without any substitution of the withdrawn Identified Proponent Party, such notice to be delivered no later than six weeks after the date of withdrawal or 21 days before the Technical Submission Deadline, whichever is earlier.
- (5) A notice delivered under either RFP Sections 3.6.2(3) or 3.6.2(4) shall:
  - (a) clearly identify the Proposed Change in Identified Proponent Party (including, as applicable, a statement of the Proponent's intention to continue in the absence of a withdrawn Identified Proponent Party, or any proposed additional or substitute Identified Proponent Party);
  - (b) attach and provide sufficient documentation to demonstrate, to the satisfaction of the Sponsors in their sole discretion, that the Proposed Change in Identified Proponent Party will not materially adversely affect the Proponent's ability to submit a complete and

compliant Proposal or impair the Proponent's or the Identified Proponent Party's ability to perform their respective obligations under the Project Agreement; and

- (c) attach and provide sufficient documentation to demonstrate, to the satisfaction of the Sponsors in their sole discretion, that the reconstituted Proponent team (whether through addition, substitution or continuation without replacement of one or more of the Identified Proponent Parties, as applicable) would have met or exceeded any applicable criteria applied during the RFQ process.
- (6) In reviewing a request made in accordance with RFP Sections 3.6.2(3) or 3.6.2(4), the Sponsors may, in their sole discretion and at any time, instruct the Proponent to deliver further documentation or additional information as may be reasonably requested by the Sponsors to assess any Proposed Change in Identified Proponent Party. When a request for further documentation or additional information is made by the Sponsors, the Proponent shall deliver such information and documentation as soon as possible and in any event no later than the deadlines set out in RFP Sections 3.6.2(3) or 3.6.2(4), as applicable. The Sponsors are under no obligation to consider any further documentation or additional information delivered after the applicable deadline.
- (7) With respect to any request for a Proposed Change in Identified Proponent Party, the Sponsors may, in their sole discretion, do any one or more of the following:
- (a) consent to or reject the Proposed Change in Identified Proponent Party;
  - (b) impose such other terms and conditions as the Sponsors may require in connection with any consent to a Proposed Change in Identified Proponent Party; and/or
  - (c) following a rejection of a Proposed Change in Identified Proponent Party (where such Proposed Change in Identified Proponent Party involves a substitution of an Identified Proponent Party), permit the Proponent to deliver a further notice for a Proposed Change in Identified Proponent Party identifying an alternate substitute for review and approval by the Sponsors, subject to the same deadlines, terms and conditions and standard of review as set out in RFP Sections 3.6.2(1) to 3.6.2(7).
- (8) The Sponsors may, in their sole discretion, disqualify a Proponent and terminate a Proponent's continued involvement in the RFP Process or allow a Proponent to continue under such terms and conditions as the Sponsors may require, in their sole discretion, in the event of any of the following:
- (a) an actual change in any Identified Proponent Party is made at any time during the RFP Process by the Proponent without obtaining prior consent of the Sponsors (including any withdrawal of an Identified Proponent Party described in RFP Section 3.6.2(4));
  - (b) a request for change in any Identified Proponent Party is made after the deadlines set out in RFP Sections 3.6.2(3) or 3.6.2(4), as applicable; or
  - (c) a change in circumstances with respect to a Proponent after the Technical Submission Deadline that may materially adversely affect an Identified Proponent Party in a way which could impair the Proponent's or the Identified Proponent Party's ability to perform their respective obligations under the Project Agreement.

### 3.6.3 Change in Control

- (1) If, at any time during the RFP Process, a Prime Team Member of any Proponent team has publicly announced a change in Control involving a merger with or acquisition of another Proponent Team Member (or Prime Team Member) of a different Proponent team (each of the Prime Team Member and Proponent Team Member(s) are referred to as an “**Impacted Participant**”), then, if the Impacted Participants wish to remain on separate teams for the duration of the RFP Process, each Impacted Participant shall promptly deliver a notice to the Sponsors disclosing the announced change in Control.
- (2) Upon the receipt of the notice required by RFP Section 3.6.3(1) and in anticipation of the change in Control, the Sponsors may, in their sole discretion, require the delivery of assurances and agreements from both of the affected Proponent teams and their respective Impacted Participants regarding the implementation of safeguards necessary to protect the integrity of the RFP Process, to the satisfaction of the Sponsors, in their sole discretion.
- (3) If, at any time after the identification of the Preferred Proponent there is either (i) a change in Control of a Proponent or of one of its Prime Team Members as a result of a merger with or an acquisition of that Proponent or Prime Team Member by one of the other Proponents or one of the other Proponent’s Prime Team Members or Proponent Team Members, or (ii) the consummation of a change in Control previously announced and disclosed pursuant to RFP Section 3.6.3(1), then the Sponsors may, in their sole discretion, allow the Impacted Participants to continue in the RFP Process subject to the following:
  - (a) The Sponsors may, in their sole discretion, impose terms and conditions on the continued participation of the Impacted Participants in the RFP Process. Such terms and conditions may include the provision of new or additional assurances from, and a new agreement with, any new (or changed) entity(s) created as a result of the change in Control;
  - (b) To assist the Impacted Participants with respect to the requirements that may be imposed by the Sponsors pursuant to RFP Section 3.6.3(3)(a), the Sponsors published guidelines during the RFQ Process identifying the types of assurances and agreement(s) that the Sponsors intend to impose;
  - (c) If one or both of the Impacted Participants, or any new entity(s) created as a result of the change in Control fail to satisfy the conditions imposed by the Sponsors pursuant to this RFP Section 3.6.3, the Sponsors may, in their sole discretion, require the applicable Proponent(s) to remove one or both of the Impacted Participants from their respective Proponent team(s);
  - (d) If the Sponsors require the removal of one or both of the Impacted Participants pursuant to RFP Section 3.6.3(3)(c), the Proponents that are affected by such disqualification must request a change to their Proponent teams to deal with the disqualification. The Sponsors shall review such request, in their sole discretion;
  - (e) In the event that a request to change the Proponent’s team pursuant to RFP Section 3.6.3(3)(d) is rejected by the Sponsors, the Sponsors may, in their sole discretion, disqualify the Proponent from continuing in the RFP Process; and

- (f) In making the determination contemplated in RFP Section 3.6.3(3)(e), the Sponsors may elect, in their sole discretion, to allow the Impacted Participant that is the acquirer to continue in the RFP Process.

For clarity, RFP Section 3.6.3 does not apply where the change in Control involves Proponent Team Members of two Proponent teams (and does not involve any Prime Team Member of any Proponent team).

### **3.7 Addenda/Changes to the RFP Documents**

- (1) Subject to Section 3.1(2), the Sponsors may, in their sole discretion, amend or supplement the RFP Documents at any time. The Sponsors shall issue changes to the RFP Documents by Addenda only. No other statement, whether oral or written, made by the Sponsors or the Sponsors' Advisors, employees or representatives, including, for clarity, the Contact Person, or any other person, shall amend the RFP Documents. The approximate final date that the Sponsors will issue an Addendum in respect of the Project Agreement is set out in the Timetable.
- (2) The Proponent is solely responsible to ensure that it has received all Addenda issued by the Sponsors. Proponents may, in writing, seek confirmation of the number of Addenda issued under this RFP from the Contact Person.
- (3) The Sponsors shall issue Addenda by placing them in the AWARD Data Room and notifying the Proponents' Representatives by e-mail that an Addendum has been placed in the AWARD Data Room.
- (4) Any reference to any one or all of the RFP Documents in the RFP Documents includes any amendments to the RFP Documents made in accordance with this RFP Section 3.7.

### **3.8 Freedom of Information, Confidentiality and Copyright Matters**

#### **3.8.1 Freedom of Information and Protection of Privacy Act**

- (1) Proponents are advised that the Sponsors may be required to disclose the RFP Documents and a part or parts of any Proposal pursuant to the *Freedom of Information and Protection of Privacy Act* (Ontario) ("FIPPA").
- (2) Proponents are also advised that FIPPA does provide protection for confidential and proprietary business information. Proponents are strongly advised to consult their own legal Advisors as to the appropriate way in which confidential or proprietary business information should be marked as such in their Proposals.
- (3) Subject to the provisions of FIPPA, the Sponsors will use reasonable commercial efforts to safeguard the confidentiality of any information identified by the Proponent as confidential but shall not be liable in any way whatsoever to any Proponent or Proponent Team Member if such information is disclosed based on an order or decision of the Information and Privacy Commissioner or otherwise as required under Applicable Law.

#### **3.8.2 Confidentiality Agreements**

- (1) No later than five days after a request by the Sponsors, the Proponent shall cause,

- (a) each of its employees, representatives and Advisors; and
  - (b) its Proponent Team Members and each of their employees, representatives and Advisors,
- who are in receipt of or will receive Confidential Information, to execute and deliver to the Sponsors a confidentiality agreement in a form prescribed by and with terms and conditions acceptable to the Sponsors, in their sole discretion.

### 3.8.3 Confidential Information

- (1) For the purpose of this RFP Process, “**Confidential Information**” means all material, data, information or any item in any form, whether oral or written, including in electronic or hard-copy format, supplied by, obtained from or otherwise provided by the Sponsors or the Government of Ontario in connection with the RFP Process, the RFP Documents or the Project, whether supplied, obtained from or provided before or after the RFP Process.
- (2) The Proponent agrees that all Confidential Information:
  - (a) shall remain the sole property of the Government of Ontario or the Sponsors, as applicable, and the Proponent shall treat it as confidential;
  - (b) shall not be used by the Proponent for any purpose other than developing and submitting a Proposal in response to this RFP Process or the performance of any subsequent agreement with the Signing Parties relating to the Project;
  - (c) shall not be disclosed by the Proponent to any person who is not involved in the Proponent’s preparation of its Proposal or the performance of any subsequent agreement with the Signing Parties relating to the Project, without prior written consent of the Sponsors or the Government of Ontario, as applicable;
  - (d) shall not be used in any way detrimental to the Sponsors or the Government of Ontario; and
  - (e) if requested by the Sponsors, shall be returned by the Proponents to the Sponsors no later than 10 days after that request.
- (3) Each Proponent shall be responsible for any breach of the provisions of this RFP Section 3.8.3 by any person to whom it discloses the Confidential Information including, for greater clarity, the Proponent’s employees, representatives and Advisors and the Proponent Team Members and their employees, representatives and Advisors. Each Proponent shall indemnify each of the Sponsors, the Government of Ontario and each of their related entities and each of their respective directors, officers, consultants, employees, agents and representatives and save each of them fully harmless from and against any and all loss, cost, damage, expense, fine, suit, claim, penalty, demand, action, obligation and liability of any kind or nature (including, without limitation, professional fees on a full indemnity basis) suffered or incurred by any of them arising as a result of or in connection with any breach of any of the provisions of this RFP Section 3.8.3 by the Proponent or by any person to whom the Proponent has disclosed the Confidential Information. Each Proponent agrees that the Sponsors act as trustee for each of their related entities and the Government of Ontario and each of their respective directors, officers, consultants, employees, agents and representatives with respect to all rights contemplated hereunder arising in favour of a

related entity or the Government of Ontario or any of their respective directors, officers, consultants, employees, agents or representatives and that the Sponsors have agreed to accept such trust and hold and enforce such rights on behalf of each related entity or the Government of Ontario and each of their respective directors, officers, consultants, employees, agents and representatives.

- (4) Each Proponent acknowledges and agrees that a breach of the provisions of this RFP Section 3.8.3 would cause the Sponsors, the Government of Ontario and their related entities to suffer loss that could not be adequately compensated by damages, and that the Sponsors, the Government of Ontario and any of their related entities may, in addition to any other remedy or relief, enforce any of the provisions of this RFP Section 3.8.3 upon application to a court of competent jurisdiction without proof of actual damage to the Sponsors, the Government of Ontario or any of their related entities.
- (5) Notwithstanding anything else to the contrary in this RFP, the provisions of this RFP Section 3.8.3 shall survive any cancellation of this RFP Process and the conclusion of the RFP Process and, for greater clarity, shall be legally binding on all Prequalified Parties, whether or not they submit a Proposal.
- (6) The confidentiality obligations of the Proponent shall not apply to any information which falls within the following exceptions:
  - (a) information that is lawfully in the public domain at the time of first disclosure to the Proponent, or which, after disclosure to the Proponent, becomes part of the public domain other than by a breach of the Proponent's confidentiality obligations or by any act or fault of the Proponent;
  - (b) information which was in the Proponent's possession prior to its disclosure to the Proponent by the Sponsors, and provided that it was not acquired by the Proponent under an obligation of confidence; or
  - (c) information which was lawfully obtained by the Proponent from a third party without restriction of disclosure, provided such third party was at the time of disclosure under no obligation of secrecy with respect to such information.

#### **3.8.4 Copyright and Use of Information in Proposals**

- (1) The Sponsors' rights, as set out in this RFP Section 3.8.4, to the Proposal and all Proposal Information submitted by the Proponent during the RFP Process shall be granted to the Sponsors as follows:
  - (a) if a Proposal Submission Fee is offered in accordance with RFP Section 10.3.2:
    - (i) for unsuccessful Proponents, upon payment of the Proposal Submission Fee Payment described in RFP Section 10.3.2(1)(b)(i); and
    - (ii) for the Preferred Proponent, upon Commercial Close;
  - (b) if the Project is cancelled and a Break Fee is offered in accordance with RFP Section 10.3.3, upon payment of the Break Fee; or



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- (c) if RFP Sections 3.8.4(1)(a) and 3.8.4(1)(b) do not apply, upon submission of the Proposal.
- (2) Proponents shall not use or incorporate into their Proposals any concepts, products or processes which are subject to copyright, patents, trademarks or other intellectual property rights of third parties unless Proponents have, or will procure through licensing without cost to the Sponsors, the right to use and employ such concepts, products and processes in and for the Project.
- (3) All requirements, designs, documents, plans and information supplied by the Sponsors to the Proponents in connection with this RFP are and shall remain the property of the Sponsors. Upon request of the Sponsors, the Proponents must return all such designs, documents, plans and information (and any copies thereof in any format or medium created by or on behalf of the Proponent) to the Sponsors.
- (4) The Proponent shall grant to the Sponsors and Her Majesty the Queen in Right of Ontario a non-exclusive, perpetual, irrevocable, world-wide, fully paid and royalty free license (fully assignable without the consent of the Proponent and with the right to sub-license without the consent of the Proponent) to use the Proposal Information (the “**Proposal Information Licence**”). Without limiting the foregoing, the Proposal Information Licence shall include the right to modify the Proposal Information, and, where applicable, to use it, or any modified form of it, anywhere in the world. Under no circumstances shall the Proponent, except Project Co (as defined in the Project Agreement) in relation to this Project, be liable to the Sponsors, Her Majesty the Queen in Right of Ontario or to any other person or entity for any damages, losses, costs, expenses, claims or actions whatsoever arising directly or indirectly from the use of the Proposal Information pursuant to the Proposal Information Licence.
- (5) For the purpose of this RFP Section 3.8.4, “**Proposal Information**” includes:
- (a) all information contained in a Proposal or which is disclosed by or through a Proponent to the Sponsors during the evaluation of Proposals or during the process of executing any Project Agreement; and
- (b) any and all ideas, concepts, products, alternatives, processes, recommendations and suggestions developed by or through a Proponent and revealed to or discovered by the Sponsors, including any and all those which may be connected in any way to the preparation, submission, review or negotiation of any Proposal or the Project Agreement.
- (6) Proponents shall ensure that all intellectual property rights associated with any and all of the Proposal Information (including copyright and moral rights but excluding patent rights) provide for and give Infrastructure Ontario, the Client and Her Majesty the Queen in Right of Ontario the rights set out in this RFP Section 3.8.4. It is expressly understood and agreed that any actual or purported restriction in the future on the ability of Infrastructure Ontario, the Client or Her Majesty the Queen in Right of Ontario to use any of the Proposal Information, or anything else obtained by or through Proponents, shall be absolutely null and void and unenforceable as against Infrastructure Ontario, the Client, Her Majesty the Queen in Right of Ontario and each of their respective Advisors, and that the provisions of this RFP Section 3.8.4 shall take precedence and govern.

**3.8.5 Open Data Directive**

- (1) Proponents acknowledge that the RFP Documents and a part or parts of any Proposal are subject to the Open Data Directive and that the Ontario ministries and agencies are required to disclose or publish certain data in accordance with the Open Data Directive.

**3.8.6 Disclosure of Parts of Proposals Relating to New Third Party Infrastructure**

- (1) Proponents acknowledge that the Sponsors may, at any time following the Technical Submission Deadline, disclose any part or parts of a Proposal relating to one or more components of the New Third Party Infrastructure to a person who could or will have a future ownership interest in, or another legal right to, such New Third Party Infrastructure.

**3.9 Conflict of Interest and Ineligible Persons****3.9.1 Conflict of Interest**

- (1) Proponents and Proponent Team Members and each of their Advisors shall disclose, in their Proposal Submission Forms and the Proponent Team Member Declaration (in respect of Proponent Team Members), all perceived, potential and actual Conflicts of Interest. Proponents are advised to review the “Metrolinx Consultant Conflict of Interest and Unfair Advantage Guidance Document” posted in the E-Builder Data Room and ensure that all Proponent Advisors, as applicable, have complied with the requirements of these guidelines and with any instructions from the Sponsors arising from the application of these guidelines. For clarity, Proponents have an ongoing obligation to comply with this RFP Section 3.9.1 in addition to complying with the Metrolinx Consultant Conflict of Interest and Unfair Advantage Guidance Document.
- (2) If a Proponent, a Proponent Team Member or any of their respective Advisors, prior to or following submission of the Proponent’s Proposal, discovers any perceived, potential or actual Conflict of Interest, the Proponent shall promptly disclose the perceived, potential or actual Conflict of Interest to the Sponsors in a written statement to the Contact Person.
- (3) At the request of the Sponsors, the Proponent shall provide the Sponsors with the Proponent’s proposed means to mitigate and minimize to the greatest extent practicable any perceived, potential or actual Conflict of Interest. The Proponent shall submit any additional information to the Sponsors that the Sponsors consider necessary to properly assess the perceived, potential or actual Conflict of Interest. The Sponsors are not obliged to request a Proponent to propose means to mitigate any perceived, potential or actual Conflict of Interest.
- (4) The Sponsors may, in their sole discretion,
  - (a) exclude any Proponent Team Member or Proponent Advisor on the grounds of a perceived, potential or actual Conflict of Interest; or
  - (b) disqualify a Proponent on the grounds of a perceived, potential or actual Conflict of Interest.

The final determination of whether a perceived, potential or actual Conflict of Interest exists shall be made by the Sponsors in their sole discretion.

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- (5) Without limiting the generality of RFP Sections 3.9.1(4) or 3.9.1(6), the Sponsors may, in their sole discretion, require the Proponent, Proponent Team Member or a Proponent’s Advisor to substitute a new person or entity for the person or entity giving rise to the perceived, potential or actual Conflict of Interest.
- (6) The Sponsors may, in their sole discretion, waive any and all perceived, potential or actual Conflicts of Interest of Proponents or Proponent Team Members, or any of their respective Advisors. A waiver may be upon such terms and conditions as the Sponsors, in their sole discretion, require to satisfy themselves that the perceived, potential or actual Conflict of Interest has been appropriately managed, mitigated and minimized, including requiring the Proponent to put into place such policies, procedures, measures and other safeguards as may be required by and be acceptable to the Sponsors, in their sole discretion, to manage, mitigate and minimize the impact of such perceived, potential or actual Conflict of Interest.
- (7) For the purposes of this RFP Process, “**Conflict of Interest**” includes any situation or circumstance where a Proponent, any Proponent Team Member, any Proponent Advisor or any of the employees of a Proponent, Proponent Team Member or Proponent Advisor engaged in the development or oversight of development of the Proponent’s Proposal (including for such employees in their personal capacities):
- (a) has other commitments, relationships or financial interests or involvement in any litigation or proceeding that:
    - (i) could or could be seen to exercise an improper influence over the objective, unbiased and impartial exercise of the independent judgment by any personnel of the Sponsors or their Advisors; or
    - (ii) could or could be seen to compromise, impair or be incompatible with the effective performance of a Proponent’s obligations under the Project Agreement if that Proponent was determined to be the Preferred Proponent under the RFP Process;
  - (b) has contractual or other obligations to Infrastructure Ontario or the Client that could or could be seen to have been compromised or otherwise impaired as a result of its participation in the RFP Process or the Project; or
  - (c) has knowledge of confidential information (other than Confidential Information) that,
    - (i) has been made available to the Proponent, any Proponent Team Member or any Proponent Advisor by the Client or Infrastructure Ontario;
    - (ii) is of strategic and/or material relevance to the RFP Process or to the Project; and
    - (iii) is not available to other Proponents and that could or could be seen to give the Proponent an unfair competitive advantage.

### 3.9.2 Ineligible Persons

- (1) As a result of their involvement in the Project, the persons named as “Ineligible Persons” in the RFP Data Sheet, together with any persons who formerly worked on behalf of either of the

Sponsors and in the course of such work had knowledge of confidential information of strategic and/or material relevance to the RFP Process or to the Project that is not available to other Proponents and that could or could be seen to give the Proponent an unfair advantage (collectively, “**Ineligible Persons**”), their employees, and any of their subcontractors, advisors, consultants or representatives engaged in respect of this Project and, subject to RFP Sections 3.9.2(3) and 3.9.2(4) any person controlled by, that controls or that is under common control with the Ineligible Persons (each an “**Ineligible Person’s Affiliate**”) are not eligible to participate as a Proponent Team Member, Advisor to the Proponent, Financial Services Provider or Advisor to a Financial Services Provider.

- (2) The Sponsors may amend the Ineligible Persons list in the RFP Data Sheet from time to time during the RFP Process.
- (3) An Ineligible Person’s Affiliate may be eligible to participate as a Proponent Team Member, Advisor to the Proponent, Financial Services Provider or Advisor to a Financial Services Provider only after it has obtained a written consent from the Sponsors permitting it to participate as a Proponent Team Member, Advisor to the Proponent, Financial Services Provider or Advisor to a Financial Services Provider. To obtain consent for an Ineligible Person’s Affiliate to participate as a Proponent Team Member, Advisor to the Proponent, Financial Services Provider or Advisor to a Financial Services Provider, the Proponent must submit a request for consent to the Contact Person that includes the following information:
  - (a) the full legal name of the Ineligible Person’s Affiliate that the Proponent wishes to include on its team or as a Proponent Team Member, Advisor to the Proponent, Financial Services Provider or Advisor to a Financial Services Provider;
  - (b) information regarding the Ineligible Person’s Affiliate’s relationship to the Ineligible Person listed in the RFP Data Sheet; and
  - (c) a description of the policies and procedures that will be put in place to manage, mitigate or minimize the impact of any perceived, potential, or actual Conflict of Interest with respect to the Ineligible Person’s Affiliate.
- (4) Upon the Contact Person’s receipt of a Proponent’s properly completed request for consent in accordance with RFP Section 3.9.2(3), the Sponsors shall, in their sole discretion, make a determination as to whether they consider there to be a perceived, potential or actual Conflict of Interest and whether the impact of such perceived, potential or actual Conflict of Interest can be appropriately managed, mitigated or minimized. The Proponent shall be notified of the Sponsors’ decision to consent by means of a letter setting out the nature of the consent and the management, mitigation or minimization measures required as a condition of consent. If the Ineligible Person’s Affiliate is considered to have a perceived, potential or actual Conflict of Interest, the impact of which cannot be properly managed, mitigated or minimized and the Sponsors do not consent to the request, the Sponsors shall add the Ineligible Person’s Affiliate to the Ineligible Persons list by Addendum.

### 3.9.3 Conflict of Interest Screening List

- (1) Proponents shall deliver to the Contact Person, no later than the deadline set out in the Timetable and in the form prescribed by Schedule 5 to this RFP, the list of Identified Proponent Parties and other significant individuals having involvement in the preparation and/or oversight of the

preparation of the Proposal, which list shall be used by the Sponsors in their assessment of the presence of a perceived, potential or actual Conflict of Interest involving any Proponent, Identified Proponent Party or any employee or advisor of the Sponsors in respect of the Project.

### **3.9.4 Special Rules for Legacy O/M Contractors**

- (1) Special rules regarding Proponent Team Members that are Legacy O/M Contractors are set out in the RFP Data Sheet.

### **3.9.5 Special Rules for Utility Subcontractors**

- (1) Special rules regarding Utility Subcontractors are set out in the RFP Data Sheet.

### **3.9.6 Special Rules for New Fleet Providers and Signalling Works Providers**

- (1) Special rules regarding the Proponents' New Fleet Providers and Signalling Works Providers are set out in the RFP Data Sheet.

### **3.10 Proponent Costs**

- (1) The Proponent and the Proponent Team Members shall bear all costs and expenses incurred by them relating to any aspect of their participation in this RFP Process, including all costs and expenses related to the Proponent's involvement in:
  - (a) the preparation, presentation and submission of its Proposal;
  - (b) attendance at any Proponents Meeting, Commercially Confidential Meeting or any other meeting with the Sponsors;
  - (c) due diligence and information gathering processes;
  - (d) Proponent Visits and Inspections;
  - (e) preparation of responses to questions or requests for information from the Sponsors;
  - (f) preparation of the Proponent's own RFIs during the clarification process; and
  - (g) negotiations.

### **3.11 Insurance and Workers Compensation**

#### **3.11.1 Insurance Required during the RFP Process**

- (1) During the RFP Process, the Proponent is required to obtain, and to cause all Proponent Team Members and other persons listed in this RFP Section 3.11.1(1) to obtain, and at all times keep and maintain in force the insurance as set out in RFP Sections 3.11.1(1)(a) and 3.11.1(1)(b), whenever the Proponent, a Proponent Team Member, or any of their respective directors, officers, employees, consultants, Advisors, agents or representatives are present at the Lands, existing Metrolinx Infrastructure, existing Metrolinx facilities, or at any facilities or premises of the Sponsors for any purpose whatsoever:

- (a) Commercial/Comprehensive General Liability insurance, having an inclusive limit of not less than \$5,000,000 for each occurrence or accident and covering all sums which the Proponent, a Proponent Team Member or any other persons listed in the introductory language of RFP Section 3.11.1(1) may become legally obligated to pay for damages as a result of bodily injury (including death at any time resulting there from) sustained by any person or persons or because of damage to, destruction of, or loss of use of property caused by an occurrence or accident arising out of any operations or activities carried out in connection with this RFP or RFP Process. The policy or policies shall include as insureds or additional insureds each of Her Majesty the Queen in Right of Ontario, MOI, Infrastructure Ontario or the Client (and each of their respective directors, officers, employees, legislators, members, officials, consultants and agents), and an endorsement specifying that the policy shall be primary and without right of contribution from any insurance otherwise maintained by Infrastructure Ontario, Her Majesty the Queen in Right of Ontario, MOI, MTO and the Client; and
  - (b) Motor Vehicle Liability insurance, in the amount of \$2,000,000 per accident, for vehicles used by Proponents or Proponent Team Members (or their respective directors, officers, employees, consultants, Advisors and agents) while on or at the Metrolinx Lands or Existing Third Party Infrastructure or on or at any facilities or premises of the Sponsors.
- (2) As a condition of allowing access to the Lands, Existing Third Party Infrastructure or to the facilities or premises of the Sponsors, the Sponsors may, in their sole discretion, require Proponents to provide evidence acceptable to the Sponsors that the insurance required by RFP Sections 3.11.1(1)(a) and 3.11.1(1)(b) is in place.
- (3) If a Proponent proposes to perform any investigations at Lands, existing Metrolinx Infrastructure, existing Metrolinx facilities, or at any facilities or premises of the Sponsors, the risk related to which may not be fully insured under the policies set out in RFP Section 3.11.1(1)(a) and 3.11.1(1)(b), the Sponsors may, in their sole discretion, require the Proponent, at its own cost and expense, to obtain insurance additional to that specified in RFP Sections 3.11.1(1)(a) and 3.11.1(1)(b).
- (4) All insurance policies required to be obtained by Proponents shall provide that the insurance shall not be cancelled, reduced, restricted, modified or changed in any way without the insurer giving at least 30 days prior written notice to the Sponsors.

### **3.11.2 Workplace Safety during the RFP Process**

- (1) As a condition of allowing access to the Lands, existing Metrolinx Infrastructure, existing Metrolinx facilities, or at any facilities or premises of the Sponsors each of the Sponsors may, in its sole discretion, require Proponents to provide evidence acceptable to the Sponsors that the Proponent and its Proponent Team Members are registered with the Workplace Safety Insurance Board of Ontario, if such registration is required under Applicable Law, or, if such registration is not required under Applicable Law, to provide evidence acceptable to it that the Proponent and its Proponent Team Members have employer's liability insurance in amounts and on terms and conditions acceptable to it.

### 3.11.3 Infrastructure Ontario Construction Insurance Program

- (1) Infrastructure Ontario may determine that certain construction insurance to be provided during the Works phase under the Project Agreement will be obtained under the Infrastructure Ontario Construction Insurance Program (“**IOCIP**”). If a Project has been designated by Infrastructure Ontario in the RFP Data Sheet to proceed under IOCIP, a “User Guide” will be posted as Background Information. The User Guide includes the form of confidentiality agreement that must be entered into between a Proponent and the IOCIP Broker of Record and the forms of applications to be completed by a Proponent and submitted to the IOCIP Broker of Record for the Works phase construction insurance.

### 3.12 Property Request Submissions and Other Property Rules

- (1) The Proponents shall submit to the Contact Person their requests relating to existing and additional properties in accordance with the instructions set out in the RFP Data Sheet (each, a “**Property Request Submission**”) no later than the deadline for Property Request Submissions set out in the Timetable.
- (2) The RFP Data Sheet sets out rules for how the Sponsors intend to deal with Property Request Submissions and other rules with respect to the Metrolinx Lands, the Optional Lands, the Lands and any properties adjacent thereto.

### 3.13 Utility Work

- (1) If there are any special rules or processes that apply with respect to work to be carried out by Project Co in respect of utilities, such rules or processes will be set out in the RFP Data Sheet.

### 3.14 Canada Infrastructure Bank

- (1) Proponents are advised that the Canada Infrastructure Bank (“**CIB**”) will establish a CIB team to participate as a special participant (the “**Special Participant Team**”) in the RFP Process during the special participant period. The special participant period will commence on the date of issuance of the first version of the Project Agreement (whether or not all Schedules to the Project Agreement are issued on that date) and will terminate on the last day for the issuance of Addenda in the RFP Process (as set out in the Timetable) (the “**Special Participant Period**”).
- (2) The Special Participant Team is obliged to comply with the requirements of the RFP Documents and will,
  - (a) receive all documents issued by the Sponsors at the same time as Proponents;
  - (b) have access to the Data Room(s) in the same fashion as Proponents;
  - (c) be permitted to submit RFIs and Commercially Confidential RFIs;
  - (d) assist the Sponsors in in developing responses to Proponent RFIs that relate to the CIB terms and conditions or documents;

- (e) be permitted to comment on the issued RFP Documents, and other documents issued to Proponents by the Sponsors, including providing comments on a commercially confidential basis in accordance with the requirements of the RFP Documents;
  - (f) participate in that portion of Commercially Confidential Meetings related to input on the CIB terms and conditions or documents;
  - (g) in the Sponsors' discretion, participate in ad hoc CCMs convened by the Sponsors in accordance with the provisions of the RFP Documents; and
  - (h) receive and respond to, via the Sponsors, finance-related risk allocation comments made by Proponents (without attribution to the Proponent who made the comment).
- (3) On the termination of the Special Participant Period, CIB's status as a special participant will terminate (subject to RFP Section 3.14(4)) and CIB will assign new CIB teams to assist and interact with each Proponent team (each a "**CIB Representative Team**"). The CIB Representative Teams will be obliged to comply with the requirements of the RFP Documents and shall be subject to the following:
- (a) CIB will put ethical walls in place between each CIB Representative Team;
  - (b) CIB will put ethical walls in place between the Special Participant Team and the CIB Representative Teams;
  - (c) Each CIB Representative Team shall work directly with its assigned Proponent team to review the usage of the CIB Products, due diligence the Proponent's Financial Submissions pursuant to RFP Section 3.14(3)(e) and provide an investment commitment prior to RFP Submission Deadline;
  - (d) If a CIB Representative Team,
    - (i) discovers any fatal flaw or concern with the CIB terms and conditions or documents that requires a revision to the CIB template documents; or
    - (ii) a Proponent and the CIB develop a significant conflict such that a no-investment decision from CIB may be imminent,the CIB Representative Team may submit a request to consult with the CIB Management Investment Committee to the Contact Person (a "**Request to Consult**"). The CIB Representative Team shall inform its Proponent team if it submits a Request to Consult but is not obliged to seek the consent of the relevant Proponent to submit the Request to Consult. All consultations between a CIB Representative Team and the CIB Management Investment Committee arising from a Request to Consult shall be attended by the Fairness Monitor; and
  - (e) As agreed between CIB and the Sponsors, while CIB will be permitted carry out an analysis of those components of the Proponents' Financial Submissions required by CIB to conduct its due diligence, CIB will not be involved in the evaluation of Proposals, in whole or in part.



- (4) If a question related to the CIB terms and conditions or documents arises after the end of the Special Participant Period, the Sponsors may, in their sole discretion, consult with the Special Participant Team.

#### **4. PROPOSAL FORM AND CONTENT REQUIREMENTS**

##### **4.1 Format and Content of the Proposal**

- (1) Proponents shall submit Proposals organized in accordance with and in the format set out in Schedules 3 to 8 to this RFP.
- (2) Proponents shall submit Proposals in two parts as follows:
- (a) Part A – Technical Submission consisting of:
- (i) Proposal Submission Form (Technical);
  - (ii) a Proponent Team Member Declaration (Schedule 6 to this RFP);
  - (iii) Certificate of Officer (Schedule 7 to this RFP) for each Proponent Team Member; and
  - (iv) the Technical Submission Information,  
(collectively, the “**Technical Submission**”); and
- (b) Part B – Financial Submission consisting of:
- (i) Proposal Submission Form (Financial);
  - (ii) Price Submission Form (Schedule 8 to this RFP); and
  - (iii) Financial Submission Information,  
(collectively, the “**Financial Submission**”).
- (3) Proponents shall submit each of Parts A and B of their Proposals in accordance with the requirements and instructions set out in Schedules 3 to 8 to this RFP.

#### **5. SUBMISSION, WITHDRAWAL, MODIFICATION OF THE PROPOSAL AND LENDER REQUIREMENTS**

##### **5.1 Submission of Proposal**

- (1) Each Proponent shall submit its Technical Submission on or before the Technical Submission Deadline and its Financial Submission on or before the Financial Submission Deadline. For the purposes of the RFP Process, the determination of whether the Technical Submission or the Financial Submission has been submitted on or before the Technical Submission Deadline or Financial Submission Deadline, as applicable, shall be based on the electronic time and date stamp the Proponent receives from the Electronic Submission and Evaluation System identified in

the RFP Data Sheet. Technical Submissions or Financial Submissions received after the Technical Submission Deadline or Financial Submission Deadline, as applicable, in each case as documented by the electronic time and date stamp, shall be returned unopened to the sender.

- (2) Proponents shall submit their Technical Submissions and their Financial Submissions using only the method set out in the RFP Data Sheet. It is the sole responsibility of the Proponent to ensure that each of the Technical Submission and the Financial Submission is received by Infrastructure Ontario prior to the Technical Submission Deadline or the Financial Submission Deadline, as applicable, and to ensure it receives an electronic time and date stamp receipt from the Electronic Submission and Evaluation System confirming its timely delivery. The Sponsors will not accept a Technical Submission or a Financial Submission delivered by electronic mail.
- (3) Proponents shall provide such number and type of copies of their Technical Submissions and Financial Submissions as specified in Part 3 of Schedule 3 to this RFP.
- (4) If there is any difference whatsoever between the copies of a Technical Submission or Financial Submission and the original electronic copy of the corresponding Technical Submission or Financial Submission submitted through the Electronic Submission and Evaluation System, the original electronic copy of the Technical Submission or Financial Submission submitted through the Electronic Submission and Evaluation System shall govern.

## 5.2 Withdrawal of Proposals

- (1) A Proponent may withdraw its Technical Submission using the Electronic Submission and Evaluation System before the Technical Submission Deadline. The Sponsors will return, unopened, any hard copies or USB copies of a Proposal that has been withdrawn electronically in accordance with this RFP Section 5.2.
- (2) A Proponent may withdraw its Financial Submission using the Electronic Submission and Evaluation System before the Financial Submission Deadline provided that the Proponent resubmits a revised Financial Submission prior to the Financial Submission Deadline.

## 5.3 Amendment of Proposal

- (1) Except as provided in RFP Section 5.5, Proponents may amend their Technical Submissions and Financial Submissions after submission but only if the withdrawn and amended Technical Submission is resubmitted before the Technical Submission Deadline and the withdrawn and amended Financial Submission is resubmitted before the Financial Submission Deadline in accordance with the following:
  - (a) the Proponent shall withdraw its original Technical Submission or Financial Submission by using the Electronic Submission and Evaluation System before the Technical Submission Deadline or Financial Submission Deadline, as applicable; and
  - (b) the Proponent shall submit a revised replacement Technical Submission or Financial Submission in accordance with the RFP Documents and before the Technical Submission Deadline or Financial Submission Deadline, as applicable, in accordance with the requirements of RFP Section 5.1.

**5.4 Proposal Irrevocability**

- (1) Subject to RFP Sections 5.6(1), 5.6(2) and 5.6(3) and subject to RFP Section 5.5 and the Proponent’s right to withdraw a Technical Submission before the Technical Submission Deadline, the Proposals shall be irrevocable and shall remain in effect and open for acceptance for **[180 days]** after the Financial Submission Deadline (the “**Proposal Validity Period**”) or until Financial Close, whichever occurs first.

*[Note to Proponents: The Sponsors are currently reviewing the Proposal Validity Period.]*

**5.5 Credit Spreads and Lenders Commitment Letter**

- (1)
- (a) After the Financial Submission Deadline, the Indicative Credit Spread Benchmarks (if applicable) and, subject to RFP Section 5.5(2)(e), the election pursuant to RFP Section 5.5(1)(b) shall not change.
- (b) On the Financial Submission Deadline, each Proponent shall identify in writing to the Sponsors by way of an election:
- (i) which form(s) of lending facility and/or debt financing instruments and investment instrument(s), if any, in respect of which it shall participate in the First Credit Spread Lock-in Date (the “**Credit Spread Election Facilities**”); and
- (ii) which form(s) of lending facility and/or debt financing instruments and investment instrument(s), if any, in respect of which it shall hold, subject to RFP Section 5.5(3.1), Credit Spreads from the Financial Submission Deadline to Financial Close (the “**Held Pricing Facilities**”),
- and such information shall be reflected in the Financial Model.
- (c) In respect of the Credit Spread Election Facilities, a Proponent shall, no later than 10 Business Days prior to the Financial Submission Deadline, provide to the Sponsors for their review and acceptance, in their sole discretion, a formula in writing describing how its Credit Spreads shall move upwards or downwards consistent with the movement in the Indicative Credit Spread Benchmarks and the Sponsors shall confirm in writing to such Proponent whether the Sponsors will accept such formula for the purposes of this RFP Section 5.5. The Sponsors shall confirm whether or not they accept the formula submitted by the Proponent no later than seven Business Days prior to the Financial Submission Deadline. Any formula that is accepted by the Sponsors may be used by the Proponent and the Proponent’s Lenders to explain (A) why the movement, if any, in the Indicative Credit Spread Benchmarks is or is not sufficient to require a change to the Credit Spreads, and (B) how the change, or lack thereof, to the Credit Spreads is consistent with the movement, if any, of the Indicative Credit Spread Benchmarks. Where the formula is not accepted, the provisions of this RFP Section 5.5 shall apply as if any such formula had not been provided to the Sponsors by the Proponent.
- (2) Each Proponent that has provided notification pursuant to RFP Section 5.5(1)(b)(i) shall, prior to identification of the Preferred Proponent under RFP Section 8.1 and before 12:00:00 p.m. on the

first Credit Spread lock-in date established by the Sponsors in accordance with this RFP (the “**First Credit Spread Lock-in Date**”) confirm or change, in respect of the Credit Spread Election Facilities, the Credit Spreads set out in the Proponent’s Financial Submission, in accordance with the following process:

- (a) the Sponsors shall provide at least seven calendar days prior written notice to the Proponents of the Sponsors’ establishment of the First Credit Spread Lock-in Date and provided that the Sponsors may revoke their notice and issue a replacement notice in their sole discretion;
- (b) the Proponent shall, no later than the First Credit Spread Lock-in Date, advise the Sponsors of its decision to either confirm or change its Credit Spreads in accordance with the following:
  - (i) if there has been upward or downward movement in the Indicative Credit Spread Benchmarks sufficient to require a change to its Credit Spreads on or before the First Credit Spread Lock-in Date, the Proponent shall change its Credit Spreads by submitting to the Sponsors:
    - (A) an updated Financial Model that has been,
      - (I) revised only to reflect the Proponent’s changes to its Credit Spreads; and
      - (II) optimized in accordance with the procedure outlined in the Financial Submission Requirements found in **[Section 6 of Section B of Part 2 of Schedule 3]** to this RFP.

For greater clarity, no changes shall be made to the Financial Model other than to change the Credit Spreads and any resulting changes from the re-optimization of the Financial Model to reflect the revised Credit Spreads;

- (B) an amended Price Submission Form and Summary of Proposal Cost Form revised only to reflect the Proponent’s changes to its Credit Spreads;
- (C) a written explanation and, where applicable, calculations from the Proponent demonstrating:
  - (I) why the upward or downward movement in the Indicative Credit Spread Benchmarks from the Financial Submission Deadline to the First Credit Spread Lock-in Date is sufficient to require a change to the Credit Spreads; and
  - (II) that the change to the Credit Spreads is consistent with the movement of the Indicative Credit Spread Benchmarks of the Proponent from the Financial Submission Deadline to the First Credit Spread Lock-in Date.

For greater clarity, the written explanation shall be supported by facts, justifications and analysis of relevant factors such as new issue spreads, credit default swap spreads, and/or other publicly verifiable spread indices, as applicable. The Sponsors may reject the submission if the calculation related to the movement in the Indicative Credit Spread Benchmarks does not reflect, in the Sponsors' sole discretion, accurate market pricing levels for the relevant instruments included in the Indicative Credit Spread Benchmarks;

- (D) a written explanation and, where applicable, calculations prepared and executed by the Proponent's Lenders demonstrating:
  - (I) why the upward or downward movement in the Indicative Credit Spread Benchmarks from the Financial Submission Deadline to the First Credit Spread Lock-in Date is sufficient to require a change to the Credit Spreads; and
  - (II) that the change to the Credit Spreads is consistent with the movement of the Indicative Credit Spread Benchmarks of the Proponent from the Financial Submission Deadline to the First Credit Spread Lock-in Date.

For greater clarity, the written explanation shall be supported by facts, justifications and analysis of relevant factors such as new issue spreads, credit default swap spreads, and/or other publicly verifiable spread indices, as applicable. The Sponsors may reject the submission if the calculation related to the movement in the Indicative Credit Spread Benchmarks does not reflect, in the Sponsors' sole discretion, accurate market pricing levels for the relevant instruments included in the Indicative Credit Spread Benchmarks; and

- (E) written confirmation that the Proponent has not changed any variables in the Financial Model or made any revisions to the Financial Submission except for the Credit Spreads and any resulting changes from the re-optimization of the Financial Model to reflect the revised Credit Spreads;
- (ii) if there has not been upward or downward movement in the Indicative Credit Spread Benchmarks sufficient to require a change to its Credit Spreads, on or before the First Credit Spread Lock-in Date, the Proponent shall not change its Credit Spreads and shall submit to the Sponsors:
  - (A) a written explanation and, where applicable, calculations from the Proponent demonstrating:
    - (I) why the movement, if any, in the Indicative Credit Spread Benchmarks from the Financial Submission Deadline to the First Credit Spread Lock-in Date is not sufficient to require a change to the Credit Spreads; and
    - (II) that maintaining the Credit Spreads as submitted on the Financial Submission Deadline is consistent with the movement, if any, in the Indicative Credit Spread Benchmarks of the Proponent from the Financial Submission Deadline to the First Credit Spread Lock-in Date.

For greater clarity, the written explanation shall be supported by facts, justifications and analysis of relevant factors such as new issue spreads, credit default swap spreads, and/or other publicly verifiable spread indices, as applicable. The Sponsors may reject the submission if the calculation related to the movement in the Indicative Credit Spread Benchmarks does not reflect, in the Sponsors' sole discretion, accurate market pricing levels for the relevant instruments included in the Indicative Credit Spread Benchmarks; and

- (B) a written explanation and, where applicable, calculations prepared and executed by the Proponent's Lenders demonstrating:
  - (I) why the movement, if any, in the Indicative Credit Spread Benchmarks from the Financial Submission Deadline to the First Credit Spread Lock-in Date is not sufficient to require a change to the Credit Spreads; and
  - (II) that maintaining the Credit Spreads as submitted on the Financial Submission Deadline is consistent with the movement, if any, in the Indicative Credit Spread Benchmarks of the Proponent from the Financial Submission Deadline to the First Credit Spread Lock-in Date.

For greater clarity, the written explanation shall be supported by facts, justifications and analysis of relevant factors such as new issue spreads, credit default swap spreads, and/or other publicly verifiable spread indices, as applicable. The Sponsors may reject the submission if the calculation related to the movement in the Indicative Credit Spread Benchmarks does not reflect, in the Sponsors' sole discretion, accurate market pricing levels for the relevant instruments included in the Indicative Credit Spread Benchmarks; and

- (iii) as of the First Credit Spread Lock-in Date, but subject to RFP Sections 5.5(3) and 5.6(2), the revised or unchanged Credit Spreads, as applicable, and, if applicable, any re-optimization of its Financial Model and any revisions to its Financial Submission provided by the Proponent shall apply until the expiry of the Proposal Validity Period.
- (c) if a Proponent fails to confirm or submit a change to the Credit Spreads in accordance with RFP Section 5.5(2) on or before the First Credit Spread Lock-in Date, the Sponsors may:
  - (i) deem that the Proponent has amended its Credit Spreads to be consistent with the movement of the Indicative Credit Spread Benchmarks of the Proponent from the Financial Submission Deadline to the First Credit Spread Lock-in Date and require the Proponent to submit the information set out in RFP Section 5.5(2)(b)(i), failing which the Sponsors may deem the Proposal materially non-compliant; and/or
  - (ii) deem that the Proponent has made no changes to its Credit Spreads subsequent to the Financial Submission Deadline and require the Proponent to submit the information set out in RFP Section 5.5(2)(b)(ii), failing which the Sponsors may deem the Proposal materially non-compliant; and/or

- (iii) deem the Proposal materially non-compliant;
  - (d) if, in the sole discretion of the Sponsors, the Proponent’s amendment or confirmation of the Credit Spreads under RFP Section 5.5(2) is not consistent with the Indicative Credit Spread Benchmarks, the Sponsors may:
    - (i) require the Proponent to re-submit pursuant to RFP Section 5.5(2)(b); and/or
    - (ii) consider this inconsistency in the evaluation and scoring of the Proponent’s Proposal; and/or
    - (iii) decline to select the Proponent as the Preferred Proponent;
  - (e) on the First Credit Spread Lock-in Date, each Proponent that has confirmed or changed its Credit Spreads in respect of the Credit Spread Election Facilities in accordance with RFP Section 5.5(2) shall identify in writing to the Sponsors by way of an election that, if selected as the Preferred Proponent:
    - (i) which, if any, Credit Spread Election Facilities it shall participate in respect of the Final Credit Spread Lock-in Date (the “**Final Credit Spread Election Facilities**”); and
    - (ii) which, if any, Credit Spread Election Facilities it shall hold Credit Spreads from the First Credit Spread Lock-in Date to Financial Close.
- (3) If the Preferred Proponent has provided notification pursuant to RFP Section 5.5(2)(e)(i), the Preferred Proponent shall, prior to Commercial Close and no later than the date established by the Sponsors as the final Credit Spread lock-in date in accordance with this RFP (the “**Final Credit Spread Lock-in Date**”), further confirm or change, in respect of the Final Credit Spread Election Facilities, the Credit Spreads in its Financial Submission, and as submitted pursuant to RFP Section 5.5(2) in accordance with the following process:
- (a) the Sponsors shall provide at least one (1) Business Day prior written notice to the Preferred Proponent of the Sponsors’ establishment of the Final Credit Spread Lock-in Date and provided the Sponsors may revoke their notice and issue a replacement notice in their sole discretion;
  - (b) the Preferred Proponent shall, no later than the Final Credit Spread Lock-in Date, advise the Sponsors of either a confirmation or change to its Credit Spreads in accordance with the following:
    - (i) if there has been upward or downward movement in the Indicative Credit Spread Benchmarks sufficient to require a change to its Credit Spreads on or before the Final Credit Spread Lock-in Date, the Preferred Proponent shall change its Credit Spreads by submitting to the Sponsors:
      - (A) an updated Financial Model that has been,
        - (I) revised only to reflect the Preferred Proponent’s changes to its Credit Spreads; and

- (II) optimized in accordance with the procedure outlined in the Financial Submission Requirements found in **[Section 6 of Section B of Part 2 of Schedule 3]** to this RFP.

For greater clarity, no changes shall be made to the Financial Model other than to change the Credit Spreads and any resulting changes from the re-optimization of the Financial Model to reflect the revised Credit Spreads;

- (B) an amended Price Submission Form and Summary of Proposal Cost Form revised only to reflect the Preferred Proponent's changes to its Credit Spreads;
- (C) a written explanation and, where applicable, calculations from the Preferred Proponent demonstrating:
  - (I) why the upward or downward movement in the Indicative Credit Spread Benchmarks from the First Credit Spread Lock-in Date to the Final Credit Spread Lock-in Date is sufficient to require a change to the Credit Spreads; and
  - (II) that the change to the Credit Spreads is consistent with the movement of the Indicative Credit Spread Benchmarks of the Preferred Proponent from the First Credit Spread Lock-in Date to the Final Credit Spread Lock-in Date.

For greater clarity, the written explanation shall be supported by facts, justifications and analysis of relevant factors such as new issue spreads, credit default swap spreads, and/or other publicly verifiable spread indices, as applicable. The Sponsors may reject the submission if the calculation related to the movement in the Indicative Credit Spread Benchmarks does not reflect, in the Sponsors' sole discretion, accurate market pricing levels for the relevant instruments included in the Indicative Credit Spread Benchmarks;

- (D) a written explanation and, where applicable, calculations prepared and executed by the Preferred Proponent's Lenders demonstrating:
  - (I) why the upward or downward movement in the Indicative Credit Spread Benchmarks from the First Credit Spread Lock-in Date to the Final Credit Spread Lock-in Date is sufficient to require a change to the Credit Spreads; and
  - (II) that the change to the Credit Spreads is consistent with the movement of the Indicative Credit Spread Benchmarks of the Preferred Proponent from the First Credit Spread Lock-in Date to the Final Credit Spread Lock-in Date.

For greater clarity, the written explanation shall be supported by facts, justifications and analysis of relevant factors such as new issue spreads, credit default swap spreads, and/or other publicly verifiable spread indices, as applicable; and



- (E) written confirmation that the Preferred Proponent has not changed any variables in the Financial Model or made any revisions to the Financial Submission except for the Credit Spreads and any resulting changes from the re-optimization of the Financial Model to reflect the revised Credit Spreads;
- (ii) if there has not been upward or downward movement in the Indicative Credit Spread Benchmarks sufficient to require a change to its Credit Spreads, on or before the Final Credit Spread Lock-in Date, the Preferred Proponent shall not change its Credit Spreads and shall submit to the Sponsors:
  - (A) a written explanation and, where applicable, calculations from the Preferred Proponent demonstrating:
    - (I) why the movement, if any, in the Indicative Credit Spread Benchmarks from the First Credit Spread Lock-in Date to the Final Credit Spread Lock-in Date is not sufficient to require a change to the Credit Spreads; and
    - (II) that maintaining the Credit Spreads as submitted on the First Credit Spread Lock-in Date is consistent with the movement, if any, in the Indicative Credit Spread Benchmarks of the Preferred Proponent from the First Credit Spread Lock-in Date to the Final Credit Spread Lock-in Date.

For greater clarity, the written explanation shall be supported by facts, justifications and analysis of relevant factors such as new issue spreads, credit default swap spreads, and/or other publicly verifiable spread indices, as applicable. The Sponsors may reject the submission if the calculation related to the movement in the Indicative Credit Spread Benchmarks does not reflect, in the Sponsors sole discretion, accurate market pricing levels for the relevant instruments included in the Indicative Credit Spread Benchmarks; and

- (B) a written explanation and, where applicable, calculations prepared and executed by the Preferred Proponent's Lenders demonstrating:
  - (I) why the movement, if any, in the Indicative Credit Spread Benchmarks from the First Credit Spread Lock-in Date to the Final Credit Spread Lock-in Date is not sufficient to require a change to the Credit Spreads; and
  - (II) that maintaining the Credit Spreads as submitted on the First Credit Spread Lock-in Date is consistent with the movement, if any, in the Indicative Credit Spread Benchmarks of the Preferred Proponent from the First Credit Spread Lock-in Date to the Final Credit Spread Lock-in Date.

For greater clarity, the written explanation shall be supported by facts, justifications and analysis of relevant factors such as new issue spreads, credit default swap spreads, and/or other publicly verifiable spread indices, as applicable. The Sponsors may reject the submission if the calculation related to the movement in the Indicative Credit Spread Benchmarks does not reflect,

in the Sponsors' sole discretion, accurate market pricing levels for the relevant instruments included in the Indicative Credit Spread Benchmarks; and

- (iii) as of the Final Credit Spread Lock-in Date, but subject to RFP Section 5.6(2), the revised or unchanged Credit Spreads, as applicable, and, if applicable, any re-optimization of its Financial Model and any revisions to its Financial Submission provided by the Preferred Proponent shall apply until Financial Close; and
- (c) if the Preferred Proponent fails to confirm or submit a change to the Credit Spreads in accordance with RFP Section 5.5(3) on or before the Final Credit Spread Lock-in Date, the Sponsors may:
  - (i) deem that the Preferred Proponent has amended its Credit Spreads:
    - (A) consistent with the movement of the Indicative Credit Spread Benchmarks of the Preferred Proponent from the First Credit Spread Lock-in Date to the Final Credit Spread Lock-in Date; and/or
    - (B) in the case of bonds, to reflect the Clearing Spread set out in RFP Section 5.5(4),  
  
and require the Proponent to submit the information set out in RFP Section 5.5(3)(b)(i) and/or RFP Section 5.5(4); and/or
  - (ii) deem that the Preferred Proponent has made no changes to its Credit Spreads subsequent to the First Credit Spread Lock-in Date and require the Preferred Proponent to submit the explanations set out in RFP Section 5.5(3)(b)(ii).

(3.1) Each Proponent that has provided notification under RFP Section 5.5(1)(b)(ii) or RFP Section 5.5(1)(b)(i) that it intends to provide, respectively, Held Pricing Facilities or Credit Spread Election Facilities may, on the First Credit Spread Lock-in Date only, as applicable (i) reduce the Credit Spreads set out in the Proponent's Financial Submission relating to the Held Pricing Facilities (or any of them), (ii) increase the Credit Spreads set out in the Proponent's Financial Submission relating to Held Pricing Facilities for investment instruments (or any of them), or (iii) redesignate the Credit Spread Election Facilities (or any of them) as Held Pricing Facilities conditional upon the redesignation resulting in a reduction of the Credit Spreads applicable thereto from those set out in the Proponent's Financial Submission, and, in each case, shall submit to the Sponsors on the First Credit Spread Lock-in Date:

- (a) the decreased (or increased, as applicable) Credit Spreads for each of the affected Held Pricing Facilities or Credit Spread Election Facilities and an unconditional confirmation that the decreased (or increased, as applicable) Credit Spreads will remain in effect for the balance of the Proposal Validity Period with respect to the affected Held Pricing Facilities or Credit Spread Election Facilities;
- (b) an updated Financial Model that has been,
  - (i) revised only to reflect the Proponent's decreases (or increases, as applicable) to its Credit Spreads; and

- (ii) optimized in accordance with the procedure outlined in the Financial Submission Requirements found in **[Section 6 of Section B of Part 2 of Schedule 3]** to this RFP.

For greater clarity, no changes shall be made to the Financial Model other than to decrease (or increase, as applicable) the Credit Spreads and any resulting changes from the re-optimization of the Financial Model to reflect the decreased Credit Spreads;

- (c) an amended Price Submission Form and Summary of Proposal Cost Form revised only to reflect the Proponent's decrease(s) (or increase(s), as applicable) to its Credit Spreads; and
- (d) written confirmation that the Proponent has not changed any variables in the Financial Model or made any revisions to the Financial Submission except in respect of the Credit Spreads in accordance with this RFP Section 5.5 and any resulting changes from the re-optimization of the Financial Model to reflect the decreased (or increased, as applicable) Credit Spreads.

(3.2) The Sponsors will evaluate the reasonableness of the Credit Spreads for the Credit Spread Election Facilities submitted by the Proponent and as priced in the Proponent's Financial Submission. If the Sponsors, acting in their sole discretion, do not find such Credit Spreads to be reasonable, the Sponsors may,

- (a) either at the First Credit Spread Lock-in Date or at the Final Credit Spread Lock-in Date, as the case may be, deem that the Proponent has amended such Credit Spreads to be consistent with the movement of the Indicative Credit Spread Benchmarks of the Proponent from the Financial Submission Deadline to the First Credit Spread Lock-In Date and/or from the First Credit Spread Lock-in Date to the Final Credit Spread Lock-in Date; provided, that, if the Sponsors exercise their rights under this RFP Section 5.5 (3.2)(a), any deemed amendments to the Credit Spreads shall be equal to the change in the Indicative Credit Spread Benchmarks over the applicable period of time; or
  - (b) no later than the identification of Preferred Proponent, deem the Proposal materially non-compliant.
- (4) The Preferred Proponent and Lenders (including but not limited to underwriters, mandated lead arrangers and arrangers) acknowledge and agree that if, on the Final Credit Spread Lock-In Date:
- (a) the Clearing Spread for the bonds payable by the Preferred Proponent is less than the Credit Spread derived using Indicative Credit Spread Benchmarks, the full benefit of such lower Clearing Spread will be passed through to Infrastructure Ontario. This Clearing Spread will be reflected in the reduction of the Sponsor Payments payable by Infrastructure Ontario as set out in the Financial Model submitted by the Preferred Proponent prior to Financial Close using the optimization procedure set out in **[Section 6 of Section B of Part 2 of Schedule 3]** to this RFP;

- (b) the Clearing Spread for the bonds payable by the Preferred Proponent is higher than the Credit Spread derived using the Indicative Credit Spread Benchmarks, then the Lenders will be required to provide to Infrastructure Ontario an explanation for such variance between the Clearing Spread and the Credit Spread derived using the Indicative Credit Spread Benchmarks described in this RFP Section 5.5, supported by facts, justifications and analysis of relevant factors. Only if such explanation is accepted by Infrastructure Ontario, acting in its sole discretion, then such higher Credit Spread will be reflected in the Sponsor Payments payable by Infrastructure Ontario as set out in the Financial Model submitted by the Preferred Proponent prior to Financial Close using the optimization procedure set out in [Section 6 of Section B of Part 2 of Schedule 3] to this RFP. If such explanation is not accepted by Infrastructure Ontario, acting in its sole discretion, Infrastructure Ontario may exercise its rights set out in RFP Section 5.5(6) without limiting any other rights under this RFP. If, pursuant to RFP Section 5.5(3.2), the Sponsors have concluded, based on similarly rated transactions or similarly rated comparables, that the Credit Spreads are unreasonable, then the Sponsors shall reject any explanation or justification provided by the Lenders or Preferred Proponent for the upward deviance between the Credit Spread derived using the Indicative Credit Spread Benchmark process and the Clearing Spread in connection with the Final Credit Spread Lock-in Date;
- (c) to provide complete transparency, between the time of selection of the Preferred Proponent and targeted Financial Close, the Preferred Proponent and the Lenders will provide periodic updates to the satisfaction of Infrastructure Ontario in respect of (i) the expected Clearing Spread for the bonds using the Indicative Credit Spread Benchmarks process pursuant to this RFP and (ii) any variances between the expected Clearing Spread for the bonds and the Credit Spread derived using the Indicative Credit Spread Benchmarks process pursuant to this RFP.
- (5) In a written notice given to the Preferred Proponent the Sponsors shall prescribe the date (provided the Sponsors may give a further notice of a revised date in their sole discretion) on which the Preferred Proponent shall submit to the Sponsors a letter, the form and substance of which shall be satisfactory to the Sponsors, acting reasonably, on the letterhead of its Lenders and executed by the Lenders (the “**Lenders Commitment Letter**”) addressed to the Preferred Proponent confirming,
- (a) the Lenders’ funding commitment to provide the financing described in the Financial Submission including as revised under RFP Sections 5.5(2), 5.5(3), 5.5(3.1) or 5.5(4) which, subject to Section 5.5(5)(b), may be subject to such reasonable and customary conditions of the Lenders as agreed to by the Sponsors, acting reasonably;
- (b) that the funding commitment does not contain any material adverse change clause, market flex clause or any other similar condition which explicitly or implicitly makes the funding commitment by the Lenders conditional on the absence of a material adverse change in the market, or if any such conditions were originally applicable that the Lenders have now waived such conditions; and
- (c) that the Lenders accept the Project Agreement without any material change.

Prior to the issuance of the Lenders Commitment Letter, and no later than either the Final Credit Spread Lock-in Date, if applicable, or five Business Days prior to the due date of the Lenders Commitment Letter

as prescribed by the Sponsors pursuant to this RFP Section 5.5(5), the Preferred Proponent shall submit a draft thereof (the “**Draft Lenders Commitment Letter**”) to the Sponsors for review and comment by the Sponsors.

- (6) If (i) in respect of the Final Credit Spread Election Facilities, the amendment or confirmation of the Credit Spreads under RFP Section 5.5(3) are not consistent with the Indicative Credit Spread Benchmarks of the Preferred Proponent, in the sole discretion of the Sponsors, or (ii) in respect of the Final Credit Spread Election Facilities, the written explanations justifying the amendment or confirmation of the Credit Spreads under RFP Section 5.5(3) are not, in the sole discretion of the Sponsors, acceptable to the Sponsors, or (iii) any other of the requirements respecting the amendment or confirmation of the Credit Spreads under RFP Section 5.5(3) have not, in the sole discretion of the Sponsors, been satisfied or complied with, or (iv) the Preferred Proponent’s Lenders have not provided a Lenders Commitment Letter which, in the Sponsors’ sole discretion, satisfies the requirements of RFP Section 5.5(5), then:
- (a) The Sponsors shall, no later than seven Business Days after the Final Credit Spread Lock-In Date or the date of receipt by the Sponsors of the Lenders Commitment Letter, give written notice to the Preferred Proponent setting out the manner in which any of the foregoing requirements of RFP Sections 5.5(3), 5.5(4) or 5.5(5) have not been satisfied or complied with (the “**Rectification Notice**”). The Preferred Proponent shall have seven Business Days following the date of the Rectification Notice to rectify the failure to satisfy the requirements as set out in the Rectification Notice (for greater certainty, including the resubmission of an updated Financial Model that provides for revised Credit Spreads that are consistent with the changes to the Indicative Credit Spread Benchmarks of the Preferred Proponent or the resubmission of the Lenders Commitment Letter) by submitting to the Sponsors a response to the Rectification Notice (the “**Rectification Notice Response**”).
- (b) If the Sponsors, in their sole discretion: (A) are not satisfied with the Rectification Notice Response or with the Draft Lenders Commitment Letter; and/or (B) determine that the NPV of the Preferred Proponent’s Financial Submission as revised by RFP Section 5.5(3) exceeds the budget for the Project; and/or (C) determine that the NPV of the Preferred Proponent’s Financial Submission as revised by RFP Section 5.5(3) changes the overall rank of the Preferred Proponent relative to the other Proponents, the Sponsors may, in their sole discretion and without limitation to any other right under this RFP:
- (i) Request the Second Negotiations Proponent (as referred to in RFP Section 8.1(1)(b)) to confirm or change its Credit Spreads in accordance with RFP Section 5.5(3), and at the same time request the Preferred Proponent to again confirm or change its Credit Spreads in accordance with RFP Section 5.5(3), and based on the results thereof, re-run the evaluation process to determine which of the Preferred Proponent or the Second Negotiations Proponent is then the highest ranked Proponent. If the Second Negotiations Proponent is then the highest ranked Proponent, then the Second Negotiations Proponent shall then become the Preferred Proponent in place of the first selected Preferred Proponent for all purposes of this RFP;
- (ii) Commence negotiations with the Second Negotiations Proponent in accordance with RFP Section 8, including requesting the Second Negotiations Proponent to confirm or change its Credit Spreads in accordance with RFP Section 5.5(3). If

the Second Negotiations Proponent is then the highest ranked Proponent, then the Second Negotiations Proponent shall then become the Preferred Proponent in place of the first selected Preferred Proponent for all purposes of this RFP;

- (iii) Direct the Preferred Proponent to terminate its relationship with its Lenders, and the Sponsors shall conduct, in conjunction with the Preferred Proponent, a competition amongst prospective lenders to become Lenders to the Preferred Proponent following which the Preferred Proponent shall resubmit its Financial Submission to incorporate the financial terms and conditions of the Lenders that are successful in the competition. Based thereon, the Sponsors may, in their sole discretion, continue with the Preferred Proponent in accordance with the provisions of this RFP;
- (iv) Commence separate and distinct but contemporaneous negotiations with the Second Negotiations Proponent and the Preferred Proponent. If the Second Negotiations Proponent is then the highest ranked Proponent then the Second Negotiations Proponent shall then become the Preferred Proponent in place of the first selected Preferred Proponent for all purposes of this RFP; or
- (v) Request the Second Negotiations Proponent and the Preferred Proponent to resubmit their respective Proposals for evaluation under and in accordance with this RFP, and for such purpose shall establish a new Technical Submission Deadline and Financial Submission Deadline.

The Sponsors may, in their sole discretion and for greater clarity, elect to change which of the RFP Section 5.5(6)(b) processes to employ at any time during the application of RFP Section 5.5(6)(b). In the event that the Sponsors have determined to proceed under any of RFP Sections 5.5(6)(b)(i), 5.5(6)(b)(ii) or 5.5(6)(b)(iv), then the provisions of RFP Sections 8.1(2), 8.1(3) and 8.1(4) shall apply to such processes. Without limitation to the foregoing, and in their sole discretion, the Sponsors may, if they are not satisfied with the Rectification Notice Response or the Lenders Commitment Letter, at any time notify the Preferred Proponent in a written notice (the “**Termination Notice**”) that the Preferred Proponent is disqualified and is no longer entitled to participate in the RFP Process. In such latter circumstance, the Sponsors may consider the performance of the Preferred Proponent and the Proponent Team Members of the Preferred Proponent and the fact of the giving of the Termination Notice to the Preferred Proponent in any future requests for qualifications issued by the Sponsors.

- (c) The Sponsors may, in their sole discretion, exercise any of their rights under RFP Section 5.5(6)(b)(i) to 5.5(6)(b)(v) in the event that the Sponsors determine, in their sole discretion, that the Lenders have made any change to the Draft Lenders Commitment Letter or the Lenders Commitment Letter.
- (d) In the sole discretion of the Sponsors, the Letter of Credit provided by the Preferred Proponent in accordance with RFP Section 9.1(2) may be returned to the Preferred Proponent within three days of delivery by the Sponsors of the Termination Notice and/or such Preferred Proponent may be paid the amount, if any, of the Proposal Submission Fee Payment described in RFP Section 10.3.2(1)(b)(i) or the Break Fee under RFP Section

10.3.3. The return of the Letter of Credit and/or the payment of the Proposal Submission Fee Payment described in RFP Section 10.3.2(1)(b)(i) or the Break Fee to such Preferred Proponent shall represent full and final satisfaction of any obligation or liability of the Sponsors and the Government of Ontario to the Preferred Proponent and the Proponent Team Members of the Preferred Proponent in connection with this RFP, and the Sponsors' decision to return the Letter of Credit and/or pay the Proposal Submission Fee Payment described in RFP Section 10.3.2(1)(b)(i) and the Break Fee shall be contingent on the receipt of a waiver, in form and substance satisfactory to the Sponsors, from such Preferred Proponent and the Proponent Team Members of the Preferred Proponent to that effect.

- (7) The Sponsors reserve the right to request and/or approve a change in the financing plan or debt strategy of the Preferred Proponent (for example, fixed or variable rate, the use of synthetics, bank debt or capital market debt) following identification of the Preferred Proponent under RFP Section 8.1 and prior to Financial Close.

## 5.6 Extension of Proposal Validity Period

- (1) If the Sponsors wish to extend the Proposal Validity Period, the Sponsors shall submit a request to extend to those Proponents whose Proposals, in the Sponsors' sole discretion, are still under consideration in the RFP Process. For the purpose of greater clarity, the Sponsors may issue a request to extend the Proposal Validity Period after the Negotiations Proponents or the Preferred Proponent have already been identified. A Proponent may, in its discretion, refuse to extend the Proposal Validity Period in accordance with the following:
- (a) notwithstanding a Proponent's refusal to extend the Proposal Validity Period, that Proponent's Proposal shall continue to be valid in accordance with the original Proposal Validity Period; and
  - (b) if the Sponsors determine that they will be unable to determine the Preferred Proponent or reach Commercial Close prior to the expiration of the original Proposal Validity Period, the Sponsors may discontinue the evaluation or consideration of a Proponent or may discontinue negotiations with a Negotiations Proponent or finalization of a Project Agreement with a Preferred Proponent if that Proponent has refused the Sponsors' request to extend the Proposal Validity Period and may continue the RFP Process with only those Proponents that have agreed to an extension of the Proposal Validity Period.
- (2) In respect of the Preferred Proponent, the Sponsors shall be considered to have accepted the Preferred Proponent's Proposal, including its Financial Submission and its revised Credit Spreads pursuant to RFP Section 5.5 prior to the expiration of the Proposal Validity Period if the Signing Parties and the Preferred Proponent reach Commercial Close prior to the expiration of the Proposal Validity Period (or the extended Proposal Validity Period, if applicable). For greater clarity, the Preferred Proponent shall maintain its prices as set out in its Price Submission Form (as submitted on the Financial Submission Deadline or, if applicable, as amended pursuant to RFP Section 5.5 or during any negotiations process pursuant to RFP Section 5.5(6) or RFP Section 8.1) from Commercial Close until Financial Close, subject only to certain allowable adjustments to the Benchmark Rate(s) on Financial Close as described in Part 2 of Schedule 3 of this RFP.

- (3) Notwithstanding RFP Section 5.6(1), if, during the course of negotiations between a Negotiations Proponent and the Sponsors, the Negotiations Proponent resubmits prices to the Sponsors or agrees to revised terms and conditions of the Project Agreement or the Negotiations Proponent's Proposal prior to the expiration of the Proposal Validity Period, that Negotiations Proponent is deemed to have agreed to an extension of the Proposal Validity Period for the Negotiations Proponent's amended Proposal for a period of 95 days after the date of the Proponent's submission to the Sponsors of the revised prices or revised terms and conditions, as applicable. For clarity, notwithstanding the submission by a Negotiations Proponent or Preferred Proponent of an amended Proposal in accordance with this RFP Section 5.6(3), the Proponent's original Proposal, as amended by the application or by RFP Section 5.5, as applicable, continues to exist in accordance with the original Proposal Validity Period.
- (4) Notwithstanding RFP Sections 5.5 or 5.6(1), 5.6(2) or 5.6(3), the adjustments on Financial Close that are set out in Part 2 of Schedule 3 to this RFP shall remain applicable.

### 5.7 Lender Requirements

- (1) At any time in the RFP Process, Proponents shall not enter into exclusivity arrangements with any Lenders, including prospective Lenders. The Proponent or the Proponent's financial Advisor will be required to confirm in its letter to be delivered under [Section 1.2 of Section E of Part 2 of Schedule 3] of this RFP that the Lenders have not entered into any exclusivity arrangement with the Proponent with respect to the Project. Notwithstanding any other provision of this RFP, but subject to the following proviso, the Lenders may act in the capacity of Lenders for more than one Proponent under this RFP Process provided the Lenders have agreed with each Proponent:
- (a) to establish industry standard confidentiality and conflict of interest screens to ensure that each Proponent is represented by a discrete team of Lender personnel;
  - (b) to prohibit any communication regarding this RFP Process between members of different teams of Lender personnel;
  - (c) to physically separate all documentation under the control of each team of Lender personnel;
  - (d) to keep all computer based information and data discrete and control access to prohibit persons other than on a team of Lender personnel to have access to that Proponent team's information; and
  - (e) that any breaches of such confidentiality requirements are appropriately sanctioned including possible dismissal.
- (2) Lenders participating in a Proposal ("**Participating Lenders**") shall not be Affiliates of any of the Proponent Team Members participating in that Proposal ("**Participating Proponent Team Members**") (other than any other Participating Lender or a financial advisor wholly owned by a Participating Lender) and shall act at all times at arm's length to every other Participating Proponent Team Member (other than any other Participating Lender or a financial advisor wholly owned by a Participating Lender).



## 6. EVALUATION, CLARIFICATION AND VERIFICATION OF PROPOSALS

### 6.1 Evaluation Committee and Advisors

- (1) The Sponsors will establish an evaluation committee (the “**Evaluation Committee**”) for the purpose of evaluating Proposals in accordance with the RFP Documents. The Sponsors, in their sole discretion, will determine the size, structure and composition of the Evaluation Committee and any sub-committees of the Evaluation Committee. The Evaluation Committee may be assisted by and receive advice from any of the Sponsors’ Advisors, and any other employees or representatives of the Sponsors in any manner determined necessary or desirable by the Sponsors.
- (2) If a member of the Evaluation Committee or, if applicable, an evaluation sub-committee becomes unable to continue serving on the Evaluation Committee or evaluation sub-committee before the completion of a step in the evaluation process, the evaluation comments and scores of that individual, in respect of the uncompleted steps in the evaluation process only, shall be ignored. For clarity, if an Evaluation Committee or sub-committee member becomes unable to continue serving on the Evaluation Committee or a sub-committee after the full completion of a step in the evaluation process, the results of the completed steps of the evaluation process are unaffected and remain valid. Whether or not an Evaluation Committee or sub-committee member, in these circumstances, is replaced is in the sole discretion of the Sponsors.

### 6.2 Sponsors’ Clarification and Verification of Proposals

- (1) The Sponsors may:
  - (a) require the Proponent to clarify or verify the contents of its Proposal or any statement made by the Proponent;
  - (b) require the Proponent to submit supplementary documentation clarifying or verifying any matters contained in its Proposal; and
  - (c) seek a Proponent’s acknowledgement of the Sponsors’ interpretation of the Proposal or any part of the Proposal.
- (2) The Sponsors are not obliged to seek clarification or verification of any aspect of a Proposal or any statement by a Proponent, including an ambiguity in a Proposal or in a statement made by a Proponent.
- (3) Any written information received by the Sponsors from a Proponent pursuant to a request for clarification or verification from the Sponsors as part of the RFP Process may, in the Sponsors’ sole discretion, be considered as an integral part of the applicable Proposal.

### 6.3 Determination of Compliance

- (1) For purposes of this RFP, a Proposal is “**non-compliant**” and does not “**comply**” or achieve “**compliance**” with the requirements of the RFP Documents if that Proposal contains a “**Material Deviation**”. A Material Deviation is any failure in a Proposal to conform with any requirement of the RFP Documents that, in the sole discretion of the Sponsors:
  - (a) impedes, in any material way, the ability of the Sponsors to evaluate the Proposal;

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- (b) constitutes an attempt by the Proponent to revise the Sponsors’ or the Proponent’s rights or obligations under the RFP Documents or affects the Sponsors’ ability to enforce the Proponent’s obligations pursuant to the RFP Documents in a way not permitted by this RFP; or
  - (c) constitutes an attempt by the Proponent to revise the Sponsors’ or the Proponent’s rights or obligations under the Project Agreement.
- (2) A requirement in either this RFP or in the Schedules to this RFP that a Proponent “must” or “shall” do anything is not intended to supersede the concepts of “comply”, “compliance” or “Material Deviation” or any other portion of this RFP Section 6.3.
  - (3) Each Proponent acknowledges and agrees that the Sponsors’ evaluation of compliance with the RFP Documents is not an evaluation of absolute compliance and that the Sponsors may waive:
    - (a) any deviation that is not a Material Deviation at any time; and
    - (b) any Material Deviation in accordance with RFP Section 10.2(3).
  - (4) The Sponsors may identify a Material Deviation in a Proposal at any time during the RFP Process (after the Technical Submission Deadline) and, for clarity, at any step during the evaluation process set out in RFP Section 6.5.
  - (5) Subject to RFP Section 6.3(3)(b), if the Sponsors determine that a Proposal is non-compliant in accordance with RFP Section 6.3, the Sponsors may, in their sole discretion and without liability, cost or penalty, declare that the Proposal shall not be given any further consideration and take such action as permitted under RFP Section 7.2. If a declaration by the Sponsors that a Proposal is non-compliant occurs after the scoring of that Proposal has commenced, any scores given to that Proposal shall be declared null and void.

#### **6.4 Non-Compliance Distinguished from Poor Quality**

- (1) A Proposal that contains a poor quality response and/or a failure to conform to a requirement of the RFP Documents shall not be deemed to be non-compliant and such poor quality response and/or failure to conform shall not be deemed to be a Material Deviation unless, and only unless, such poor quality response and/or failure to conform to the requirement of the RFP Documents, in the sole discretion of the Sponsors, meets the definition of a Material Deviation as set out in RFP Section 6.3(1) above.
- (2) A design compliance/conformance or technical compliance/conformance review is only a tool to assist in the evaluation and scoring of Technical Submissions. Notwithstanding the similarity of terminology, the determination of whether a Proposal, in its entirety, is compliant or non-compliant with the requirements of the RFP Documents is not the same as the concept of “design compliance”, “design conformance and/or non-conformance”, “technical compliance”, or “technical conformance and/or non-conformance” or any other assessment of quality made during the evaluation and scoring of a Proposal.
- (3) The quality of a Proposal, an assessment of which is made during the evaluation and scoring of that Proposal and which is separate and distinct from the assessment of the compliance of a

Proposal, may be subject to one or more minimum scoring thresholds in accordance with Part 3 of Schedule 3 to this RFP.

- (4) A Proposal that does not contain any Material Deviations shall not be automatically presumed to pass any applicable minimum scoring threshold set out in Part 3 of Schedule 3 to this RFP. Any assessment of “design compliance”, “design conformance and/or non-conformance”, “technical compliance”, or “technical conformance and/or non-conformance” or any other assessment of quality of a Proposal shall not result in any presumed score for that Proposal.
- (5) The submission of a compliant Proposal that contains a poor quality response and/or any failure by a Proponent to conform with any requirement of the RFP Documents which is not Material Deviation does not derogate from the obligations of the Preferred Proponent pursuant to Section 9.2 of this RFP, or of Project Co under the Project Agreement to bring all aspects of a Proponent’s proposed design, construction, financing, operations or maintenance into conformance with the requirements of the Project Agreement, pursuant to its terms.

## **6.5 Steps in the Evaluation Process**

### **6.5.1 Step 1 – Compliance of Technical Submissions**

- (1) In Step 1 of the evaluation process, the Sponsors will open each Technical Submission and will review the contents of the Technical Submission to assess whether it is in compliance with the terms and conditions of the RFP Documents.
- (2) If the Sponsors identify a Material Deviation in a Technical Submission then, subject to RFP Section 6.3(3)(b), the Sponsors may determine that the Proposal to which the Technical Submission relates is non-compliant in accordance with RFP Section 6.3 and take such action as described in RFP Section 6.3(5).
- (3) In the event that the Sponsors declare a Proposal to be non-compliant and declare that it shall not be further considered before the opening of the Financial Submission, and have not waived such non-compliance in accordance with RFP 6.3(3), the Financial Submission of that Proponent will remain unopened and will not be evaluated. Unopened Financial Submissions will be returned to Proponents at the conclusion of the RFP Process.

### **6.5.2 Step 2 – Review of the Proposal Submission Form (Technical)**

- (1) In Step 2 of the evaluation process, the Sponsors shall review the Proposal Submission Form (Technical) to:
  - (a) ensure that there have been no changes to the Proponent or Proponent Team Members from their Prequalification Submissions, except for changes that have been approved by the Sponsors in accordance with RFP Section 3.6; and
  - (b) assess the Conflict of Interest and Confidential Information sections of the Proposal Submission Form (Technical).

**6.5.3 Step 3 – Review and Scoring of the Technical Submissions**

- (1) In Step 3 of the evaluation process, the Technical Submissions will be evaluated and scored in accordance with Parts 1 and 3 of Schedule 3 to this RFP.
- (2) If a Proponent fails to achieve any of the minimum scores as set out in the applicable provisions of **[Part B (Proposal Evaluation) of Part 3 of Schedule 3]** to this RFP, then, as part of Step 3 of the evaluation process and pursuant to and in accordance with such provisions, the Sponsors may, in their sole discretion, determine whether that Proponent's Proposal will continue to be considered in the RFP Process.
- (3) In the event that a Proponent's Technical Submission fails to achieve any of the minimum scores as set out in the applicable provisions of **[Part B (Proposal Evaluation) of Part 3 of Schedule 3]** to this RFP and the Sponsors do not exercise their discretionary rights set out in Section 6.5.3(2), the Proponent's Proposal will not continue to Step 4 of the evaluation process. Additionally, the Financial Submission of that Proponent will remain unopened and will not be evaluated. Unopened Financial Submissions will be returned to Proponents at the conclusion of the RFP Process.

**6.5.4 Step 4 – Review of the Proposal Submission Form (Financial)**

- (1) In Step 4 of the evaluation process, the Sponsors shall review the Proposal Submission Form (Financial) to:
  - (a) ensure that there have been no changes to the representations and warranties made by the Proponent in its Proposal Submission Form (Technical);
  - (b) ensure that there have been no changes to the Proponent or Proponent Team Members from their Prequalification Submissions following the Technical Submission Deadline, except for changes that have been approved by the Sponsors in accordance with RFP Section 3.6; and
  - (c) assess the Conflict of Interest and Confidential Information sections of the Proposal Submission Form (Financial).

**6.5.5 Step 5 – Compliance of Financial Submissions**

- (1) In Step 5 of the evaluation process, the Sponsors will open each Financial Submission and will review the contents of the Financial Submission to assess whether it is in compliance with the terms and conditions of the RFP Documents.
- (2) If the Sponsors identify a Material Deviation in a Financial Submission then, subject to RFP Section 6.3(3)(b), the Sponsors may determine that the Proposal to which the Financial Submission relates is non-compliant in accordance with RFP Section 6.3 and take such action as described in RFP Section 6.3(5).

**6.5.6 Step 6 – Affordability Review**

***[Note to Proponents: Provisions with respect to affordability to be added following the finalization of the submission requirements/evaluation framework.]***

**6.5.7 Step 7 – Review and Scoring of the Financial Submissions**

- (1) In Step 7 of the evaluation process, the Financial Submissions, as revised by RFP Section 5.5(2) as applicable, will be evaluated and scored in accordance with Parts 2 and 3 of Schedule 3 to this RFP.
- (2) If a Proponent fails to achieve any of the minimum scores as set out in the applicable provisions of **[Part B (Proposal Evaluation) of Part 3 of Schedule 3]** to this RFP, then, as part of Step 7 of the evaluation process and pursuant to and in accordance with such provisions, the Sponsors may, in their sole discretion, determine whether that Proponent’s Proposal will continue to be considered in the RFP Process.
- (3) In the event that a Proponent’s Financial Submission fails to achieve any of the minimum scores as set out in the applicable provisions of **[Part B (Proposal Evaluation) of Part 3 of Schedule 3]** to this RFP and the Sponsors do not exercise their discretionary rights set out in RFP Section 6.5.7(2), the Proponent’s Proposal will not continue to Step 8 of the evaluation process.

**6.5.8 Step 8 – Establishing a Final Proposal Score**

- (1) For the purpose of the evaluation process, the weightings and scoring set out in **[Part B (Proposal Evaluation) of Part 3 of Schedule 3]** to this RFP will apply.
- (2) In Step 8 of the evaluation process, upon receipt by, and acceptance of, the Evaluation Committee of the results of the evaluation process and finalization of the scores of all Proponents’ Proposals, the score for each Proposal will be tallied and finalized.
- (3) The score established based on this RFP Section 6.5.8 shall be the “**Final Proposal Score**”.

**6.5.9 Step 9 – Ranking the Proponents**

- (1) In Step 9 of the evaluation process, the Evaluation Committee shall rank only those Proponents that have met all requirements in Steps 1 through 8 of the evaluation process and shall base the ranking on the Final Proposal Score determined in Step 8.
- (2) In the event of a tie in the Final Proposal Score between two Proponents the Sponsors may, in their sole discretion, give the higher ranking to the Proponent proposing the lower NPV in its Proposal.

**7. GENERAL EVALUATION AND DISQUALIFICATION PROVISIONS****7.1 Sponsors’ Discretion in Determining Compliance, Scoring and Ranking**

- (1) The Sponsors shall, in their sole discretion, determine:
  - (a) the membership of the Evaluation Committee and any sub-committees of the Evaluation Committee;
  - (b) whether a Proposal is compliant with the RFP Documents;
  - (c) whether a failure to comply constitutes a Material Deviation;

- (d) whether Key Individuals who were not named in the Prequalification Submission are acceptable to the Sponsors;
  - (e) the Final Proposal Score of a Proposal;
  - (f) the rankings of the Proposals;
  - (g) whether a Proposal or a Proponent,
    - (i) is disqualified; or
    - (ii) will cease to be considered in the evaluation process; and
  - (h) whether an Affordability Threshold Event has occurred.
- (2) The Sponsors' discretion in determining compliance, scores, ranking and disqualification of the Proponents and their Proposals is not limited or restricted in any way by the fact that a prequalification process preceded this RFP Process.
- (3) The Sponsors have the right, at any time and in their sole discretion, to consider in the evaluation of the Proposals or in the exercise of any of the Sponsors' rights under this RFP:
- (a) any instances of poor performance by a Proponent or a Proponent Team Member that the Sponsors have experienced; and/or
  - (b) any publicly available information about a Proponent or a Proponent Team Member that is, in the Sponsors' sole discretion, credible information.
- (4) Pursuant to the page limit restrictions applicable to any portion of a Proposal as described in this RFP, the Sponsors shall, without discretion, neither review nor score any pages of a Proposal that exceed the maximum number of pages specified for the applicable portion of the Proposal.

## 7.2 Disqualification

- (1) The Sponsors may, in their sole discretion, disqualify a Proponent, a Proponent Team Member, or a Proposal or reverse their decision to make an award (even if the award has already been made to a Preferred Proponent under this RFP) at any time prior to Commercial Close with respect to the Preferred Proponent and at any time prior to Financial Close with respect to the remaining Proponents, if,
- (a) the Proposal is determined to be non-compliant pursuant to RFP Section 6.3
  - (b) the Proponent fails to cooperate in any attempt by the Sponsors to verify any information provided by the Proponent in its Proposal or interview;
  - (c) the Proponent contravenes RFP Sections 3.3.2 or 3.3.3;
  - (d) the Proponent fails to comply with Applicable Law;

- (e) the Proponent, any Proponent Team Member, their identified subcontractors, or any of their directors, officers, employees or Affiliates have engaged in a Prohibited Act;
- (f) the Proponent, any Proponent Team Member, their identified subcontractors, or any of their directors, officers, employees or Affiliates are a Restricted Person;
- (g) the Proposal, including any officer's certificate or any form attached to the Proposal, contains false or misleading information or a misrepresentation;
- (h) the Proponent or any Proponent Team Member fails to disclose any information (including in any officer's certificate or any other form attached to the Proposal in connection with this RFP) that would materially adversely affect the Sponsors' evaluation of the Proposal;
- (i) the Sponsors have determined, in their sole discretion, to exclude a Proponent Team Member or Proponent Advisor or to disqualify a Proponent on the grounds of a perceived, potential or actual Conflict of Interest;
- (j) the Proposal, in the opinion of the Sponsors, reveals a material perceived, potential or actual Conflict of Interest as described in RFP Section 3.9 and the Proponent,
  - (i) does not receive a waiver from the Sponsors in accordance with RFP Section 3.9.1(6) or does not receive a consent in accordance with RFP Section 3.9.2(4), as applicable; or
  - (ii) fails to substitute the person or entity giving rise to the perceived, potential or actual Conflict of Interest in accordance with RFP Section 3.9.1(5);
- (k) in the 36 months prior to the Financial Submission Deadline, the Sponsors became aware that the Proponent or any Proponent Team Member failed to disclose an actual Conflict of Interest in any past or current procurement issued by either Sponsor, unless the Proponent has demonstrated to the satisfaction of the Sponsors that the Proponent has implemented measures to prevent future false or omitted disclosure of actual Conflicts of Interest;
- (l) in the opinion of the Sponsors, acting reasonably, the Proponent or a Proponent Team Member or any of their respective Advisors, employees or representatives directly or indirectly colluded with one or more other Proponents or its Proponent Team Members or any of their respective Advisors, employees or representatives in the preparation or submission of a Proponent's Proposal or otherwise contravened RFP Section 3.3.4;
- (m) the Proponent has committed a material breach of any existing agreement between the Proponent and a Sponsor;
- (n) the Proponent or any Proponent Team Member has been convicted of an offence in connection with, any services rendered to the Sponsors or any Ministry, agency, Board or Commission of the Government of Ontario;

- (o) there are any convictions related to inappropriate bidding practices or unethical behaviour by a Proponent or a Proponent Team Member or any of their Affiliates in relation to a public or broader public sector tender or procurement, in any Canadian jurisdiction;
- (p) the Proponent contravenes the requirements set out in the RFP Data Sheet with respect to Utility Subcontractors;
- (q) the Proponent or any Proponent Team Member has an economic or other interest or relationship that:
  - (i) is, or could reasonably be perceived to be, contrary to the objectives of the Project; or
  - (ii) could potentially compromise the Sponsors' reputation or integrity or the Sponsors' procurement process, so as to affect public confidence in that process, whether or not such interest creates a perceived, potential or actual Conflict of Interest;
- (r) the Proponent or any member of a Proponent team contravenes any of the requirements set out in RFP Section 3.9.4 and the corresponding provision of the RFP Data Sheet with respect to Legacy O/M Contractors;
- (s) a request by a Proponent to change the Proponent's team with respect to a New Fleet Provider or a Signalling Works Provider is rejected by the Sponsors in accordance with RFP Section 3.9.6 and the corresponding provision of the RFP Data Sheet;
- (t) any of the circumstances listed in RFP Sections 3.6.2(8) or 3.6.3(3)(e) occur; or
- (u) if the Proponent fails to achieve any of the minimum scores set out in Schedule 3 to this RFP.

## 8. COMPETITION, NEGOTIATIONS AND THE IDENTIFICATION OF A PREFERRED PROPONENT

*[Note to Proponents: The Sponsors are reviewing and may revise to reflect the method of contractualization of certain key submissions submitted as part of the Negotiations Proponent's Proposal.]*

### 8.1 Evaluation Results and the Identification of a Preferred Proponent or Negotiations Proponents

- (1) Based on the Final Proposal Scores, the Sponsors may, in their sole discretion, at any time prior to the expiration of the Proposal Validity Period:
  - (a) identify the highest ranked Proponent as the Preferred Proponent and either negotiate with such Proponent or accept the Proponent's Proposal as submitted;
  - (b) identify the two highest ranking Proponents as the "**First Negotiations Proponent**" (highest ranked) and the "**Second Negotiations Proponent**" (second highest ranked) (the "**Negotiations Proponents**") and enter into negotiations with the First Negotiations



- Proponent and, failing successful negotiations, enter into negotiations with the Second Negotiations Proponent and identify the Proponent with whom the Sponsors conclude successful negotiations as the Preferred Proponent; or
- (c) enter into separate and distinct but contemporaneous negotiations with the First and Second Negotiations Proponents and identify a Preferred Proponent as a result of those negotiations.
- (2) The Sponsors may use the negotiations process to negotiate any aspect of a Negotiations Proponent's Proposal or the Project Agreement, or both, including, for greater clarity, any amendments to the Project Agreement that are reasonably required to:
- (a) accommodate a Negotiations Proponents' financing arrangements;
- (b) revise the scope of the Project in the event that all Proposals are Unaffordable;
- (c) ensure that a Negotiations Proponent's Proposed Works Schedule meets the applicable requirements set out in [**Schedule C-2 - Works Scheduling (Fixed Assets - Initial Works)**] of the Project Agreement in order to satisfy the Sponsors that the Negotiations Proponent will be able to meet the requirement set out in RFP Section 9.2(1)(d), if the Negotiations Proponent is identified as the Preferred Proponent; and/or
- (d) satisfy the Sponsors with respect to the current status of a Negotiations Proponents' health and safety certifications, provided in accordance with [**Section 4.1 of Part 1 of Schedule 3 to this RFP**].
- (3) Except as provided in RFP Section 5.6(3), notwithstanding any negotiations between the Sponsors and a Negotiations Proponent, the Proposals of all Proponents shall remain valid and irrevocable until the expiration of the Proposal Validity Period or until Financial Close, in accordance with RFP Section 5.4(1).
- (4) If, in accordance with RFP Sections 8.1(1)(a), 8.1(1)(b) or 8.1(1)(c) the Proponent and the Sponsors negotiate revisions to the Project Agreement, the Sponsors and the Preferred Proponent shall develop a revised Project Agreement and, for the purposes of RFP Section 9, the revised Project Agreement shall be the "**Project Agreement**".
- (5) The Sponsors may, in their sole discretion and for greater clarity, elect to change the selection of which of the RFP Section 8.1(1) negotiations processes to employ at any time during the application of RFP Section 8.

## **9. PREFERRED PROPONENT**

### **9.1 Identification of the Preferred Proponent and the Letter of Credit**

- (1) Subject to RFP Sections 10.1 and 10.2, the Sponsors intend to identify a Preferred Proponent in accordance with RFP Section 8.1 or RFP Section 5.5(5).
- (2) No later than three Business Days after a Proponent's receipt of a notice from the Contact Person that the Proponent is the Preferred Proponent, the Preferred Proponent shall provide an irrevocable standby letter of credit (the "**Letter of Credit**") in the amount specified in the RFP

Data Sheet and in the form attached as Schedule 9 to this RFP to secure the Preferred Proponent's obligations in accordance with RFP Section 9.1(5) and Project Co's (as defined in the Project Agreement) obligations in accordance with [Section 2.3(c)] of the Project Agreement. The Preferred Proponent may, with the prior written consent of the Sponsors, which consent may be withheld in the sole discretion of the Sponsors, provide multiple irrevocable standby letters of credit from Proponent Team Members as approved and confirmed by the Sponsors (each a "Letter of Credit Provider") totalling the amount specified in the RFP Data Sheet and in the form attached as Schedule 9 to this RFP to secure the Preferred Proponent's obligations in accordance with RFP Section 9.1(5) and Project Co's (as defined in the Project Agreement) obligations in accordance with [Section 2.3(c)] of the Project Agreement.

- (3) If the Preferred Proponent does not provide the Letter(s) of Credit to the Sponsors as required by this RFP Section 9.1 the Sponsors may, in their sole discretion, by written notice to the Preferred Proponent, cease all discussions with the Preferred Proponent, terminate any obligations of the Sponsors to the Preferred Proponent under any agreement or understanding relating to the Project, and, for greater certainty, the Preferred Proponent will not be entitled to or receive any payment or compensation of any kind relating to the Project.
- (4) Subject to the Sponsors' right to retain and apply the Letter(s) of Credit as liquidated damages as provided in this RFP or in the Project Agreement, the Letter(s) of Credit shall be returned to the Preferred Proponent as follows:
  - (a) if the Sponsors give notice to the Preferred Proponent that they are cancelling or discontinuing the RFP Process, no later than 10 days after receipt by the Sponsors of a written demand for the Letter of Credit(s) by the Preferred Proponent; or
  - (b) if Commercial Close has been achieved, the return of the Letter(s) of Credit will be governed in accordance with the terms of the Project Agreement.
- (5) The Sponsors shall be entitled to draw on the Letter(s) of Credit and retain and apply the proceeds thereof as liquidated damages if,
  - (a) there is a breach of the Preferred Proponent obligations set out in RFP Section 9.2 by the Preferred Proponent;
  - (b) a Termination Notice has been given to the Preferred Proponent under RFP Section 5.5(6)(b);
  - (c) Commercial Close has not occurred (for reasons other than the failure of the Signing Parties to execute the Project Agreement in accordance with its terms),
    - (i) on or before the Commercial Close Target Date; or
    - (ii) if the Commercial Close Target Date has passed and the Sponsors have given their consent, on or before the expiration of the Proposal Validity Period (or the extended Proposal Validity Period, if applicable); or
  - (d) the Preferred Proponent has notified the Sponsors in writing that it wishes to cease all discussions with the Sponsors relating to the Project.

If Commercial Close has been achieved, the Sponsors shall be entitled to draw on the Letter(s) of Credit and retain and apply the proceeds thereof as liquidated damages in accordance with the terms of the Project Agreement.

- (6) The Sponsors shall not be required to give any prior written notice to the Preferred Proponent of their intention to draw on the Letter(s) of Credit. If the Preferred Proponent notifies the Contact Person in writing that the Preferred Proponent disputes the Sponsors' right to draw on the Letter(s) of Credit and to retain the proceeds as liquidated damages, then the Sponsors shall nonetheless be entitled to draw on the Letter(s) of Credit, but will remain liable to repay all or a portion of the amount drawn, together with interest charges at the rate prescribed on that amount, until such dispute has been finally resolved. If the Preferred Proponent fails to renew or extend the Letter(s) of Credit at least 30 days prior to its expiry date, the Sponsors may, at any time without notice to the Preferred Proponent, draw on the Letter(s) of Credit and hold the proceeds thereof in the same manner and for the same purposes as the Letter(s) of Credit.
- (7) If the Preferred Proponent delivers multiple Letters of Credit from multiple Letter of Credit Providers in accordance with RFP Section 9.1(2), the Preferred Proponent acknowledges and agrees that:
  - (a) the Sponsors may draw upon any Letter of Credit provided by any Letter of Credit Provider in any specified ratable amount;
  - (b) the Sponsors may draw on any Letter of Credit provided by any Letter of Credit Provider in a disproportionate amount to such Letter of Credit Provider's contribution to security;
  - (c) the Sponsors may draw upon any Letter of Credit provided by any Letter of Credit Provider even in the event that such Letter of Credit Provider is no longer a Proponent Team Member; and
  - (d) the provision of multiple letters of credit shall not in any way prejudice or adversely affect the rights of the Sponsors to draw on any Letter of Credit in accordance with this RFP, including in the event that the Sponsors are entitled to draw on the Letter of Credit in accordance with RFP Section 9.1(5) and such circumstance is not the result of any act or omission of the Letter of Credit Provider whose Letter of Credit is drawn upon.

## 9.2 Preferred Proponent Obligations

- (1) The Preferred Proponent shall,
  - (a) achieve Commercial Close,
    - (i) prior to the Commercial Close Target Date; or
    - (ii) if the Commercial Close Target Date has passed, unless the Sponsors have given their consent, prior to the expiration of the Proposal Validity Period (or the extended Proposal Validity Period, if applicable)

based on the Project Agreement in substantially the same form and content as finalized prior to the Technical Submission Deadline or on the Project Agreement as revised and agreed to by the Proponent and the Sponsors;

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- (b) execute the Project Agreement, subject only to revision in respect of the following:
- (i) minor changes, additions and modifications necessary to create a legally complete and binding agreement;
  - (ii) changes, additions and modifications to those provisions which require:
    - (A) the insertion or addition of information relating to the Preferred Proponent's corporate and funding structure which are not inconsistent with the principles set out in the Project Agreement;
    - (B) the insertion or addition of information or the modification of provisions of the Project Agreement required in order to reflect accurately the nature of the Preferred Proponent's relationships with its principal subcontractors; or
    - (C) the revision of provisions in the Project Agreement to more accurately reflect the result of negotiations in accordance with RFP Section 8.1;
  - (iii) changes, additions and modifications required in order to complete (based on the Proposal) any provision of the Project Agreement (where contemplated in or required under the terms of the RFP Documents) or to complete any Schedules to the Project Agreement; and
  - (iv) changes, additions and modifications to those parts of the Project Agreement which are indicated in the Project Agreement as being subject to completion or finalization,
- provided, that, in each case the changes, additions or modifications identified in this RFP Section 9.2(1)(b) are consistent with the principles set out in the Project Agreement, are otherwise acceptable to the Sponsors, acting reasonably, and are consistent with RFP Section 9.2(4);
- (c) maintain its prices in accordance with the terms and conditions of this RFP, subject only to (i) revisions to the Credit Spreads, if any, in accordance with, as applicable, RFP Section 5.5(5), or (ii) revisions to the price explicitly agreed to by the Sponsors; and
  - (d) no later than five days following receipt of notice from the Sponsors that it is the Preferred Proponent, submit the Interim Baseline Works Schedule to the Sponsors for review in accordance with the requirements of **[Schedule C-2 - Works Scheduling (Fixed Assets - Initial Works)]** of the Project Agreement.
- (2) The Preferred Proponent shall not later than five days after receipt of notice from the Sponsors that it is the Preferred Proponent, deliver to the Contact Person a timetable setting out its schedule for achieving the following Financial Close milestone dates:
- (a) commencement and completion of financing documentation;
  - (b) receipt of final ratings from rating agencies (if applicable); and

- (c) final pricing of the financing,

for review and approval by the Sponsors, acting reasonably (the “**Financing Timetable**”). The Sponsors may elect, in their sole discretion, to extend one or more of the dates identified in the Financing Timetable.

- (3) The Preferred Proponent shall provide access and shall promptly make available to the Sponsors and their Advisors, agents and representatives such documentation, financial and technical information as may be reasonably requested by the Sponsors from time to time in connection with the Sponsors’ due diligence investigations, including, without limitation, copies of any written representations, statements, assurances, commitments or agreements which the Preferred Proponent, any Preferred Proponent Team Member or any of their respective Advisors have received from any municipality, governmental authority or utility relating to the Project. The Preferred Proponent shall provide to the Sponsors, in a timely fashion, final draft versions of all documents required to be delivered by the Preferred Proponent in accordance with the Project Agreement, together with such other documentation as the Sponsors may reasonably request from time to time.
- (4) The Preferred Proponent acknowledges and agrees that, except for those parts of its Proposal which are, in the sole discretion of the Sponsors, incorporated by explicit reference into the Project Agreement by the Project Co Proposal Extracts, on Financial Close, the RFP Documents and the Proposal will be superseded entirely by the executed Project Agreement.

### **9.3 The Sponsors Authorization and Approvals**

- (1) The Preferred Proponent acknowledges and agrees that the entering into of the Project Agreement by the Signing Party or Parties is conditional on and subject to the Signing Party or Parties obtaining any necessary authorizations and approvals required in connection with the Project, including, for certainty, the approval of any relevant government authority.

## **10. GENERAL LEGAL MATTERS AND RIGHT TO ACCEPT OR REJECT**

### **10.1 General Rights of the Sponsors**

- (1) The Sponsors may, in their sole discretion:
  - (a) reject any or all of the Proposals;
  - (b) reject the Key Individuals proposed in a Proposal and, if not satisfactorily substituted, reject the Proposal;
  - (c) accept any Proposal;
  - (d) if only one Proposal is received, elect to accept or reject it or enter into negotiations with the Proponent;
  - (e) elect to discontinue the RFP Process at any time before the end of the RFP Process, including after the identification of a Preferred Proponent but before Commercial Close;

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- (f) alter the Timetable, the RFP Process or any other aspect of this RFP, which for greater certainty, includes the right to schedule Financial Close on the day after Commercial Close; and
- (g) cancel this RFP Process and subsequently advertise or call for new submissions for the same or different subject matter of these RFP Documents with the same or different participants.
- (2) Each Proponent Team Member of any Proponent is required to provide a certificate of an officer from such Proponent Team Member in the form attached as Schedule 7 – Certificate of Officer to this RFP. Without limitation to any other rights of the Sponsors hereunder, in order to ensure the integrity, openness and transparency of the RFP Process, the Sponsors may in their sole discretion require at any time, including any time after a Proponent has submitted its Proposal, that any Proponent Team Member of any Proponent resubmit a certificate of an officer from such Proponent Team Member in the form attached as Schedule 7 – Certificate of Officer to this RFP.
- (3) Without limitation to any other rights of the Sponsors hereunder, and in addition to the Sponsors' rights as set out in RFP Section 7.2(1)(o), in order to ensure the integrity, openness and transparency of the RFP Process, the Sponsors may, in their sole discretion:
- (a) impose at any time on all Proponents and any Proponent Team Members additional conditions, requirements or measures, with respect to bidding practices or ethical behaviour of the Proponents and Proponent Team Members; and
- (b) require that any or all Proponents and/or any Proponent Team Member at any time during the RFP Process provide the Sponsors with copies of its internal policies, processes and controls establishing ethical standards for its bidding practices and evidence of compliance by the Proponent and all Proponent Team Members with such policies, processes and controls.
- (4) If a financial institution put forward as a Proponent Team Member and acting in a financial advisory capacity is not an Affiliate of any of the Proponent Team Members of the Proponent ("**Exempt Financial Institution**"), then RFP Sections 10.1(2) and 10.1(3) shall not apply to any such Exempt Financial Institution.
- (5) Further to RFP Sections 10.1(2) and 10.1(3), and in addition to the Sponsors' rights as set out in RFP Section 7.2(1)(o), in the event that any Proponent and/or Proponent Team Member:
- (a) fails to comply with any requirement prescribed by the Sponsors pursuant to RFP Section 10.1(2) or 10.1(3); or
- (b) complies with Sponsors' requirement as prescribed in accordance with RFP Section 10.1(2) or 10.1(3), but the Sponsors determine that any Proponent and/or Proponent Team Member has or may have engaged in inappropriate bidding practices or unethical behaviour,

the Sponsors shall have the right, at any time and in their sole discretion to reject and not consider a Proposal from a Proponent, to require the Proponent to remove and/or replace any Proponent Team Member pursuant to RFP Section 3.6, or to otherwise elect not to proceed further in the procurement process with such Proponent.

## 10.2 Special Circumstances

- (1) If the Sponsors determine that all of the Proposals submitted are non-compliant in accordance with RFP Section 6.3, the Sponsors may, in their sole discretion:
  - (a) take any action in accordance with RFP Section 10.1;
  - (b) carry out a process whereby all Proponents are directed to correct the Material Deviations in their Proposals for re-submission, without a change in their Commercial and Financial Sections or their Proposed Works Schedules; or
  - (c) enter into negotiations with any one of the Proponents to attempt to finalize an agreement.
- (2) If the Sponsors receive,
  - (a) one Proposal and that Proposal is compliant; or
  - (b) more than one Proposal, but only one compliant Proposal,

the Sponsors may, in their sole discretion:

- (c) take any action in accordance with RFP Section 10.1(1); or
  - (d) cancel this RFP and subsequently enter into negotiations with the Proponent that submitted a compliant Proposal.
- (3) The Sponsors, in their sole discretion, may waive a Material Deviation in a Proposal and, therefore, waive a material failure to comply with the requirements of the RFP Documents. The Sponsors may, in their sole discretion, decline to disqualify a non-compliant Proposal.
- (4) If at any time prior to the Technical Submission Deadline any Proponent withdraws or is disqualified from the RFP Process, the Sponsors may, in their sole discretion, invite the next highest-ranked party under the RFQ process that preceded this RFP, other than the Proponents (the "**Reserve Prequalified Party**") to participate in the RFP Process in place of the withdrawn Proponent. For clarity, the Reserve Prequalified Party must have submitted a complete Prequalification Submission in accordance with the terms and conditions of the RFQ, and achieved the minimum score required by Section 6.1(3) of the RFQ and satisfied any other conditions imposed by the Sponsors. Upon the Reserve Prequalified Party's written acceptance of such invitation, the Reserve Prequalified Party shall become a Prequalified Party and a Proponent under this RFP.

## 10.3 Sponsors' Liability for Proponent's Costs

### 10.3.1 General

- (1) Except as provided in RFP Sections 10.3.2, 10.3.3 and 10.4(3), as applicable, neither the Sponsors nor the Government of Ontario shall be liable,

- (a) for any expense, cost, loss or damage incurred or suffered by any Proponent, any Proponent Team Member, any Proponent Advisor or any person connected with any one of them; or
- (b) to reimburse or compensate any Proponent, any Proponent Team Member, any Proponent Advisor or any person connected with any one of them,

under any circumstances, regardless of the outcome of the RFP Process.

### 10.3.2 Proposal Submission Fee

- (1) Subject to the provisions of this RFP Section 10.3.2, the Sponsors shall pay a Proposal Submission Fee in a total amount of \$[REDACTED], plus any applicable HST, to each Proponent, subject to and in accordance with the following:
  - (a) \$[REDACTED] of the Proposal Submission Fee is eligible to be paid in advance of the Proposal Submission Deadline in the following payments:
    - (i) an amount of \$[REDACTED] to be paid by the approximate date set out in the Timetable;
    - (ii) an amount of \$[REDACTED] to be paid by the approximate date set out in the Timetable; and
    - (iii) an amount of \$[REDACTED] to be paid by the approximate date set out in the Timetable,(each, a “**Proposal Submission Fee Advance Payment**”).
  - (b) The Sponsors shall pay an amount equal to \$[REDACTED] to each Proponent, following the Proponent’s submission of a Proposal, in accordance with the following:
    - (i) an amount of \$[REDACTED] on the Proponent’s submission of a Proposal that meets the requirements of RFP Section 10.3.2(3); and
    - (ii) an amount of \$[REDACTED] on the Financial Close Date,(each, a “**Proposal Submission Fee Payment**”). The Proponent that achieves Financial Close will not be eligible to receive the Proposal Submission Fee Payment described in RFP Section 10.3.2(1)(b)(ii), but will be permitted to retain any Proposal Submission Fee Advance Payments received.
- (2) Subject to RFP Section 10.3.2(10), in order to be eligible to receive a Proposal Submission Fee Advance Payment,
  - (a) the Proponent must have in place a fully formed Proponent team, and in respect of any new or changed Proponent team members, have met the requirements of RFP Section 3.6;



- (b) the Proponent must participate fully (including providing the requested submissions) in Project Agreement CCMs, Design Presentation Meetings and other consultations occurring prior to a Proposal Submission Fee Advance Payment date;
  - (c) when determining whether the Proponent has met the conditions set out in RFP Sections 10.3.2(2)(a) and 10.3.2(2)(b), the Sponsors shall act reasonably;
  - (d) no later than the date set out in the Timetable, the Proponent must submit payment information in the form set out in the RFP Data Sheet; and
  - (e) the Proponent must comply fully with RFP Sections 3.3.2, 3.3.3, 3.3.4 and 3.8.3, and the provisions of any confidentiality agreement entered into in connection with the RFP Process.
- (3) The Proponent must submit a full and proper Proposal based on factors that include whether the Proposal is compliant with this RFP (as determined in accordance with RFP Section 6.3) and whether the Proposal received a **[insert scoring threshold]** in order for the Proponent to be entitled to receive the Proposal Submission Fee Payment described in RFP Section 10.3.2(1)(b)(i).

***[Note to Proponents: The scoring threshold to be issued by Addendum, following the finalization of submission requirements and evaluation criteria.]***

- (4) The Sponsors and the Preferred Proponent must achieve Financial Close in order for the Proponent to be entitled to receive the Proposal Submission Fee Payment described in RFP Section 10.3.2(1)(b)(ii).
- (5) With respect to the Proposal Submission Fee Payment described in RFP Sections 10.3.2(1)(b)(i) and 10.3.2(1)(b)(ii),
- (a) a Proponent will not be eligible to receive any amount of the Proposal Submission Fee that has not yet been paid if it withdraws from this RFP Process;
  - (b) if Infrastructure Ontario draws upon a Proponent’s Letter of Credit in accordance with this RFP or the Proponent’s Standby Letter of Credit in accordance with the Project Agreement, then such Proponent will not be eligible to receive the Proposal Submission Fee Payments; and
  - (c) Financial Close must be achieved with a Proponent under the Project Agreement to this RFP, provided that in the event that Financial Close is not achieved with a Proponent under the Project Agreement because Infrastructure Ontario, as a result of a Severe Market Disruption,
    - (i) exercises its rights under **[Section 2.4(b)]** of the Project Agreement (the “**Severe Market Disruption Event Date**”), and
    - (ii) concludes and reaches Financial Close under a new project agreement respecting the Project within six months after the Severe Market Disruption Event Date,then this condition in this RFP Section 10.3.2(5)(c) shall be satisfied.

- (6) For greater certainty, a Proponent shall not be eligible to receive both a Proposal Submission Fee and the compensation contemplated under [Section 2.4(c)] of the Project Agreement.
- (7) The Sponsors' obligation to pay the Proposal Submission Fee Advance Payment and Proposal Submission Fee Payment shall be contingent on the receipt of an executed release from the Proponent and Proponent Team Members to that effect for the applicable Proposal Submission Fee Advance Payment or Proposal Submission Fee Payment (each, a "Release"). Each such Release shall be in the form set out in the RFP Data Sheet and delivered to the Sponsors no later than the deadline set out in the Timetable. Each Proposal Submission Fee Advance Payment and Proposal Submission Fee Payment described in RFP Section 10.3.2(1) shall represent full and final satisfaction of any obligation or liability of the Sponsors and the Government of Ontario to the Proponent and Proponent Team Members in connection with this RFP for the time period up until the date of the applicable Release.
- (8) If the RFP Process is cancelled at any time, a Proponent is entitled to retain those Proposal Submission Fee Advance Payments and Proposal Submission Fee Payments that have been paid to the Proponent prior to the date of the cancellation in accordance with this RFP Section 10.3.2.
- (9) If the Proponent fails to successfully submit a Proposal that meets the requirements of RFP Section 10.3.2(3), such Proponent may retain any Proposal Submission Fee Advance Payments already made to the Proponent pursuant to this RFP Section 10.3.2, but the Proponent is not eligible for any Proposal Submission Fee Payments.
- (10) If the Proponent has not received a Proposal Submission Fee Advance Payment (for example, because the Proponent did not satisfy criteria set out in RFP Section 10.3.2(2)(a), RFP Section 10.3.2(2)(b), RFP Section 10.3.2(2)(c), RFP Section 10.3.2(2)(d) or RFP Section 10.3.2(2)(e)), that Proponent shall be entitled to receive a payment in an amount equal to the total of all Proposal Submission Fee Advance Payments upon the Proponent's submission of a Proposal that meets the requirements of RFP Section 10.3.2(3).
- (11) If a Proponent achieves the Financial Close milestone, the amounts associated with the Proposal Submission Fee Advance Payments and the Proposal Submission Fee Payments that were already paid to such Proponent shall be deducted from its initial Construction Period Payments under the Project Agreement.

### 10.3.3 Break Fee

- (1) Subject to the Sponsors having obtained all necessary approvals, including approval from the Minister of Finance, if the Sponsors offer a Break Fee for this Project as set out in the RFP Data Sheet, such Break Fee plus any applicable HST, shall be paid in accordance with the following:
  - (a) if the Project is cancelled prior to submission of Proposals:
    - (i) only a Proponent who has demonstrated, to the Sponsors' satisfaction, active participation in the RFP Process will be eligible to receive a Break Fee; and
    - (ii) the Sponsors may require a Proponent to substantiate its active participation in the RFP Process in order to receive a Break Fee; and

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- (b) if the Project is cancelled after submission of Proposals or a Break Fee is payable for any other reason, a Break Fee will be paid to a Proponent that has submitted a full and proper Proposal.
  - (2) The Sponsors shall determine whether a Proposal is full and proper based on factors that include whether the Proposal is compliant with this RFP (as determined in accordance with RFP Section 6.3) and whether the Proposal received a Final Proposal Score of at least 50%.
  - (3) The amount of the Break Fee payable to each eligible Proponent will depend on the point in the RFP Process that cancellation occurs, in accordance with the principles set out in the RFP Data Sheet. The base amount of the Break Fee (the “**Base Break Fee**”) is set out in the RFP Data Sheet.
  - (4) Payment of a Break Fee shall represent full and final satisfaction of any obligation or liability of the Sponsors and the Government of Ontario to the Proponent and Proponent Team Members in connection with this RFP, and the Sponsors’ obligation to pay the Break Fee shall be contingent on the receipt of a waiver, in form and substance satisfactory to the Sponsors, from the Proponent and Proponent Team Members to that effect.
  - (5) If the Project is cancelled or a Break Fee is payable for any other reason, a Proponent shall only be eligible to receive a Break Fee and the Proponent will not be eligible to receive a Proposal Submission Fee as well. For greater certainty, a Proponent shall not be eligible to receive both a Break Fee and a Proposal Submission Fee relating to the Proponent’s participation in the RFP Process for this Project.

#### **10.4 Applicable Law, Attornment and Limit on Liability**

- (1) This RFP shall be governed and construed in accordance with Applicable Law as defined in the Project Agreement.
- (2) The Proponent agrees that,
  - (a) any action or proceeding relating to this RFP Process shall be brought in any court of competent jurisdiction in the Province of Ontario and for that purpose the Proponent irrevocably and unconditionally attorns and submits to the jurisdiction of that Ontario court;
  - (b) it irrevocably waives any right to and shall not oppose any Ontario action or proceeding relating to this RFP Process on any jurisdictional basis, including forum non conveniens; and
  - (c) it shall not oppose the enforcement against it, in any other jurisdiction, of any judgement or order duly obtained from an Ontario court as contemplated by this RFP Section 10.4.
- (3) Except as provided in RFP Sections 10.3.2 and 10.3.3, the Proponent agrees that if the Sponsors or the Sponsors’ Advisors commit a material breach of their obligations under or in connection with this RFP (that is, a material breach of the bidding contract or Contract A), the Sponsors’ liability to the Proponent and the aggregate amount of damages recoverable against the Sponsors for any matter relating to or arising from that material breach, whether based upon an action or claim in contract, warranty, equity, negligence, intended conduct or otherwise, including any

action or claim arising from the acts or omissions, negligent or otherwise, of the Sponsors, shall be the lesser of,

- (a) the Proposal preparation costs that the Proponent seeking damages from the Sponsors can demonstrate; and
- (b) the Proposal Submission Fee.

## 10.5 Licenses, Permits, etc.

- (1) If a Proponent is required by Applicable Law to hold or obtain a licence, permit, consent or authorization to carry on an activity contemplated in its Proposal or in the Project Agreement, neither acceptance of the Proposal nor execution of the Project Agreement by the Sponsors shall be considered to be approval by the Sponsors of carrying on such activity without the requisite licence, permit, consent or authorization.

## 10.6 Power of Legislative Assembly

- (1) Proponents are advised that no provision of the RFP Documents (including a provision stating the intention of the Sponsors) is intended to operate, nor shall any such provision have the effect of operating, in any way, so as to interfere with or otherwise fetter the discretion of the Legislative Assembly of Ontario in the exercise of its legislative powers.

## 11. NOTIFICATION AND DEBRIEFING

- (1) Any time after the Preferred Proponent has been identified, the Sponsors will formally notify all Proponents who were not successful in the RFP Process that they have not been selected. Notwithstanding such notification, the Proponents' Proposals shall be irrevocable until the expiration of the Proposal Validity Period (or extended Proposal Validity Period, if applicable) or Financial Close, in accordance with RFP Section 5.4.
- (2) Any reference in this RFP to a submission deadline means the noted time to the second, even where seconds are not explicitly noted. For greater certainty, a submission deadline is as of the zero count of seconds of the noted time.
- (3) Any time after Financial Close, the Sponsors, and a member or members of the Evaluation Committee will meet with any unsuccessful Proponents, at the request of the unsuccessful Proponent, to provide a de-briefing.

## 12. DEFINITIONS

### 12.1 General

- (1) Unless otherwise defined in this RFP Section 12, capitalized terms and expressions used in this RFP have the meaning given to them in the Project Agreement. In this RFP, the singular shall include the plural and the plural shall include the singular, except where the context otherwise requires.
- (2) All references in this RFP to the Sponsors' or Infrastructure Ontario's "discretion" or "sole discretion" means in the sole and absolute discretion of the party exercising the discretion.

- (3) All references in this RFP to “day” or “days” means calendar days, unless otherwise stated.

## 12.2 RFP Definitions

*[Note to Proponents: Definitions will be reviewed and supplemented following the finalization of RFP Schedule 3. Note that there are certain capitalized terms used throughout the RFP Documents that will be defined in the Project Agreement. The meaning of each of these terms is generally self-evident, but the Proponent is advised to submit an RFI on any specific questions the Proponent may have about the meaning of a particular capitalized term.]*

Whenever used in the RFP:

- (1) “Ad Hoc Meetings” is defined in Schedule 2 to this RFP;
- (2) “Addendum” means a written addendum to the RFP Documents issued by the Sponsors as set out in RFP Section 3.7;
- (3) “Advisor” means any person or firm retained to provide professional advice to any one of the Sponsors, a Proponent, a Proponent Team Member or a Financial Services Provider, as applicable;
- (4) “AWARD Data Room” is defined in RFP Section 2.4(1)(a);
- (5) “Background Information” means various types of information provided by the Sponsors and is defined in RFP Section 2.4(1)(b);
- (6) “Base Break Fee” is defined in RFP Section 10.3.3(3);
- (7) “Benchmark Rate” is defined in **[Section 1.0 of Part B of Part 2 of Schedule 3 to this RFP]**;
- (8) “Benchmarking Date” is defined in **[Section 1.0 of Part B of Part 2 of Schedule 3 to this RFP]**;
- (9) “Break Fee” means an amount to compensate a Proponent for some of the costs the Proponent had incurred in developing and submitting a Proposal in the event that the RFP Process is cancelled, as determined by the Sponsors in accordance with RFP Section 10.3.3;
- (10) “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;
- (11) “CIB” is defined in RFP Section 3.14(1);
- (12) “CIB Management Investment Committee” means **[•]**;
- (13) “CIB Products” means **[•]**;
- (14) “CIB Representative Team” is defined in RFP Section 3.14(3);

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- (15) “Clearing Spread” means the financing premiums/spread in excess of the Benchmark Rate used to calculate the price at which the end investors purchase bonds, as accepted by Infrastructure Ontario;
- (16) “Client” means the client or clients listed in the RFP Data Sheet in respect of RFP Section 1.1(1);
- (17) “Commercial Close” means the date the Project Agreement is signed by the Preferred Proponent and the Signing Parties;
- (18) “Commercial Close Target Date” means the date set out as the Commercial Close Target Date in the Timetable;
- (19) “Commercially Confidential Meetings” is defined in RFP Section 3.4.2(1);
- (20) “Commercially Confidential RFIs” is defined in RFP Section 3.2.2(1)(a)(ii);
- (21) “Confidential Information” is defined in RFP Section 3.8.3(1);
- (22) “Conflict of Interest” is defined in RFP Section 3.9.1(7);
- (23) “Consultation Sessions” is defined in Schedule 2 to this RFP;
- (24) “Contact Person” is defined in RFP Section 3.2.1(1);
- (25) “Contract A” is defined in RFP Section 1.1(3);
- (26) “Contracting Authority” is defined in the Project Agreement;
- (27) “Control” has the meaning ascribed thereto in the *Business Corporations Act*, R.S.O. 1990, c. B. 16, as amended from time to time;
- (28) “Conventional Signalling” is the type of signalling where signals are separated based on fixed block lengths and drivers follow the signal aspects for train movement. The signalling logic for conventional signalling is executed using relays or microprocessor technology;
- (29) **[“Cost of Work Form” means the document entitled “Cost of Work Form” attached as Appendix B to Part 2 of Schedule 3 to this RFP;]**
- (30) “Credit Spread Election Facilities” is defined in RFP Section 5.5(1)(b)(i);
- (31) “Credit Spreads” means the financing premiums/spreads in excess of the Benchmark Rate as calculated/illustrated in the Financial Model in accordance with **[Section 3.0, Table A of Section B of Part 2 of Schedule 3 to this RFP]**. For greater certainty, Credit Spreads do not include any hedge premiums, swap counter party spreads or any other applicable fees;
- (32) “Data Rooms” is defined in RFP Section 2.4(1);
- (33) “Design Presentation Meetings” is defined in Schedule 2 to this RFP;
- (34) “Draft Lenders Commitment Letter” is defined in RFP Section 5.5(5);

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- (35) “E-Builder Data Room” is defined in RFP Section 2.4(1)(b);
- (36) “Electronic Submission and Evaluation System” means the electronic tendering software named AWARD® by Commerce Decisions®;
- (37) “Enhanced Train Control” or “ETC” is a system that vitally enforces train safety, that can be installed either as a stand-alone system or overlaid on an existing Conventional Signalling system, and includes the following:
- (a) Train location determination, by Train-borne equipment, independent of track circuits, as the primary means of Train detection;
  - (b) Train-to-wayside communications to support the timely and secure delivery of all Train control messages to equipped trains; and
  - (c) integrated Train-borne, wayside and/or central office processors capable of performing continuous fail-safe protection against collisions, excessive speed, and other hazardous conditions (such as work zone, temporary speed restrictions, crossing activation) through a combination of Train detection, Train separation, and overspeed protection;
- (38) “Evaluation Committee” is defined in RFP Section 6.1(1);
- (39) “Exempt Financial Institution” is defined in RFP Section 10.1(4);
- (40) “Fairness Monitor” is defined in the RFP Data Sheet;
- (41) “Final Credit Spread Election Facilities” is defined in RFP Section 5.5(2)(e);
- (42) “Final Credit Spread Lock-in Date” is defined in RFP Section 5.5(3);
- (43) “Final Proposal Score” is defined in RFP Section 6.5.8(3);
- (44) “Final Utility Baseline Documents” is defined in Section 3.13 – Utility Work of Schedule 1 to this RFP;
- (45) “Financial Close” is defined in the Project Agreement;
- (46) “Financial Model” means the computer model a Proponent has used and which is proposed to become the Financial Model under the Project Agreement in the format specified in **[Part 2 of Schedule 3 to this RFP]**;
- (47) “Financial Services Provider” means any Lender and any other provider of financial services or products;
- (48) “Financial Submission” is defined in RFP Section 4.1(2)(b);
- (49) “Financial Submission Deadline” is defined in RFP Section 3.1(1);
- (50) “Financial Submission Information” means the information contained in the Proponent’s Financial Submission;

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- (51) “Financing Timetable” is defined in RFP Section 9.2(2);
- (52) “FIPPA” is defined in RFP Section 3.8.1(1);
- (53) “First Credit Spread Lock-in Date” is defined in RFP Section 5.5(2);
- (54) “First Negotiations Proponent” is defined in RFP Section 8.1(1)(b);
- (55) “General RFIs” is defined in RFP Section 3.2.2(1)(a)(i);
- (56) “Government of Ontario” means Her Majesty in Right of the Province of Ontario and all ministries, agencies, boards, commissions and/or corporations thereof;
- (57) “Held Pricing Facilities” is defined in RFP Section 5.5(1)(b)(ii);
- (58) “Identified Proponent Parties” is defined in RFP Section 3.6.2(1);
- (59) “Impacted Participant” is defined in RFP Section 3.6.3(1);
- (60) “includes” and “including” means “includes without limitation” and “including without limitation”, respectively;
- (61) “Indicative Credit Spread Benchmarks” is defined in **[Section 2.8 of Part E of Part 2 of Schedule 3 to this RFP]**;
- (62) “Ineligible Person’s Affiliate” is defined in RFP Section 3.9.2(1);
- (63) “Ineligible Persons” is defined in RFP Section 3.9.2(1);
- (64) “Infrastructure Ontario” is defined in RFP Section 1.1(1);
- (65) “IO” is defined in RFP Section 1.1(1);
- (66) “IOCIP” is defined in RFP Section 3.11.3(1);
- (67) “IOCIP Broker of Record” means Aon Reed Stenhouse Inc.;
- (68) “Legacy O/M Contractors” is defined in RFP Section 3.3.1(3);
- (69) “Lenders” means the lenders providing the debt financing for the sole purpose of the Project as identified in the term sheet, credit agreement and Lenders Commitment Letter as described in **[Sections 1.1 and 1.2 of Part E of Part 2 of Schedule 3 to this RFP]**;
- (70) “Lenders Commitment Letter” is defined in RFP Section 5.5(5);
- (71) “Letter of Credit” is defined in RFP Section 9.1(2);
- (72) “Letter of Credit Provider” is defined in RFP Section 9.1(2);
- (73) “Material Deviation” is defined in RFP Section 6.3(1);



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- (74) “Metrolinx Lands” is defined in the Project Agreement;
- (75) “Metrolinx Lands Table” is defined in Section 3.12(1) of Schedule 1 to this RFP;
- (76) “Mini-Perm Financing” is defined in the Project Agreement;
- (77) **[“Mini-Perm Period” is defined in Section 3.2(a)(iv)(A) of Part B of Part 3 of Schedule 3 to this RFP;]**
- (78) “MOI” is defined in RFP Section 1.1(5);
- (79) “Negotiations Proponents” is defined in RFP Section 8.1(1)(b);
- (80) “New Fleet Provider” means the entity or entities that will be responsible for providing New Fleet on a Proponent team;
- (81) “NPV” means net present value;
- (82) “OILC” is defined in RFP Section 1.1(1);
- (83) “Operational Term” is defined in the Project Agreement;
- (84) “Optional Lands Costs” is defined in **[Section 2.23 of Part E of Part 2 of Schedule 3 to this RFP];**
- (85) “Optional Lands List” is defined in Section 3.12 of Schedule 1 to this RFP;
- (86) “Participating Lenders” is defined in RFP Section 5.7(2);
- (87) “Participating Proponent Team Members” is defined in RFP Section 5.7(2);
- (88) “PEARL Data Room” is defined in RFP Section 2.4(1)(b);
- (89) “Post RFQ Process” is defined in RFP Section 1.3(1)(b);
- (90) “Preferred Proponent” is defined in RFP Section 1.1(2);
- (91) “Prequalification Stage” is defined in RFP Section 1.3(1)(a);
- (92) “Prequalification Submission” is defined in RFP Section 1.2(1);
- (93) “Prequalified Parties” is defined in RFP Section 1.2(1);
- (94) “Price Submission Form” means the price submission form submitted by a Proponent as part of its Proposal in the form attached as Schedule 8 – Price Submission Form to this RFP;

- (95) “Prime Team Member” is defined in the RFQ;
- (96) “Prohibited Act” means:
- (a) offering, giving or agreeing to give to the Sponsors 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:
    - (i) for doing or not doing, or for having done or not having done, any act in relation to a Proponent becoming a Negotiations Proponent or the Preferred Proponent;
    - (ii) for showing or not showing favour or disfavour to any person in relation to a Proponent’s Proposal; or
    - (iii) provided that this definition shall not apply to a Proponent or Proponent Team Member (or anyone employed by or acting on their behalf) providing consideration to the Sponsors or any public body in the ordinary course;
  - (b) entering into any other agreement with the Sponsors 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 a Proponent or any Proponent Team Members, Key Individuals or any of their Affiliates, or on its behalf or to its knowledge, to the Sponsors 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 the Sponsors, provided that this definition shall not apply to a fee or commission paid by the Proponent or any Proponent Team Member or any of their Affiliates (or anyone employed by or acting on their behalf) to the Sponsors or any public body pursuant to an agreement where such fee or commission is paid in the ordinary course without contravening the intent of this section;
  - (c) breaching or committing any offence under applicable law in respect of corrupt or fraudulent acts in relation to this RFP Process; or
  - (d) defrauding or attempting to defraud or conspiring to defraud the Sponsors or any other public body;
- (97) “Project” is defined in RFP Section 1.1(6);
- (98) “Project Agreement” means the project agreement for the Project as set out in Schedule 10 to this RFP, including all Schedules, appendices and attachments thereto;
- (99) “Project Agreement CCMs” is defined in Schedule 2 to this RFP;
- (100) “Project Co” is the Preferred Proponent that has executed the Project Agreement with the Signing Party or Parties;
- (101) “Property Request Submission” is defined in RFP Section 3.12(1);
- (102) “Proponent” is defined in RFP Section 1.1(2);

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- (103) “Proponent Consultation Process” is defined in Schedule 2 to this RFP;
- (104) “Proponent Representative” is defined in RFP Section 1.2(2);
- (105) “Proponent Team Members” means all members of the Proponent team that were identified in the RFQ process and were prequalified as a Proponent team to submit a Proposal in this RFP Process;
- (106) “Proponent Visits and Inspections” is defined in RFP Section 3.5.1(1);
- (107) “Proponents Meeting” is defined in RFP Section 3.4.1(1);
- (108) “Proposal” is defined in RFP Section 1.1(2);
- (109) “Proposal Information” is defined in RFP Section 3.8.4(5);
- (110) “Proposal Information Licence” is defined in RFP Section 3.8.4(4);
- (111) “Proposal Submission Fee” means an amount to compensate a Proponent for some of the costs the Proponent had incurred in developing and submitting a Proposal, as determined by the Sponsors in accordance with RFP Section 10.3.2;
- (112) “Proposal Submission Fee Advance Payment” is defined in RFP Section 10.3.2(1)(a);
- (113) “Proposal Submission Fee Payment” is defined in RFP Section 10.3.2(1)(b);
- (114) “Proposal Submission Form (Financial)” means the submission form submitted by a Proponent as part of its Proposal in the form attached as Part B – Proposal Submission Form (Financial) to Schedule 4 – Proposal Submission Forms to this RFP;
- (115) “Proposal Submission Form (Technical)” means the submission form submitted by a Proponent as part of its Proposal in the form attached as Part A – Proposal Submission Form (Technical) to Schedule 4 – Proposal Submission Forms to this RFP;
- (116) “Proposal Submission Forms” means, collectively the Proposal Submission Form (Financial) and the Proposal Submission Form (Technical);
- (117) “Proposal Validity Period” is defined in RFP Section 5.4(1);
- (118) “Proposed Change in Identified Proponent Party” is defined in RFP Section 3.6.2(3);
- (119) “Proposed Works Schedule” is defined in **[Part 1 of Schedule 3 to this RFP]**;
- (120) “Rectification Notice” is defined in RFP Section 5.5(6)(a);
- (121) “Rectification Notice Response” is defined in RFP Section 5.5(6)(a);
- (122) “Refinancing” is defined in the Project Agreement;
- (123) “Release” is defined in RFP Section 10.3.2(7);

- (124) “Request to Consult” is defined in RFP Section 3.14(3)(d);
- (125) “Reserve Prequalified Party” is defined in RFP Section 10.2(4);
- (126) “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, (i) he or she has been convicted of any indictable offence, less than five years prior to the date at which the consideration of whether such individual is a “Restricted Person” is made hereunder, whether or not such person received a custodial sentence; or (ii) he or she has been sentenced to a custodial sentence, other than a suspended sentence, for any regulatory offence other than under the *Highway Traffic Act* (Ontario) or corresponding legislation in any other jurisdiction less than five years prior to the date at which the consideration of whether such individual is a “Restricted Person” is made hereunder;
  - (d) in the case of a person other than an individual, (i) it or any of the members of its (or its general partner’s) board of directors or its senior executive managers has been convicted of any indictable offence less than five years prior to the date at which the consideration of whether such person is a “Restricted Person” is made hereunder, whether or not such person received a custodial sentence; or (ii) any of the members of its (or its general partner’s) board of directors or its senior executive managers has been sentenced to a custodial sentence, other than a suspended sentence, for any regulatory offence other than under the *Highway Traffic Act* (Ontario) or corresponding legislation in any other jurisdiction less than five years prior to the date at which the consideration of whether such person is a “Restricted Person” is made hereunder;
  - (e) 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;
  - (f) is subject to a material claim of the Sponsors 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 the Sponsors view, in either case, be reasonably likely to materially affect the ability of the Proponent to perform its obligations under the Project Agreement, if it were to become the successful Proponent under the RFP Process; or
  - (g) has a material interest in the production of tobacco products;
- (127) “RFI” is defined in RFP Section 3.2.2(1);
- (128) “RFP” means this Request for Proposals;

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- (129) “RFP Data Sheet” means Schedule 1 to this RFP;
- (130) “RFP Documents” is defined in RFP Section 2.1(1);
- (131) “RFP Process” is defined in RFP Section 1.1(3);
- (132) “RFQ” is defined in RFP Section 1.2(1);
- (133) “Second Negotiations Proponent” is defined in RFP Section 8.1(1)(b);
- (134) “Severe Market Disruption Event Date” is defined in RFP Section 10.3.2(5)(c)(i);
- (135) “Signalling Works” means the design, supply, testing and commissioning of Conventional Signalling, Enhanced Train Control, manufacture, and any modifications to the existing signalling system, all in accordance with the Project Agreement;
- (136) “Signalling Works Provider(s)” means the entity or entities on the Proponent team that will be responsible for Signalling Works for the Project;
- (137) “Signing Parties” is defined in RFP Section 1.1(7);
- (138) “Special Participant Period” is defined in RFP Section 3.14(1);
- (139) “Special Participant Team” is defined in RFP Section 3.14(1);
- (140) “Sponsor Payments” means all payments made by Contracting Authority under the Project Agreement, including the **[insert list of payments]**, as applicable;

***[Note to Proponents: Definition to be completed following finalization of Financial Submission Requirements.]***

- (141) "Sponsors" is defined in RFP Section 1.1(1) and means Infrastructure Ontario and the Client;
- (142) “Sponsors’ Executive Ad Hoc Meeting” is defined in Schedule 2 to this RFP;
- (143) “Submission Requirements” means all of the submission requirements set out in this RFP;
- (144) “Substantial Completion Payment” is defined in **[Part 2 of Schedule 3 to this RFP;]**
- (145) “Technical Submission” is defined in RFP Section 4.1(2)(a);
- (146) “Technical Submission Deadline” is defined in RFP Section 3.1(1);
- (147) “Technical Submission Information” means the information contained in the Proponent’s Technical Submission;
- (148) “Termination Notice” is defined in RFP Section 5.5(6)(b);
- (149) “Timetable” is defined in RFP Section 3.1(1);

- (150) “Topic Meetings” is defined in Schedule 2 to this RFP;
- (151) [**“Unaffordable” means, in respect of a Proposal, that the Affordability Price submitted in the Financial Submission is above the Affordability Threshold;**]
- (152) “Utility Subcontractor” means any subcontractor of Project Co or a Utility Company engaged by or that will be engaged by or through Project Co or a Utility Company to perform any of the Utility Work; and
- (153) “White Papers” is defined in Section 3.2.3(2) of Schedule 1 to this RFP.

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