

**AGREEMENT TO DESIGN, BUILD, FINANCE  
AND MAINTAIN**

**TWELVE NEW SCHOOLS IN CENTRAL AND SOUTHERN  
ALBERTA**

**HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA**

and

**ABC SCHOOLS PARTNERSHIP**

**September 13, 2012**

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**AGREEMENT TO DESIGN, BUILD, FINANCE  
AND MAINTAIN**

**TWELVE NEW SCHOOLS IN CENTRAL AND SOUTHERN  
ALBERTA**

made this 13<sup>th</sup> day of September, 2012

**BETWEEN:**

**HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA,**  
as represented by the Minister of Infrastructure and the  
Minister of Education  
(the “**Province**”)

**AND:**

**ABC SCHOOLS PARTNERSHIP,**  
a general partnership established  
under the laws of the Province of Alberta, by its general partners  
HOCHTIEF ABC Schools Partner Inc. and 3ASAP Investment LP  
(the “**Contractor**”)

**PREAMBLE:**

Pursuant to an RFQ and RFP process, the Province has selected the Contractor to design, build and finance, and to maintain and renew for a 30 year term, twelve new schools in central and southern Alberta.

The Province and the Contractor therefore agree as follows:

## 1. INTERPRETATION

### 1.1 Defined Terms

In this Agreement (including, except where a contrary meaning is clearly intended, in the Schedules), the following expressions have the following meanings (and where applicable their plurals have corresponding meanings):

**“Adjacent Operator”** means the party or parties operating the Penhold Regional Multiplex, in its or their capacity as operators of said facility;

**“Adjusted School Capital Payment”** has the meaning indicated in Section 9.5;

**“Alberta Education”** means the Province, as represented by the Minister of Education;

**“Alberta Infrastructure”** means the Province, as represented by the Minister of Infrastructure;

**“Availability Criteria”** means all of the criteria set out in Schedule 8;

**“Business Day”** means a day other than a Saturday, Sunday or statutory holiday in Alberta;

**“Capital Payment”** means the component of the monthly payment to be made by the Province to the Contractor under Section 9.2 that is described as the Capital Payment in Schedule 14 (Payment Schedule);

**“Certificate of School Availability”** has the meaning indicated in Section 5.14;

**“Change Order”** has the meaning indicated in Schedule 1 (Change Orders);

**“Change Order Confirmation”** has the meaning indicated in Schedule 1 (Change Orders);

**“Change Order Directive”** has the meaning indicated in Schedule 1 (Change Orders);

**“Construction Completion”** means, in respect of a School, full completion of all aspects of the School in accordance with the Project Requirements, as evidenced by a certificate issued by the Province or the Independent Certifier, as applicable, under Section 5.15;

**“Construction Period”** means the time between Execution of this Agreement and Total Availability (but excluding the day when Total Availability is achieved);



**“Contractor’s Construction Schedule”** means the Contractor’s schedule for construction of the Project, set out in Schedule 2, and including any amendments made from time to time in accordance with Section 5.5;

**“Contractor’s Contact Organization”** means the Contact Organization named in the response to the RFP that culminated in the Contractor’s Proposal;

**“Contractor’s Designs”** means the Contractor’s design drawings and design reports for the Schools, set out in Schedule 3, and including any amendments made from time to time in accordance with Section 5.5;

**“Contractor’s Management Systems and Plans”** means all of the Contractor’s systems and plans presented in the Contractor’s Proposal and set out in Schedule 4, and including any amendments made from time to time in accordance with Section 5.5;

**“Contractor’s Proposal”** means the final (SR2B and SR3) proposal submitted by a consortium of which the Contractor is the special purpose vehicle contemplated by the proposal, submitted in response to the RFP, and includes all amendments made by the Contractor in accordance with the RFP;

**“Core Structure”** has the meaning indicated in Schedule 18 (Technical Requirements);

**“Court”** means a court of law of competent jurisdiction;

**“Damage Event”** means:

- (a) damage to a School caused by risks that are Primary Exclusions (as defined in section 3.1(g) of Schedule 11 (Insurance Requirements)) under the property insurance required to be maintained pursuant to Section 11 and section 3.1(g) of Schedule 11;
- (b) damage to a School, up to the lesser per occurrence of the Property Damage Amount and the actual deductible applicable to the Contractor’s property insurance required to be maintained pursuant to Section 11 and section 3.1(g) of Schedule 11, caused by:
  - (i) the occurrence of Graffiti (as defined in section 5.12.5 of Schedule 18 (Technical Requirements)) or resulting from Graffiti removal; or
  - (ii) the breaking of interior or exterior glazing, other than due to weather events; and
- (c) damage to a School to the extent caused by an Adjacent Operator,

except to the extent that the damage described in clauses (a) to (c) is caused by the Contractor, its agents or subcontractors or others for whom the Contractor is legally responsible or is caused or contributed to by any failure of the Contractor to meet the Project Requirements or the M&R Requirements;

“**Direct Lender Agreement**” means the agreement contemplated by Section 3.2 and Schedule 6, to be entered into among the Province, the Contractor, and one or more lenders (or any trustee or other representative of such lenders) who provide the Senior Debt Financing;

“**Dispute Resolution Procedure**” means the procedure set out in Schedule 7;

“**Environmental Damage or Degradation**” means the presence of contamination in water, soil or air, in violation of applicable environmental laws (including, without limitation, environmental laws enacted after the time at which the Hazardous Substance causing the contamination is first present), caused by any Hazardous Substance, and includes death or injury to plants, animals or human beings resulting in whole or in part from such contamination;

“**Equity**” means any part of the Project Financing other than the Senior Debt Financing;

“**Execution**” of this Agreement means the signing and delivery of this Agreement by both the Province and the Contractor;

“**Exterior Improvements**” has the meaning indicated in Schedule 18 (Technical Requirements);

“**Financing and Initial Performance Letter of Credit**” means the letter of credit, or the letters of credit as the case may be, to be delivered by the Contractor to the Province under Section 3.3, the amount of which may vary as applicable if the second paragraph of Section 3.5 is invoked;

“**FOIP**” means the *Freedom of Information and Protection of Privacy Act* (Alberta), as amended or replaced from time to time;

“**Force Majeure Event**” means any war, invasion, insurrection, armed conflict, act of foreign enemy, revolution, terrorist act, interference by military authorities, nuclear explosion, contamination by ionizing radiation, epidemic, or quarantine restriction that prevents, delays or interrupts the performance of any obligation under this Agreement, other than any obligation to pay any money, and provided such event does not occur by reason of:

- (i) the negligence of the party relying on the Force Majeure Event (or those for whom it is in law responsible); or

(ii) any act or omission of the party relying on the Force Majeure Event (or those for whom it is in law responsible) that is in breach of the provisions of this Agreement;

“**Gross Floor Area**” of a School Building means the sum of the floor areas of the School Building included within the outside face of the exterior walls for all stories or areas that have floor surfaces;

“**Handback Requirements**” means the Contractor’s obligations to hand back the Schools at the end of the Term in the condition required by Schedule 18 (Technical Requirements);

“**Handback on Expiry Requirements**” means the Contractor’s obligations to perform the requirements of the Contractor’s Handback on Expiry Plan set forth in Schedule 4 (Contractor’s Management Systems and Plans) as required by Schedule 18 (Technical Requirements);

“**Hazardous Substance**” means any solid, liquid, gas, odor, heat, sound, vibration, radiation or other substance or emission that is a contaminant, pollutant, dangerous substance, toxic substance, hazardous waste, hazardous material or hazardous substance that is or becomes regulated by or under any applicable environmental law or that is or becomes classified as hazardous or toxic by or under any applicable environmental law;

“**Identified Encumbrances**” means:

(a) all encumbrances and interests that as of May 18, 2012 are registered against any of the titles listed in section 2 of Schedule 12 (School Sites) except instrument 121 087 331 registered in the South Alberta Land Registration District as it pertains to the Town of Chestermere RVS (K-9) School Site; and

(b) all unregistered utility rights of way, easements and other similar interests that are known to the Contractor as of May 18, 2012, or would have been disclosed to the Contractor on that date had the Contractor made inquiry through Alberta One-Call Corporation.

“**Independent Certifier**” means the Independent Certifier contemplated by Section 5.12 whose certificate constitutes certification of School Availability under Section 5.14;

“**Initial Capacity**” means, in respect of a School, the initial student capacity of the School as set out in Schedule 13 (Schools);

“**M&R**” means the maintenance and renewal of the Schools, as contemplated by the M&R Requirements, and the actions required in order for the Contractor to fulfill the Handback Requirements and the Handback on Expiry Requirements;

“**M&R Payment**” means the component of the Payment that is other than the Capital Payment;

“**M&R Period**” means the time from Total Availability (including the day that Total Availability is achieved) until the end of the Term;

“**M&R Requirements**” means the Province’s requirements and technical specifications for:

- (a) all aspects of the maintenance of the Schools; and
- (b) renewal of the Schools;

all as set out in Schedule 18 (Technical Requirements), and including any amendments made from time to time pursuant to Section 7.2;

“**Modifications**” means renovations, alterations, improvements or expansions at a School, including adding Modular Classrooms beyond the Initial Capacity of a School, and any deletions at a School, including removing Modular Classrooms;

“**Modular Classroom**” has the meaning indicated in Schedule 18 (Technical Requirements);

“**Municipality**” means any of, and “**Municipal**” is a reference in respect of any of, the City of Brooks, the City of Medicine Hat, the City of Red Deer, the City of Airdrie, the Town of Beaumont, the Town of Chestermere, the Town of Cochrane and the Town of Penhold, as the context requires;

“**Payment**” means the total monthly payment to be paid by the Province to the Contractor under Section 9.2;

“**Payment Adjustment**” means an adjustment to the Payment authorized under Section 10.2 and Schedule 18 (Technical Requirements) and summarized in Schedule 15 (Payment Adjustments Summary);

“**Prime**” means the rate of interest from time to time declared by the Canadian Imperial Bank of Commerce (or its successor, in the event of a merger or amalgamation) as its prime rate for Canadian dollar commercial loans in Canada;

“**Progress Payments**” means the payments that become due to the Contractor under Section 9.1 in relation to the Provincial Funding;

“**Project**” means the design and build of the Schools in accordance with the Project Requirements;

**“Project Financing”** means financing (of whatever nature, and inclusive of Senior Debt Financing and Equity) arranged by or on behalf of the Contractor sufficient (having regard to the Provincial Funding) to carry out and complete the Project; but not in any event exceeding the amount of Project Financing indicated in or by the Contractor’s Proposal (as such amount may be adjusted in accordance with the definition of **“Senior Debt Financing”**);

**“Project Requirements”** means the Province’s specifications and requirements for the Project, as set out in Schedule 18 (Technical Requirements), and including any amendments made or deemed to be made from time to time pursuant to any provision of this Agreement;

**“Property Damage Amount”** means \$25,000;

**“Provincial Funding”** means funding for the Project in the amount of \$[**amount redacted**] that will be provided by the Province in the form of progress payments as contemplated by Section 9.1 and Schedule 19 (Provincial Funding Progress Payments);

**“Relief Event”** has the meaning set out in Section 13.2, and subject to the foregoing generally means an event the risk of which is for some purposes allocated to the Province by Section 13;

**“Renewal Payment”** means the component of the M&R Payment that is designated in Schedule 14 (Payment Schedule) as the Renewal Payment;

**“RFP”** means the request for proposals issued by the Province in respect of the Project and the M&R;

**“School”** means a School listed in Schedule 13 (Schools), as applicable, with each School being comprised of the Core Structure, the Modular Classrooms and the associated Exterior Improvements;

**“Schools”** means collectively the Schools set out in Schedule 13 (Schools) and subject to the foregoing generally means the twelve new schools in central and southern Alberta;

**“School Availability”** means, in respect of a School, the date when the School has met the Availability Criteria, which occurs on the date that the Certificate of School Availability is issued in respect of that School;

**“School Board”** means any of The Board of Trustees of Black Gold Regional Division No. 18 (**“BGRD”**), The Board of Trustees of Chinook’s Edge School Division No. 73 (**“CESD”**), The Board of Trustees of Grasslands Regional Division No. 6 (**“GRD”**), The Board of Trustees of Medicine Hat School District No. 76 (**“MHSD”**), The Board of Trustees of Rocky View School Division No. 41 (**“RVS”**),

The Board of Trustees of Red Deer Catholic Regional Division No. 39 (“**Red Deer Catholic**”), The Board of Trustees of Red Deer Public School District No. 104 (“**Red Deer Public**”), The Board of Trustees of St. Thomas Aquinas Roman Catholic Separate Regional Division No. 38 (“**STAR**”), The Regional authority of the Greater North Central Francophone Education Region No. 2 (“**Greater North Central Francophone**”), The Regional authority of the Greater Southern Separate Catholic Francophone Education Region No. 4 (“**Greater Southern Catholic**”), as applicable based upon the School in issue;

“**School Building**” means a School excluding the Exterior Improvements;

“**School Capital Payment**” means, in respect of a School, the portion of the Capital Payment attributable to that School based on the Initial Capacity of that School as a proportion of Total Initial Capacity;

“**School M&R Payment**” means, in respect of a School, the portion of the M&R Payment attributable to that School based on the Gross Floor Area of the School Building as a proportion of the Gross Floor Area of all of the School Buildings combined (assuming that all Schools contemplated by this Agreement are constructed), where the Gross Floor Area of each School Building is calculated as of October 31 of each year by the applicable School Board;

“**School M&R Period**” means, in respect of a School, the time from School Availability to Total Availability, including the day that School Availability is achieved and excluding the day that Total Availability is achieved;

“**School Sites**” means the lands on which the Schools are required to be constructed (excluding all fixtures and improvements constructed thereon) as described in Schedule 12, and “**School Site**” means any one of them;

“**Senior Debt Financing**” means any part of the Project Financing that is debt financing (including capitalized interest) and that, through arrangement with the Contractor has or shares in a first charge on, or otherwise has or shares in first priority to, the Payment; but not in any event exceeding the amount of the Senior Debt Financing indicated in or by the Contractor’s Proposal adjusted for any increase or decrease in that amount that is:

(a) attributable solely to movements in interest rates between the time of submission of the Contractor’s Proposal and the earlier of the initial financial closing of the Senior Debt Financing and one year after Execution of this Agreement; and

(b) in the case of an increase, communicated to the Province within 14 days after the Contractor causes or agrees to the increase;

and subject to the above limit means, in the event that the debt financing is initially

raised in a currency other than Canadian dollars, the equivalent Canadian dollar amount that is: (i) if the amount raised is converted into Canadian dollars by a hedging instrument, the Canadian dollar equivalent, taking into account both the amount raised and the hedging instrument; or (ii) if the amount raised is not converted into Canadian dollars by a hedging instrument, the equivalent in Canadian dollars at the time the financing is raised;

“**Technical Requirements**” means all requirements set out in Schedule 18, including but not limited to the Project Requirements, the M&R Requirements, the Handback Requirements and the Handback on Expiry Requirements, and including any amendments made pursuant to Section 7.1 or Section 7.2;

“**Term**” means the period from and including the day that Total Availability is achieved to and including the day immediately preceding the day that is 30 years from the Total Availability Target Date;

“**Termination Event**” means any event described in Section 16.8, and subject to the foregoing, generally means an event or circumstance entitling the Province to terminate this Agreement;

“**Termination Payment**” means the applicable payment specified in Section 18 required to be made by the Province to the Contractor upon termination of this Agreement;

“**Total Initial Capacity**” means the Initial Capacity of all Schools together, as set out in Schedule 13 (Schools);

“**Total Availability**” means the day when all the Schools have achieved School Availability;

“**Total Availability Target Date**” means June 30, 2014; and

“**Tri-Party Agreement**” means an agreement contemplated by Section 2.6 and Schedule 9, to be entered into by the Province and the Contractor with each School Board.

## 1.2 Section References

References in this Agreement to Sections of this Agreement are to the correspondingly numbered provisions of this Agreement. References to Schedules are to the correspondingly numbered Schedules listed in Section 1.3.

## 1.3 Schedules

The following Schedules delivered with this Agreement at the time of Execution of this Agreement are for every purpose to be considered as part of this Agreement (and

provisions of the Schedules are to be considered as provisions of this Agreement):

**Schedule 1 - Change Orders**

**Schedule 2 - Contractor's Construction Schedule**

**Schedule 3 - Contractor's Designs**

**Schedule 4 - Contractor's Management Systems and Plans**

**Schedule 5 - Design and Plan Certification Process and Review Procedure**

**Schedule 6 - Direct Lender Agreement**

**Schedule 7 - Dispute Resolution Procedure**

**Schedule 8 - Availability Criteria**

**Schedule 9 - Form of Tri-Party Agreement**

**Schedule 10 - Index Factor**

**Schedule 11 - Insurance Requirements**

**Schedule 12 - School Sites**

**Schedule 13 - Schools**

**Schedule 14 - Payment Schedule**

**Schedule 15 - Payment Adjustments Summary**

**Schedule 16 - Safety Requirements**

**Schedule 17 - Subcontractors**

**Schedule 18 - Technical Requirements**

**Schedule 19 – Provincial Funding Progress Payments**

#### **1.4 Order of Precedence**

In the event of any conflict or inconsistency between the provisions in the body of this Agreement and the provisions of any Schedule, the provisions in the body of this Agreement shall govern. The provisions of the Direct Lender Agreement will have precedence over the provisions of this Agreement. The provisions of this Agreement will



have precedence over the provisions of the Tri-Party Agreements.

### **1.5 Entire Agreement**

This Agreement is the entire agreement between the Province and the Contractor regarding the subject matter of this Agreement, and supersedes any previous agreements, discussions, negotiations and understandings. There are no agreements, representations, warranties, terms, conditions or commitments regarding the subject matter of this Agreement except as expressed in this Agreement.

### **1.6 Currency**

In this Agreement, all references to dollar amounts are in Canadian currency.

### **1.7 Liquidated Damages**

Where any provision of this Agreement specifies or otherwise indicates an amount as liquidated damages, both the Province and the Contractor agree that such amount represents their genuine mutual pre-estimate of the particular damages arising from the particular event.

### **1.8 No Agency, Joint Venture, Partnership, Lease or Loan**

This Agreement is not intended to and does not:

- (a) constitute either party as the agent of the other for any purpose, or otherwise create any relationship of agency;
- (b) constitute or create any joint venture;
- (c) constitute or create any partnership;
- (d) constitute the relationship of landlord and tenant; or
- (e) constitute the relationship of lender and borrower;

and neither party shall allege or assert for any purpose that this Agreement constitutes or creates a relationship of agency, joint venture, partnership, landlord and tenant, or lender and borrower.

### **1.9 Contractor's Knowledge**

Where any provision of this Agreement refers to the knowledge of or matters known to the Contractor, then:

- (a) prior to Execution of this Agreement, knowledge on the part of any personnel

having direct involvement in the preparation of the Contractor's Proposal on behalf of any consortium member named in the Contractor's Proposal shall be deemed to have been knowledge of the Contractor, even if the Contractor had not yet been incorporated or created;

(b) during the Construction Period, knowledge on the part of personnel of the Contractor's principal design subcontractor or principal construction subcontractor, provided such personnel are directly involved in the design or construction of the Project, shall be deemed to be knowledge of the Contractor; and

(c) during the School M&R Period and the M&R Period, knowledge on the part of personnel of the Contractor's principal M&R subcontractor, provided such personnel are directly involved in the M&R, shall be deemed to be knowledge of the Contractor.

### **1.10 Restated Schedules**

Where any provision of this Agreement contemplates amendment of a Schedule, the party initiating the amendment or the course of action that results in the amendment shall as soon as practicable after the amendment comes into effect prepare a restated Schedule reflecting the amendment and deliver it to the other party.

### **1.11 Alberta Infrastructure and Alberta Education**

This Agreement is entered into by the Province as an indivisible legal entity. Although signing of this Agreement on behalf of the Province is effected by both Alberta Infrastructure and Alberta Education, the Province represents and warrants that unless and until the Province provides the Contractor with notice to the contrary, this Agreement will be administered solely by Alberta Infrastructure.

## **2. DESIGN, BUILD, FINANCE AND MAINTAIN**

### **2.1 Project Financing**

The Contractor undertakes to arrange the Project Financing, as more particularly contemplated in Section 3.

### **2.2 Design and Build**

The Contractor undertakes to design and build the Schools in accordance with the Project Requirements and as more particularly set out in Section 5.

### **2.3 Maintenance and Renewal**

The Contractor agrees to maintain and renew the Schools in accordance with the M&R Requirements and as more particularly set out in Section 6.

### **2.4 Handback**

The Contractor undertakes that upon expiry of the Term, the Schools shall be in accordance with the Handback Requirements and as more particularly set out in Section 8.

### **2.5 Assumption of Risk**

Except to the extent otherwise expressly allocated to the Province by the provisions of this Agreement, all risks, costs and expenses in relation to the performance by the Contractor of its obligations under this Agreement are allocated to, and as between the Province and the Contractor are the exclusive responsibility of, the Contractor.

### **2.6 Tri-Party Agreements - Condition Precedent and Delegation**

As a condition precedent to this Agreement each School Board must, concurrent with the Execution of this Agreement, sign and deliver to the Province a Tri-Party Agreement that is in all material respects in the form prescribed by Schedule 9 (Form of Tri-Party Agreement) and that does not include any substantive obligations on the part of the Province, the applicable School Board or the Contractor other than as expressly contemplated by Schedule 9, failing which this Agreement shall not come into effect and shall not create legal obligations.

The Contractor and the Province shall, upon satisfaction of the condition precedent described in the preceding paragraph, enter into with each School Board the Tri-Party Agreement signed and delivered to the Province by each respective School Board.

The Contractor acknowledges that the Province may, during the School M&R Period and the M&R Period, delegate to each School Board the rights and responsibilities of the Province under certain provisions of this Agreement (except the Province's obligations to pay the Contractor pursuant to the terms of this Agreement) as set forth in the Tri-Party Agreement with each School Board, and that the Province may from time to time, with notice to the Contractor, amend the terms of such delegation. For greater certainty, the Province remains primarily responsible to the Contractor for any matter delegated to a School Board as contemplated in this Section 2.6.

### 3. FINANCING

#### 3.1 Project Financing

The arranging of the Project Financing is the sole responsibility of the Contractor.

#### 3.2 Direct Lender Agreement

The Province will, at the Contractor's request, enter into a Direct Lender Agreement with the Contractor and a lender or lenders (or any trustee for or other representative of lenders) who provide all or a substantial portion of the Senior Debt Financing, subject to the following:

(a) the Direct Lender Agreement to be entered into under this Agreement must be in all material respects in the form prescribed by Schedule 6, and must not include any substantive obligations on the part of the Province other than as expressly contemplated by Schedule 6; and

(b) the Province will enter into a replacement Direct Lender Agreement at the Contractor's request, provided the Contractor has arranged cancellation of the Direct Lender Agreement previously in effect, it being understood that no more than one Direct Lender Agreement will be in effect at any time.

#### 3.3 Condition Precedent – Financing and Initial Performance Letter of Credit

Provided that the condition precedent set out in Section 2.6 has been satisfied, the Contractor must, as a condition precedent to this Agreement, deliver to the Province within three Business Days after Execution of this Agreement an irrevocable, unconditional, on sight letter of credit in the amount of \$10 million (or irrevocable, unconditional, on sight letters of credit together totaling \$10 million) (in either case, the "**Financing and Initial Performance Letter of Credit**"), presentable for payment at a bank in Canada and issued by a bank authorized under the *Bank Act* (Canada) to do business in Canada (or issued by such other financial institution approved in advance for the purposes of this Section by the Province, who may grant or decline such approval in its absolute discretion), and having a senior, unsecured long-term credit rating of not less than A+ (with a stable outlook) or equivalent from one of (and no rating less than A+ (with a stable outlook) or equivalent from any other of) Standard & Poor's, DBRS (formerly known as Dominion Bond Rating Service) or Fitch Ratings (or any other major credit rating agency approved for the purposes of this Section by the Province, who may grant or decline such approval in its absolute discretion), failing which this Agreement shall not come into effect and shall not create legal obligations.

### **3.4 Financing and Initial Performance Letter of Credit**

The Financing and Initial Performance Letter of Credit shall be held by the Province as security for the obligations of the Contractor to obtain the Project Financing and to design and build the Project.

### **3.5 Release of Financing and Initial Performance Letter of Credit**

The Financing and Initial Performance Letter of Credit must be maintained in effect by the Contractor until the Contractor has satisfied the Province, acting reasonably, that the Contractor has incurred in furtherance of the Project direct out of pocket expenditures of not less than \$10 million, exclusive of:

- (a) the cost of legal and financial advisors;
- (b) any costs incurred in connection with preparation of the Contractor's Proposal;
- (c) design costs;
- (d) financing costs;
- (e) mobilization costs;
- (f) any prepaid management or service fees; and
- (g) the cost of any materials that have not been incorporated into the Project as fixtures;

and upon such event, the Province shall immediately surrender the Financing and Initial Performance Letter of Credit to the Contractor. The Province will also as soon as reasonably practicable surrender to the Contractor the Financing and Initial Performance Letter of Credit if this Agreement is terminated in accordance with this Agreement other than under Section 17.2(a).

Notwithstanding the foregoing paragraph, in the event that the Contractor has delivered the Financing and Initial Performance Letter of Credit in the form of two or more letters of credit as contemplated in Section 3.3, then, when the Contractor satisfies the Province, acting reasonably, that the Contractor has incurred not less than \$5 million in direct out of pocket expenditures in furtherance of the Project, exclusive of items (a) to (g) in the foregoing paragraph, the Province shall surrender one or more of the letters of credit together totalling not more than \$5 million comprising the Financing and Initial Performance Letter of Credit to the Contractor and the Province will retain the remaining letters of credit comprising the Financing and Initial Performance Letter of Credit until such time as the Contractor has satisfied the Province, acting reasonably, that the

Contractor has incurred in furtherance of the Project direct out of pocket expenditures of not less than \$10 million, exclusive of items (a) to (g) in the foregoing paragraph.

### **3.6 Presentation of Financing and Initial Performance Letter of Credit**

The Province may present the Financing and Initial Performance Letter of Credit for payment only if:

- (a) this Agreement is terminated by the Province under Section 17.2(a);
- (b) the Financing and Initial Performance Letter of Credit has an expiry date and the Contractor fails to deliver a renewal of the Financing and Initial Performance Letter of Credit at least 20 days before the expiry date specified in the Financing and Initial Performance Letter of Credit; or
- (c) any of the senior, unsecured long-term credit ratings of the issuer of the Financing and Initial Performance Letter of Credit becomes less than A+ (with a stable outlook) or equivalent and the Contractor fails to deliver a replacement of the Financing and Initial Performance Letter of Credit no later than 21 days after being so requested by the Province,

and only if the condition in Section 3.5 for release of the Financing and Initial Performance Letter of Credit has not been achieved prior to the occurrence of the event described in clause (a) or clause (b) or clause (c), as the case may be.

Upon presenting the Financing and Initial Performance Letter of Credit for payment, the Province may, subject to the obligations of the Province under Section 3.7, retain the proceeds therefrom as liquidated damages.

### **3.7 Repayment of Proceeds**

If the Province presents the Financing and Initial Performance Letter of Credit under Section 3.6(b) or (c), and if thereafter, but prior to termination of this Agreement, the Contractor meets the condition in Section 3.5 for release of the Financing and Initial Performance Letter of Credit, then the Province shall within 10 Business Days thereafter repay to the Contractor, without interest (excepting only interest accruing pursuant to Section 9.8 after such repayment becomes due), the proceeds from presenting the Financing and Initial Performance Letter of Credit.

## **4. THE SCHOOL SITES**

### **4.1 Access and Use**

Subject to the provisions of this Section 4, the Province hereby provides, in its own right and on behalf of each School Board and each Municipality, as applicable, the Contractor

with a non-exclusive license to access and use, for the purpose of performing its obligations under this Agreement, each of the School Sites currently owned by either or both of the applicable Municipality and the applicable School Board, including the Schools to be constructed thereon under this Agreement.

Additionally, the Contractor may, in furtherance of the Project or the M&R, provide to its subcontractors, agents and employees or any representatives of the holders of the Senior Debt Financing, a right of access to and use of the School Sites and the Schools, but no such right of access to and use of the School Sites and the Schools shall have effect beyond the expiry or termination of this Agreement.

The Contractor acknowledges that the Province, the School Boards or the Municipalities may, without compensation to the Contractor except as follows from the existence of a Relief Event under Section 13.2(j), grant utility rights of way, easements or similar interests in land over the School Sites.

#### **4.2 Status of School Sites**

Except as expressly set out in this Agreement:

- (a) access to and use of the School Sites is being provided to the Contractor on an “as is” basis; and
- (b) the Province provides no representations or warranties with respect to the School Sites.

#### **4.3 Commencement and Duration**

Subject to Section 4.11, the Contractor’s right to non-exclusive access to and use of the School Sites and the Schools comes into effect upon Execution of this Agreement and continues until the expiry of the Term or sooner termination of this Agreement. Such right to non-exclusive access to and use of the School Sites and the Schools (together with any right of access to and use of the School Sites and the Schools granted by the Contractor pursuant to Section 4.1) automatically terminates upon any termination of this Agreement.

#### **4.4 No Access Fee**

No fee or other monetary amount shall be payable by the Contractor for its right of access to and use of the School Sites and the Schools.

#### **4.5 Condition of the School Sites**

Subject to Sections 11.7, 11.8 and 13.2(d), and subject to the Contractor’s obligations under this Agreement to carry out the Project, the Contractor shall maintain the School Sites so as to comply with the Technical Requirements throughout the duration of this

Agreement, and shall:

(a) subject to clause (e) below, be responsible for repairing all damage to the School Sites, however caused, excepting only damage caused by a Force Majeure Event or damage to the extent caused directly by the Province, a School Board, or a Municipality or their respective agents or contractors (except the Contractor) or those for whom the Province, a School Board or a Municipality is respectively legally responsible or caused by any person exercising rights under an Identified Encumbrance, or under a grant contemplated by the third paragraph of Section 4.1, or accessing the School Sites pursuant to paragraph (d) of Section 4.9;

(b) not stockpile any material on the School Sites except, in respect of each School Site, prior to School Availability being achieved, and except for the purpose of doing major renewal or otherwise carrying out construction, maintenance or repair activities under this Agreement;

(c) not commit or permit by the Contractor's agents or subcontractors or those for whom the Contractor is legally responsible, any waste or nuisance on the School Sites;

(d) promptly report to the Province, the applicable School Board and the applicable Municipality, and promptly report as required by applicable laws, any Environmental Damage or Degradation to the School Sites of which the Contractor becomes aware; and

(e) promptly deal with any Environmental Damage or Degradation to the School Sites as required by applicable laws (which dealing with may require excavation and removal or may permit implementation of a risk management plan depending upon the applicable laws), with the exception only of:

(i) Environmental Damage or Degradation (including, without limitation, the presence of any Hazardous Substance) pre-existing as of the date of Execution of this Agreement provided that if such pre-existing Environmental Damage or Degradation is required to be dealt with in order to carry out the Project or the M&R, the Contractor shall do so and claim relief arising in connection therewith under Section 13.2(d); and

(ii) Environmental Damage or Degradation (including, without limitation, the presence of any Hazardous Substance) caused after the date of Execution of this Agreement by the Province, a School Board, or a Municipality or their respective agents or contractors (except the Contractor) or those for whom the Province, a School Board or a Municipality is respectively legally responsible;

which excepted Environmental Damage or Degradation shall be remediated by the Province in such manner and upon such timetable as the Province may



determine, provided however that the Province shall ensure that neither the remediation nor any failure or delay by the Province to carry out the remediation interferes with or disrupts or delays the carrying out by the Contractor of the Project or the M&R, as the case may be.

The Province acknowledges and agrees that neither the Project itself nor the observing and carrying out of the Technical Requirements by the Contractor shall of itself constitute a breach of the Contractor's obligations to maintain the School Sites so as to comply with the Technical Requirements or its obligations under clauses (a) or (c) of this Section 4.5, nor shall it constitute Environmental Damage or Degradation that the Contractor is obligated to rectify under clause (e) of this Section.

#### **4.6 Permitted Use**

The Contractor covenants that it (and others for whom it is legally responsible):

(a) will use the School Sites and the Schools to be constructed thereon only for the purposes of the Project and, from and after such time as School Availability is achieved at a School, not for any commercial purposes other than the Project and the M&R; and

(b) will not, from and after such time as School Availability is achieved at a School, interfere with that School being continuously open and available for use by the School Board for Educational Activities, Educational Support Activities, Adhoc School Use, Community Use and Acceptable Third Party Use, each as defined in Schedule 18 (Technical Requirements) or by the Municipality for Community Use as defined in Schedule 18, excepting only such closures or partial closures as are expressly contemplated and authorized by the Technical Requirements.

#### **4.7 Liens and Claims**

The Contractor shall promptly pay all proper accounts for work done or materials furnished under all contracts it enters into relating to the Project or relating to the M&R, excepting those sums required to be retained under the provisions of any applicable statute of Alberta, and shall not by any act or omission cause, encourage, suffer or allow any lien or claim under any such statute or in equity to be made against the Province, the School Boards or the Municipalities or filed or registered against the School Sites or the Schools by reason of work, services or materials supplied or claimed to have been supplied to the Contractor or anyone holding any interest through or under the Contractor. The Contractor shall at its own expense promptly take all steps required to effect a discharge of any lien or deal with any claim so filed or registered.

Notwithstanding Sections 5.6(c) and 6.3, the failure by the Contractor to retain money in a "lien fund" (as defined in the *Builders' Lien Act* (Alberta)) in respect of the Project or

the M&R will not constitute a Default (as defined in Section 16.7), provided all persons who do or cause to be done any work on or in respect of the Project or the M&R, furnish any material to be used in or in respect of the Project or the M&R, or rent equipment to the Contractor used or to be used in respect of the Project or the M&R, are paid in full in accordance with the law.

#### **4.8 Ownership of Improvements**

The Contractor acknowledges that the Contractor shall not have any ownership interest in any of the Schools.

#### **4.9 Uninterrupted Access and Use**

The Province covenants that the Contractor's access to and use of the School Sites and the Schools pursuant to Section 4.1 shall be uninterrupted during the duration of this Agreement, shall be without any disturbance or interference from the Province, the School Boards or the Municipalities or any person claiming a right of access to or use of the School Sites from or under the Province, the School Boards or the Municipalities, and shall be adequate to enable the Contractor to carry out the Project throughout the Construction Period and to carry out the M&R throughout the School M&R Period and the M&R Period, in each case subject to the following:

- (a) the Identified Encumbrances;
- (b) the exercise by the Province of any express right under and in accordance with this Agreement, including without limitation the Province's right under Section 5.10 to direct the Contractor to cease construction, the Province's rights under Section 7.3 to undertake Modifications, the Province's right under Section 14.4 to access to and use of the School Sites and the Schools for inspection purposes, the Province's step-in rights under Section 16.6, the Province's emergency response rights under section 5.11.3.2 of Schedule 18 (Technical Requirements) and all other rights of Province to access the School Sites and the Schools for the purposes of any inspection or review under Schedule 18;
- (c) the reasonable exercise by a School Board of any express right under and in accordance with the School Board's respective Tri-Party Agreement;
- (d) any entry upon the School Sites or the Schools by the Province in accordance with the provisions of this Agreement or by any third party through written consent of the Province or the applicable School Board, provided that such entry does not materially adversely interfere with or disturb the Contractor's carrying out of the Project or the M&R;
- (e) the rights of the School Boards to use and occupy the Schools and the School Sites from the time that School Availability is achieved at each respective School, and the rights of the Municipalities to use the Schools for Community Use as defined in Schedule 18;

(f) the restrictions on access to the Schools and the School Sites during the School M&R Period and the M&R Period set forth in Schedule 18;

(g) the right of any Governmental Authority (as defined in Schedule 18) to enter the School Sites or the Schools for the purposes of carrying out its statutory duties; and

(h) any interference, including without limitation an injunction issued by a Court or action by protesters, to the extent attributable to a negligent or wrongful act or omission by the Contractor or those for whom the Contractor is legally responsible.

The Province shall ensure that the School Boards and the Municipalities defend title to the School Sites against any person (including, without limiting the generality of the foregoing, any person claiming aboriginal title or treaty rights) claiming any interest adverse to the Province, the applicable School Board or the applicable Municipality in the School Sites, except where such adverse interest arises as a result of a negligent or wrongful act or omission of the Contractor or those for whom it is legally responsible.

#### **4.10 Payment of Taxes on School Sites**

The Province will ensure that all property taxes, special taxes, local improvement taxes and requisitions that may be imposed on the School Sites or the Schools by a municipality pursuant to the *Municipal Government Act* (Alberta) or any successor legislation are paid where non-payment would impede the Contractor's ability to carry out its obligations under this Agreement.

#### **4.11 Access and Use Rights to Cease**

Upon any termination of this Agreement, the Contractor shall cease to have any right of access to and use of the School Sites and the Schools, and if the Contractor fails to comply with this Section 4.11, then it shall indemnify the Province, the School Boards and the Municipalities against any damages, losses or costs incurred by the Province, the School Boards or the Municipalities in consequence of such failure. Notwithstanding the foregoing sentence, the Province shall permit the Contractor reasonable access to and use of the School Sites and the Schools to, as soon as reasonably practical and in any event no later than 1 month following termination of this Agreement, demobilize and remove any of the Contractor's equipment and materials from the School Sites and the Schools, and the Contractor shall indemnify the Province, the School Boards and the Municipalities against any damages, losses or costs incurred by the Province, the School Boards or the Municipalities in consequence of the Contractor accessing and using the School Sites and the Schools after termination of this Agreement pursuant to this sentence.

#### **4.12 Hold Harmless**

Without limitation to the applicability of the general indemnity in Section 16.1, but

subject to the last sentence of Sections 5.2 and 6.2 and subject to Sections 5.7(c) and 6.4(c) and subject to the exceptions set out in Section 4.5(e) and in the last paragraph of Section 4.5, the Contractor shall hold harmless and indemnify the Province, the School Boards and the Municipalities (and as such Section 20.3 applies) from any and all third party claims for which the Contractor is legally responsible and arising in relation to the School Sites and the Schools, including without limiting the generality of the foregoing:

- (a) any claims for occupier's liability in respect of the School Sites or the Schools, including any claims for which the School Board or the Municipality has liability solely as a result of being the registered owner of the School Sites and the Schools, except to the extent that a Court has determined that such liability was caused or contributed to by the Province, the School Board or the Municipality or their respective agents or contractors (excluding the Contractor) or those for whom the Province, the School Board or the Municipality is respectively legally responsible;
- (b) any claims arising out of negligence or willful acts by the Contractor or the Contractor's agents or subcontractors or those for whom the Contractor is legally responsible; and
- (c) any claims arising under or in relation to any Environmental Damage or Degradation (except for claims arising in relation to the Environmental Damage or Degradation set out in the exceptions to Section 4.5(e)) or any nuisance.

## **5. DESIGN AND BUILD OF THE SCHOOLS**

### **5.1 Contractor's Obligations**

The Contractor agrees to design and build the Schools in accordance with the Project Requirements, the Contractor's Designs and the Contractor's Management Systems and Plans, and to use reasonable endeavors to comply with the Contractor's Construction Schedule. In the event of any inconsistency among the Project Requirements, the Contractor's Designs and the Contractor's Management Systems and Plans, the higher standard or specification shall apply; but in no event shall anything in the Contractor's Designs or the Contractor's Management Systems and Plans detract from the Contractor's absolute obligation to design and build the Schools in accordance with the Project Requirements.

### **5.2 Project Requirements**

Subject only to Section 5.4 and notwithstanding any other provision of this Agreement, the Contractor's obligation to design and build the Schools in accordance with the Project Requirements is absolute, and cannot be modified or waived except by amendment of the Project Requirements made in accordance with Section 7.1. If the Contractor asserts that any aspect of the Project Requirements is uncertain or ambiguous, either party may

require that the interpretation of that aspect of the Project Requirements be determined by the Dispute Resolution Procedure. The Province acknowledges that it is responsible for the adequacy and suitability of the Project Requirements, and shall indemnify the Contractor against any claims by third parties (including the reasonable cost of defending such third party claims, on a solicitor and client basis) for personal injuries or property damage to the extent that the Province has agreed with the Contractor, or a Court has determined that such injury or damage was caused or contributed to by a failure of the Project Requirements to be adequate and suitable (and including the reasonable cost of seeking such a Court determination in respect of the third party claim, on a solicitor and client basis, where it must be made separately from the Court proceedings constituting the third party claim).

### **5.3 Contractor's Responsibility to Carry Out Project Requirements**

Subject to Section 5.4 or as expressly stated otherwise in this Agreement, no consultation with or inspection or test or approval or comment (whether under the procedure contemplated by Section 5.9 or otherwise) or purported direction by or on behalf of the Province, and no information of any kind or nature whatsoever furnished by the Province, shall relieve the Contractor from exclusive responsibility for ensuring that the Project complies with the Project Requirements or estop the Province from asserting any non-compliance with the Project Requirements. In the event of any failure by the Contractor to comply with the Project Requirements, the Contractor shall not assert any duty of care or contributory negligence on the part of the Province in relation to such failure, and shall indemnify and hold harmless the Province, the School Boards and the Municipalities against any claims by third parties arising as a result of such failure.

### **5.4 Request for Clarification**

The Contractor may request that the Province agree that a particular design element or construction specification complies with the Project Requirements, and if the Province so agrees then such design element or construction specification shall be deemed to comply with the Project Requirements. However, the Province must consider such a request only where:

- (a) the request is in relation to a specific design element or construction specification;
- (b) the pertinent Project Requirements are capable of differing interpretations in relation to the specific design element or construction specification;
- (c) the Contractor has established that it would be exposed to significant risk of material expense or delay if its interpretation of the pertinent Project Requirements ultimately proved to be incorrect; and
- (d) the Contractor has not made numerous or generalized requests under this Section such that in the reasonable opinion of the Province the Contractor is

attempting to use this Section to transfer to the Province all or partial responsibility for ensuring that the Project meets the Project Requirements.

The Province will respond to requests from the Contractor under this Section 5.4 within five Business Days of receipt of the Contractor's written request.

### **5.5 Contractor's Designs, Plans and Schedule**

The Contractor may, in accordance with the procedures set out in Schedule 5 (Design and Plan Certification Process and Review Procedure), amend the Contractor's Designs, the Contractor's Management Systems and Plans or the Contractor's Construction Schedule with the Province's prior consent, such consent not to be unreasonably withheld (it being reasonable for the Province to withhold consent to any amendment that would result in a material reduction in the maintainability or indoor environmental quality of any School or in the ability to achieve LEED™ Silver Certification (as defined in Schedule 18 (Technical Requirements)) at any School or in the quality, safety, durability, functionality or aesthetics of any School; in which context "material" means that the Province could reasonably have declined the design on a pass-fail basis had the proposed amendment been submitted during the SR2 phase of the RFP). If the Contractor asserts that the Province has unreasonably withheld consent, either party may require that the matter be determined by the Dispute Resolution Procedure.

Notwithstanding the foregoing, the Contractor may make amendments to non-critical path items in the Contractor's Construction Schedule without obtaining the Province's prior consent, provided that notice of each such amendment is provided to the Province prior to or as soon as practicable after the amendment is made.

### **5.6 Contractor Solely Responsible for Project**

Except for the obligations of the Province specifically set out in this Agreement, the Contractor is solely responsible for doing all things of any nature whatsoever required to complete the Project, including without limiting the generality of the foregoing:

- (a) subject to the obligations of the Province set out in Section 15.4:
  - (i) the obtaining of all required permits;
  - (ii) the making of all required arrangements relating to utilities; and
  - (iii) the making of all required arrangements with municipalities;
- (b) establishing or arranging its own maintenance facility (outside the School Sites) and any other support facilities required by the Contractor; and
- (c) complying with all applicable laws.

## **5.7 Contractor Solely Responsible for Costs**

Except as expressly set out in this Agreement, the Contractor is solely responsible for paying all costs, fees and charges of any nature whatsoever required to complete the Project, excepting only:

- (a) the costs, fees and charges of the Province's own personnel, consultants and professional advisors;
- (b) the costs, fees and charges of any mediation or arbitration pursuant to the Dispute Resolution Procedure, which are specifically provided for in Schedule 7 (Dispute Resolution Procedure);
- (c) any claims by third parties asserting a right to damages as a result of the Project being carried out as contemplated by and in accordance with this Agreement, to the extent such claims are not founded on any negligent act or omission by the Contractor or any of its subcontractors or a failure by the Contractor to comply with this Agreement. The Province shall indemnify the Contractor against such third party claims set out in the foregoing portion of (c) (including the reasonable cost of defending such claims, on a solicitor and client basis); and
- (d) any costs, fees, charges or payments expressly to be made by the Province under the provisions of this Agreement.

The Province shall not be obligated to pay any costs, fees or charges in relation to the Project except as expressly set out in Section 9 (including, without limitation, the Provincial Funding) or elsewhere in this Agreement.

## **5.8 Construction Within the School Sites**

The Contractor agrees to construct each School entirely within the applicable School Site, as illustrated in Schedule 12 (School Sites), and acknowledges that it has fully familiarized itself with the requirements of each School, as detailed in Schedule 18 (Technical Requirements), and each School Site and has satisfied itself that no other land outside the applicable School Site will be required for any School.

## **5.9 Detailed Designs**

The Contractor shall, in accordance with the procedures set out in Schedule 5 (Design and Plan Certification Process and Review Procedure), provide the Province with copies of all detailed designs (including, but not limited to, design reports, detailed design drawings, shop drawings and construction specifications, and for express clarity including any changes to detailed designs previously provided to the Province in accordance with this Section 5.9) for the Project, and, if applicable, for any Modification or renewal carried out during the Term, as they are prepared, and invite comment from

the Province on the detailed designs, all in accordance with the procedures set out in Schedule 5. The Contractor shall not commence work on any component of the Project, or, if applicable, on any component of a Modification or renewal, if such work has not been addressed in detailed designs provided to the Province in accordance with this Section 5.9. **The parties expressly intend and agree that neither comment by the Province nor failure by the Province to comment or otherwise participate in any manner in respect of the procedure prescribed by Schedule 5 shall shift or detract from the Contractor's absolute responsibility under Section 5.3 to carry out the Project or any Modification or renewal in accordance with the Technical Requirements.**

#### **5.10 Stop Work Order**

The Province may at any time direct the Contractor to cease any aspect of construction at a School that it considers to be not in accordance with the Project Requirements. If it is subsequently determined that the work was in accordance with the Project Requirements, then such direction shall, subject to Section 13.2, constitute a Relief Event under Section 13.2(b).

#### **5.11 Construction Delays**

If the progress of the Project falls materially behind the Contractor's Construction Schedule, the Contractor shall immediately so advise the Province and shall in a timely manner advise the Province of its remedial plan for bringing the Project back on schedule. If the Contractor fails to achieve Total Availability by the Total Availability Target Date, the Contractor shall (subject to adjustment of the dates in clauses (a) and (b) below pursuant to Section 11.7, Section 12.1(b) or Section 13.3(b)) provide the Province with:

- (a) by July 31, 2014, the Contractor's plan for and expected dates for achieving School Availability at the remaining Schools and for achieving Total Availability; and
- (b) from and after August 1, 2014, weekly progress and activity reports, including a statement of the Contractor's current expectation of when School Availability at the remaining Schools and Total Availability will be achieved and all contingencies to which these expectations are subject.

#### **5.12 Independent Certifier**

At least 180 days prior to the date the Contractor anticipates that the first School will satisfy the Availability Criteria, the Contractor and the Province must jointly retain an Independent Certifier or Independent Certifiers acceptable to both acting reasonably to perform an assessment of each School to determine if the Availability Criteria have been



met. Each Independent Certifier shall be retained in accordance with the following:

- (a) the Independent Certifier must be an architect or engineering consultant having strong expertise in school design and safety;
- (b) the Independent Certifier must agree to carry out and discharge the responsibilities contemplated by this Section 5.12, and Sections 5.13, 5.14, 5.15, 5.16 and 5.17, as the case may be, and be available to carry out and discharge such responsibilities promptly and within the timelines contemplated in this Agreement;
- (c) the Independent Certifier must carry professional liability insurance with errors and omissions coverage of not less than \$1,000,000 per claim;
- (d) all fees and expenses of the Independent Certifier are to be shared equally by the Contractor and the Province; and
- (e) the Independent Certifier shall be impartial to the parties when required to make any recommendation, determination or assessment.

### **5.13 Anticipated School Availability**

Having regard to the first sentence of Section 5.14, when the Contractor anticipates that in approximately 20 Business Days a School will satisfy the Availability Criteria, the Contractor shall notify the Province, including an indication of the work still intended to be completed by the Contractor for the School to achieve School Availability.

The Contractor shall request an inspection by the Independent Certifier and shall provide the Province with the results of that inspection. The Province may, within 10 Business Days after receiving the results of the Independent Certifier's inspection, (i) perform its own inspection, and (ii) notify the Contractor and the Independent Certifier of any items that, in the opinion of the Province, prevent the School from satisfying the Availability Criteria.

### **5.14 Certification of School Availability**

The Independent Certifier shall not certify that School Availability has been achieved for any School prior to April 1, 2014.

When the Independent Certifier, having regard to any items noted by the Province in accordance with the process contemplated in the last sentence of Section 5.13 and all remedial action, if any, taken by the Contractor in response thereto, is satisfied that such School has satisfied the Availability Criteria, the Independent Certifier shall promptly issue to the Contractor and to the Province a certificate certifying that School Availability has been achieved ("**Certificate of School Availability**"). The date of School Availability for a School shall be the date on which the Certificate of School Availability

is issued in respect of that School and the Province shall make payments in respect of that School at the times and in accordance with the terms of this Agreement and the Contractor shall commence performing the M&R at that School.

If the Independent Certifier, having completed the inspection referred to in Section 5.13 in respect of a School and having considered any items noted by the Province in accordance with the process contemplated in the last sentence of Section 5.13 and all remedial action, if any, taken by the Contractor in response thereto, determines that the School has not satisfied the Availability Criteria, then the Independent Certifier shall issue to the Contractor and to the Province a notice stating that the Certificate of School Availability has not been issued and specifying any outstanding matters that must be attended to before the Certificate of School Availability can be issued for that School (the “**Notice of Failure to Achieve Availability Criteria**”). When the Contractor anticipates that this School will satisfy the Availability Criteria, the Contractor shall again engage the process set out in Sections 5.13 and 5.14, with the exception that the time periods contemplated in Section 5.13 shall in each case be reduced to three Business Days.

### **5.15 Construction Completion**

Upon issuing in respect of a School the Certificate of School Availability, the Independent Certifier shall also issue to the Contractor and to the Province a list of deficiencies (the “**Deficiency List**”) required to be rectified for Construction Completion and the Independent Certifier’s estimate of the cost to achieve Construction Completion. The Province may, within five Business Days of receipt of the Deficiency List, notify the Contractor and the Independent Certifier of any additional items that in the opinion of the Province are required to be rectified for Construction Completion and the Independent Certifier will, to the extent that it agrees with the Province, adjust the Deficiency List and its estimate of the cost to achieve Construction Completion accordingly.

Following achievement of School Availability at a School, the Contractor shall diligently proceed to Construction Completion at that School while complying with the restrictions on access set out in Schedule 18 (Technical Requirements). When the Contractor has advised the Province in writing that Construction Completion for that School has been achieved and requested that the Province inspect for Construction Completion, the Province will, within five Business Days after receiving the Contractor’s request, carry out an inspection (which shall be carried out jointly with the Contractor if so requested by the Contractor). Following the inspection the Province will, if all items on the Deficiency List for that School have been rectified, issue a certificate confirming Construction Completion for that School. If the Province is of the view that certain items on the Deficiency List for that School have not been rectified, then the Province will advise the Contractor and the Independent Certifier in writing of those outstanding items. In that case, the Independent Certifier will conduct subsequent inspections and will issue a certificate confirming Construction Completion when the Independent Certifier is satisfied that all items on the Deficiency List have been rectified.

### 5.16 Construction Completion Holdbacks

In respect of each School, if upon School Availability the Contractor has not achieved Construction Completion the Contractor shall within 30 days thereafter prepare and deliver to the Province a comprehensive workplan and schedule acceptable to the Province, acting reasonably, designed to achieve Construction Completion within a reasonable time thereafter. Following delivery and acceptance of such workplan and schedule, the Contractor shall keep the Province fully advised of all activity and progress in carrying out the workplan. If the Contractor fails to deliver an acceptable workplan and schedule within such 30 day period or, having delivered it, fails in any material respect to diligently carry out the workplan in accordance with the schedule, then the Province may hold back from any Payment, any Adjusted School Capital Payment and any School M&R Payment, an amount of up to twice the amount of the Independent Certifier's estimate provided (and if applicable, adjusted), in accordance with Section 5.15 of the cost of achieving Construction Completion. The holdback shall be released to the Contractor, without interest, when Construction Completion is achieved. However, if Construction Completion is not achieved within 60 days after School Availability (or such longer period as may be agreed by the Province, acting reasonably, but in any event not exceeding 12 months after School Availability), the Province shall request that the Independent Certifier provide an estimate of the cost of achieving Construction Completion based on the work that the Contractor has not completed by the date of such request. The Province may by notice to the Contractor elect to do the remaining work required to achieve Construction Completion and in that event may retain as liquidated damages an amount of up to twice the amount of the Independent Certifier's estimate of the cost to complete the work remaining to be done to achieve Construction Completion and the balance of the holdback shall be released to the Contractor without interest.

### 5.17 Landscaping Holdback

Notwithstanding Section 5.14, if:

- (a) a School does not achieve School Availability by the Total Availability Target Date;
- (b) the Independent Certifier is satisfied that that School has satisfied the Availability Criteria except the completion of the landscaping requirements set out in sections 4.9.8.8 and 4.11.1 of the Project Requirements (the "**Landscaping Work**"); and
- (c) the completion of the Landscaping Work for that School will be further delayed into the winter of 2014-2015,

then, the Independent Certifier shall issue to the Contractor and to the Province a recommendation that such School has satisfied the Availability Criteria except the completion of the Landscaping Work, and such recommendation shall for the purposes of

this Agreement constitute certification that School Availability has been achieved. The Independent Certifier shall also issue to the Contractor and to the Province the Independent Certifier's estimate of the cost to complete the Landscaping Work. The Province may hold back from any Payment, any Adjusted School Capital Payment and any School M&R Payment, an amount of up to twice the amount of the Independent Certifier's estimate of the cost to complete the Landscaping Work. The holdback shall be released to the Contractor, without interest, when the Landscaping Work is complete. If the Landscaping Work is not completed by June 30, 2015, the Province may request that the Independent Certifier provide an estimate of the cost to complete the Landscaping Work that the Contractor has not completed by that date. The Province may by notice to the Contractor elect to do the Landscaping Work that the Contractor has not completed by June 30, 2015 and in that event may retain as liquidated damages an amount of up to twice the amount of the Independent Certifier's estimate of the cost to complete the remaining Landscaping Work and the balance of the holdback shall be released to the Contractor without interest.

### **5.18 Province Disputes Achievement of Availability Criteria**

If the Province considers that a School in respect of which a Certificate of School Availability has been issued has not satisfied the Availability Criteria, the Province may notify the Contractor (which notice must set out the outstanding matters that, in the Province's opinion, must be attended to before the School will satisfy the Availability Criteria) (the "**Province's Section 5.18 Notice**") and in that event:

- (a) the Province and the Contractor will work cooperatively together to arrive at a mutually agreeable plan for the Contractor to promptly rectify the Province's concerns;
- (b) the difference of opinion and the question of whether and on what date the School achieved the Availability Criteria shall be resolved pursuant to the Dispute Resolution Procedure;
- (c) if it should be determined pursuant to the Dispute Resolution Procedure that by reason of the concerns identified by the Province in the Province's Section 5.18 Notice the School had not achieved the Availability Criteria on the date of issuance of the Certificate of School Availability, then:
  - (i) the arbitrator making that determination shall determine the date on which the School achieved the Availability Criteria and award a credit to the Province, to be applied against the Payment next coming due, of amounts, calculated for the period starting from the later of the Total Availability Target Date and the date of issuance of the Certificate of School Availability to the date that the arbitrator determines that the School achieved the Availability Criteria, that the Province would not have paid to the Contractor had the Certificate of School Availability been issued on the date that the arbitrator determines the School achieved the

Availability Criteria; and

- (ii) the Contractor shall as soon as practicable and at its expense rectify such of the Province's concerns as have not yet been rectified in order to ensure that the School satisfies the Availability Criteria.

In the event that the Contractor notifies the Province that it disputes the concerns identified by the Province but intends to address such concerns as requested by the Province while reserving the right to dispute such concerns, then the Contractor may thereafter through the Dispute Resolution Procedure seek a determination that the work done by the Contractor in response to the Province's concerns shall be deemed to be work done pursuant to a Change Order Directive.

In the event that a School is the subject of a recommendation issued by the Independent Certifier as contemplated by Section 5.17, and if the Province considers that that School has not satisfied the Availability Criteria, other than the Availability Criteria set out in Section 5.17(b), then the Province may provide the Contractor with the Province's Section 5.18 Notice and proceed with process described in the preceding paragraphs of this Section.

#### **5.19 Contractor Disputes Notice of Failure to Achieve Availability Criteria**

In circumstances where the Independent Certifier has issued a Notice of Failure to Achieve Availability Criteria (as defined in Section 5.14) in respect of a School, the Contractor may, if the Contractor considers that the School satisfied the Availability Criteria on the date of issuance of the Notice of Failure to Achieve Availability Criteria, notify the Province (which notice must reference the outstanding matters listed in the Notice of Failure to Achieve Availability Criteria and set out how the School satisfies those items) and in that event:

- (a) the Contractor shall as soon as practicable address the matters listed in the Notice of Failure to Achieve Availability Criteria and work to achieve School Availability at the School in accordance with the process set out in Sections 5.13 and 5.14;
- (b) the difference of opinion and the question of whether and on what date the School achieved the Availability Criteria shall be resolved pursuant to the Dispute Resolution Procedure;
- (c) if it should be determined pursuant to the Dispute Resolution Procedure that the School satisfied the Availability Criteria prior to the date of issuance of the Certificate of School Availability, then:
  - (i) the arbitrator making that determination shall determine the date on which the School achieved the Availability Criteria and award a credit to the Contractor of amounts, calculated for the period starting from the later

of the Total Availability Target Date and the date that the arbitrator determines that the School achieved the Availability Criteria to the date of issuance of the Certificate of School Availability, that the Contractor would have received from the Province in accordance with the terms of this Agreement if the Certificate of School Availability had been issued on the date that the arbitrator determines that the School had achieved the Availability Criteria, excepting all amounts paid to the Contractor by the Province in respect of that School subsequent to the issuance of the Certificate of Availability for that School and excepting any amounts attributable to School M&R Payments except to the extent that the Contractor can demonstrate to the satisfaction of the Province, acting reasonably, that the Contractor performed M&R at that School during such period and incurred associated costs; and

(ii) the Contractor may seek through the Dispute Resolution Procedure a determination that the work done by the Contractor to address the matters listed in the Notice of Failure to Achieve Availability Criteria shall be deemed to be work done pursuant to a Change Order Directive.

## **6. MAINTENANCE AND RENEWAL**

### **6.1 Commencement of M&R**

The Contractor shall perform and carry out the M&R in accordance with the M&R Requirements and in accordance with such of the Contractor's Management Systems and Plans (as amended from time to time as contemplated by Section 5.5) as remain pertinent to the School M&R Period and the M&R Period, for each School, from the date that School Availability is achieved until the end of the Term or the sooner termination of this Agreement in accordance with its provisions.

### **6.2 M&R Requirements**

The M&R Requirements may be modified only by amendment of the M&R Requirements made in accordance with Section 7.2. If the Contractor asserts that any aspect of the M&R Requirements is uncertain or ambiguous, either party may require that the interpretation of that aspect of the M&R Requirements be determined by the Dispute Resolution Procedure. The Province acknowledges that it is responsible for the adequacy and suitability of the M&R Requirements, and shall indemnify the Contractor against any claims by third parties (including the reasonable cost of defending such third party claims, on a solicitor and client basis) for personal injuries or property damage to the extent that the Province has agreed with the Contractor, or a Court has determined, that such injury or damage was caused or contributed to by a failure of the M&R Requirements to be adequate and suitable.

### **6.3 Compliance with Applicable Laws**

The Contractor undertakes to comply with all applicable laws in the carrying out of the M&R Requirements.

### **6.4 Contractor Solely Responsible for M&R Costs**

Except as expressly set out in this Agreement, the Contractor is solely responsible for paying all costs, fees and charges of any nature whatsoever required to perform the M&R, excepting only:

- (a) the costs, fees and charges of the Province's own personnel, consultants and professional advisors;
- (b) the costs, fees and charges of any mediation or arbitration pursuant to the Dispute Resolution Procedure, which are specifically provided for in Schedule 7 (Dispute Resolution Procedure);
- (c) any claims by third parties asserting a right to damages as a result of the M&R being carried out as contemplated by and in accordance with this Agreement, to the extent such claims are not founded on any negligent act or omission by the Contractor or any of its subcontractors or a failure by the Contractor to comply with this Agreement. The Province shall indemnify the Contractor against such third party claims set out in the foregoing portion of (c) (including the reasonable cost of defending such claims, on a solicitor and client basis); and
- (d) any costs, fees, charges or payments expressly to be made by the Province under the provisions of this Agreement.

### **6.5 Access and Performance of M&R**

The Contractor shall perform the M&R in compliance with the restrictions on access set out in Schedule 18 (Technical Requirements).

## **7. MODIFICATIONS AND CHANGE ORDERS**

### **7.1 Modification of Project Requirements**

If during the Construction Period the Province wishes to modify the Project or the Project Requirements, it shall proceed as provided in Schedule 1 (Change Orders). If the Contractor wishes to recommend modification of the Project or the Project Requirements, it may invite the Province to proceed as provided in Schedule 1. Upon a Change Order Confirmation or a Change Order Directive being issued by the Province pursuant to

Schedule 1 in respect of the Project or the Project Requirements:

(a) Schedule 18 (Technical Requirements) or any other affected Schedule (other than Schedule 14 (Payment Schedule), which is addressed in clause (e) below) shall be amended accordingly;

(b) except as otherwise agreed between the Province and the Contractor (including without limitation any arrangement proposed by the Contractor under clause (d) and agreed to by the Province), the Contractor shall be entitled to payment from the Province on a progress basis, invoiced and paid on a monthly basis, of the reasonable incremental costs, if any, calculated in accordance with Schedule 1 (Change Orders), of carrying out the Project or the Project Requirements;

(c) in addition to the amounts determined in accordance with clause (b), if the Change Order will delay School Availability for any School, then, in respect only of delay caused directly by the Change Order, the Contractor shall be entitled to the following payments from the Province (without duplication):

(i) if Total Availability would have been achieved by the Total Availability Target Date but for the Change Order, then the Contractor shall be entitled to receive each of the following amounts:

(A) the School Capital Payments for each School for which School Availability is delayed by the Change Order calculated from but excluding the Total Availability Target Date to and including the earlier of the revised date that School Availability is scheduled to be achieved as a result of the Change Order and the date that School Availability is achieved for each such School; and

(B) for those Schools that are not delayed by the Change Order and for those Schools that were delayed by the Change Order but that achieve School Availability prior to Total Availability, the 20% portion of the School Capital Payments not included in the Adjusted School Capital Payments for such Schools calculated from but excluding the later of the Total Availability Target Date and the date that each such School achieves School Availability to and including the earlier of the date that Total Availability is achieved and the revised date on which Total Availability is scheduled to be achieved as a result of the Change Order,

payment for which shall be made on a monthly basis on the dates that the Payment would have been payable had no Change Order been issued;

(ii) if Total Availability would not have been achieved by the Total



Availability Target Date notwithstanding the Change Order, then the Contractor shall be entitled to receive:

(A) the Adjusted School Capital Payments for each School for which School Availability is delayed by the Change Order calculated for each such School from but excluding the later of the Total Availability Target Date and the day that the School would have achieved School Availability but for the Change Order to and including the day that Total Availability would have been achieved but for the Change Order;

(B) School Capital Payments for each School for which School Availability is delayed by the Change Order calculated from but excluding the day that Total Availability would have been achieved but for the Change Order to and including the earlier of the revised date that School Availability is scheduled to be achieved as a result of the Change Order and the date that School Availability is achieved for each such School; and

(C) for those Schools that are not delayed by the Change Order and for those Schools that were delayed by the Change Order but that achieve School Availability prior to Total Availability, the 20% portion of the School Capital Payments not included in the Adjusted School Capital Payments for such Schools, calculated from but excluding the later of the date that Total Availability would have been achieved but for the Change Order and the date that each such School achieves School Availability to and including the earlier of the date that Total Availability is achieved and the revised date that Total Availability is scheduled to be achieved as a result of the Change Order, provided that if a School delayed by a Change Order fails to achieve School Availability by the revised date on which School Availability is scheduled to be achieved then, from and after that revised date, no payments shall be made pursuant to this subparagraph in respect of any School,

payment for which shall be made on a monthly basis on the dates that Adjusted School Capital Payments would have been payable had no Change Order been issued;

(d) if the Contractor anticipates that the Change Order will delay School Availability for any School, but is of the opinion the delay can be avoided or mitigated through extraordinary measures, the Contractor may propose to the Province that such extraordinary measures be taken by the Contractor at the Province's expense;

(e) except as otherwise agreed between the Province and the Contractor, if the

Change Order will increase or decrease the cost to the Contractor of carrying out the M&R Requirements, then the M&R Payments in Schedule 14 (Payment Schedule) shall be adjusted commensurately; and

(f) in the event that the parties cannot, for the purpose of determining the payment amounts pursuant to clause (c), agree on the date that Total Availability would have been achieved or the date that a School would have achieved School Availability but for the Change Order, or the revised date on which Total Availability should be scheduled to be achieved or on which a School should be scheduled to achieve School Availability following the issuance of a Change Order, having used reasonable commercial efforts to resolve their dispute through negotiation, then either the Contractor or the Province may refer the matter to the Project Adjudicator (as defined in Schedule 5 (Design and Plan Certification Process and Review Procedure)) for determination in accordance with the procedure set out in section 4 of Schedule 5.

The Province shall not, without the prior consent of the Contractor, pursue any Change Orders that singularly or in the aggregate involve an alteration in the scope of the Project of such magnitude that it could reasonably be expected to materially impact the Project Financing or the Contractor's ability to achieve Total Availability by the Total Availability Target Date or otherwise materially and adversely alter the risk profile of the Project (including, without limitation, increased exposure to Payment Adjustments).

## **7.2 Modification of M&R Requirements**

If the Province wishes to modify the M&R or the M&R Requirements, it shall proceed as provided in Schedule 1 (Change Orders). If the Contractor wishes to recommend modification of the M&R or the M&R Requirements, it may invite the Province to proceed under Schedule 1. Upon a Change Order Confirmation or a Change Order Directive being issued by the Province pursuant to Schedule 1 in respect of the M&R or the M&R Requirements:

- (a) Schedule 18 (Technical Requirements) or any other affected Schedule (other than Schedule 14 (Payment Schedule) which is addressed in clause (b) below) shall be amended accordingly; and
- (b) except as otherwise agreed between the Province and the Contractor, if the Change Order will increase or decrease the cost to the Contractor of carrying out the M&R or the M&R Requirements, then the M&R Payments in Schedule 14 (Payment Schedule) shall thereafter be adjusted commensurately.

Subject to section 2.2.3 of Schedule 18 (Technical Requirements), the Province shall not, without the prior consent of the Contractor, pursue any Change Orders that singularly or in the aggregate would: (i) effect a reduction in the M&R or the M&R Requirements of such magnitude as could reasonably be expected to materially and adversely affect the Contractor; or (ii) involve an alteration in the scope of the M&R of such magnitude that it

could reasonably be expected to materially and adversely alter the risk profile of the M&R (including, without limitation, increased exposure to Payment Adjustments).

### **7.3 Modifications to Schools**

The Province shall be at liberty during the School M&R Period and the M&R Period, to undertake Modifications to the Schools. The Province shall direct only the Contractor to carry out any such Modification pursuant to Schedule 1 (Change Orders). Upon a Change Order Confirmation or a Change Order Directive being issued by the Province pursuant to Schedule 1 in respect of a Modification:

- (a) Schedule 18 (Technical Requirements) or any other affected Schedule (other than Schedule 14 (Payment Schedule) which is addressed in clause (c) below) shall be amended accordingly;
- (b) except as otherwise agreed between the Province and the Contractor, the Contractor shall be entitled to payment from the Province on a progress basis, invoiced and paid on a monthly basis, of the reasonable costs, calculated in accordance with Schedule 1 (Change Orders), of carrying out the Modification; and
- (c) except as otherwise agreed between the Province and the Contractor, if a Modification will increase or decrease the cost to the Contractor of carrying out the M&R or the M&R Requirements, then the M&R Payments in Schedule 14 (Payment Schedule) shall thereafter be adjusted commensurately.

### **7.4 Determination of Costs**

All payments and adjustments of Schedule 14 (Payment Schedule) on account of Change Orders under Sections 7.1, 7.2 or 7.3 shall be calculated in accordance with the provisions of Schedule 1 (Change Orders).

## **8. HANDBACK UPON EXPIRY**

### **8.1 Handback Requirements**

Upon expiry of the Term, the Contractor shall leave the Schools in the condition required by the Handback Requirements and shall complete all requirements of the Contractor's Handback on Expiry Plan set forth in Schedule 4 (Contractor's Management Systems and Plans).

## 8.2 Handback Inspections

The Contractor and the Province shall jointly carry out the following handback inspections (consisting of all appropriate examinations and tests, carried out in accordance with all applicable Technical Requirements) in order to assess what work, including major renewal work as required, is likely to be required in order to achieve the Handback Requirements:

- (a) the first handback inspection shall take place at a time, specified by the Province following consultation with the Contractor, that is at least 57 months and not more than 63 months prior to expiry of the Term;
- (b) the second handback inspection shall take place at a time, specified by the Province following consultation with the Contractor, that is at least 28 months and not more than 34 months prior to expiry of the Term; and
- (c) the third handback inspection shall take place at a time, specified by the Province following consultation with the Contractor, that is not more than one month prior to the expiry of the Term.

## 8.3 Procedure Following Inspections

Following each handback inspection under Section 8.2, the Contractor shall within:

- (a) 60 days of the first handback inspection;
- (b) 30 days of the second handback inspection; and
- (c) 7 days of the third handback inspection;

prepare and deliver to the Province a comprehensive workplan and schedule acceptable to the Province, acting reasonably, designed to ensure that the Schools will meet the Handback Requirements upon expiry of the Term. Following delivery and acceptance of such workplan and schedule, the Contractor shall keep the Province fully advised of all activity and progress in carrying out the workplan.

## 8.4 Holdbacks

If the Contractor fails to deliver a workplan and schedule in accordance with Section 8.3 or, having delivered it, fails in any material respect to diligently carry out the workplan in accordance with the schedule, then the Province may hold back (without duplication) from any amounts thereafter becoming payable to the Contractor under this Agreement an aggregate amount (the “**Holdback**”) that the Province, acting reasonably and following consultation with the Contractor and having regard to the amounts of the M&R Payments remaining to be made during the remainder of the Term, considers sufficient to

achieve the Handback Requirements at the end of the Term in the event that the Contractor were to fail to do so. Notwithstanding the foregoing, the Province may not in any event hold back under this Section:

- (a) any amount prior to the last four years of the Term; or
- (b) any part of the Capital Payment prior to the last three years of the Term.

The Holdback shall be released to the Contractor, without interest, as the work is done by the Contractor (but not more frequently than monthly). If the Handback Requirements are not achieved by the expiry of the Term, the Province may release the Contractor from its obligation to achieve the Handback Requirements and in that event may retain the remaining balance of the Holdback as liquidated damages.

### **8.5 Substitution of Letter of Credit**

The Contractor may at any time call for release of the remaining balance of the Holdback upon delivering to the Province an irrevocable, unconditional, on sight letter of credit in the amount of the remaining balance of the Holdback, presentable for payment at a bank in Canada and issued by a bank authorized under the *Bank Act* (Canada) to do business in Canada (or issued by such other financial institution approved in advance for the purposes of this Section by the Province, who may grant or decline such approval in its absolute discretion), and having a senior, unsecured long-term issuer credit rating of not less than A+ (with a stable outlook) or equivalent from one of (and no rating less than A+ (with a stable outlook) or equivalent from any other of) Standard & Poor's, DBRS (formerly known as Dominion Bond Rating Service) or Fitch Ratings (or any other major credit rating agency approved for the purposes of this Section by the Province, who may grant or decline such approval in its absolute discretion). The Province may present the letter of credit for payment if:

- (a) upon expiry of the Term, the Handback Requirements are not met;
- (b) the letter of credit has an expiry date and the Contractor fails to deliver a renewal letter of credit at least 20 days in advance of the expiry of the letter of credit; or
- (c) any of the senior, unsecured long-term credit ratings of the issuer of the letter of credit becomes less than A+ (with a stable outlook) or equivalent and the Contractor fails to deliver a replacement of the letter of credit no later than 21 days after being so requested by the Province;

and in either case the amount received by the Province upon presentation of the letter of credit shall be dealt with by the Province in the same manner as the Holdback under Section 8.4.

Subject to Section 8.4, as the work referenced in the second paragraph of Section 8.4 is

done by the Contractor, the Province shall permit (but not more frequently than monthly), on written application by the Contractor, a corresponding reduction in the amount of the letter of credit.

## **8.6 Disagreements**

If the Contractor disputes the appropriateness of the amount of the Holdback or disagrees with the Province's assessment of whether any of the Handback Requirements have been achieved, the Contractor may refer the matter to the Dispute Resolution Procedure.

## **9. PAYMENT**

### **9.1 Payment of Provincial Funding**

The Province will make payment of the Progress Payments to the Contractor at the times and in the amounts and subject to the conditions specified in Schedule 19 (Provincial Funding Progress Payments).

### **9.2 Payment Mechanism**

Apart from the Progress Payments, and subject to Section 9.5, payment by the Province to the Contractor of the amounts contemplated in Schedule 14 (Payment Schedule) shall be in the form of a single monthly payment (the "**Payment**") comprised of the amounts described below in clauses (a) and (b) less the amounts described below in clauses (c), (d) and (e):

(a) the amount of the Capital Payment as set out in Schedule 14 (Payment Schedule); plus

(b) the amount of the M&R Payment as set out in Schedule 14 (Payment Schedule) as amended and adjusted from time to time in accordance with the Index Factor, in accordance with Section 10.1;

less

(c) the amount of any holdback made by the Province in accordance with Sections 5.16, 5.17 or 8.4; and

(d) the amount of any Payment Adjustments made by the Province in accordance with Section 10.2; and

(e) any amount set off by the Province in accordance with Section 9.7.

In the event that the above calculation produces a negative amount for any month, such amount may be set off by the Province against the Payment for the next following month

(or, if necessary, months).

The Province's obligation to make the Payment each month until expiry of the Term (or earlier termination of this Agreement in accordance with its provisions) shall not be interrupted, abated or adjusted except as expressly set out in this Agreement.

### **9.3 Payment Procedure**

Subject to Section 9.4, the first Payment shall be calculated from but excluding the day that Total Availability is achieved to and including the last day of that month. The first Payment shall be paid not later than the 10th Business Day of the following month, and each subsequent Payment shall be made by the Province not later than the 10th Business Day of each month thereafter. The Contractor shall, at least five Business Days prior to the first Business Day of each month, submit in the form specified by Schedule 14 (Payment Schedule), details of the Contractor's proposed calculation of the Payment next falling due, including details of all applicable Payment Adjustments and having regard to the categories enumerated in Section 9.2. The Province shall, on or before making each Payment, provide to the Contractor in the form specified by Schedule 14, the Province's calculation (similarly enumerated by category) of that Payment. In the event that the Contractor disputes the amount of any Payment made by the Province, the Contractor shall bring such dispute to the attention of the Province within 90 days after the date the Payment is received.

### **9.4 Early Completion**

In the event that Total Availability is achieved prior to or on the Total Availability Target Date, then:

- (a) the Term shall expire 30 years from the Total Availability Target Date, that is, the M&R Period shall be 30 years plus the period from Total Availability to the Total Availability Target Date; and
- (b) the first Payment contemplated in Section 9.2 shall be calculated from but exclude the Total Availability Target Date and the final Payment contemplated in Section 9.2 shall include the day the Term expires.

### **9.5 Late Completion**

In the event that Total Availability is not achieved until after the Total Availability Target Date, then:

- (a) the Term shall expire 30 years from the Total Availability Target Date, that is, so that the M&R Period is less than 30 years; and
- (b) Schedule 14 (Payment Schedule) shall not be adjusted or amended, except that:

- (i) the Contractor shall not be entitled to any payment for a School prior to the later of July 1, 2014 and School Availability at that School, subject to the provisions of Sections 7.1(c), 11.7, 12.1(d) and 13.3(d);
- (ii) the Province shall pay the Contractor an amount (the “**Adjusted School Capital Payment**”) comprised of 80% of the School Capital Payment for each School that achieves School Availability prior to Total Availability, calculated in respect of each School from and including the later of July 1, 2014 and the first day following the day that School Availability is achieved and continuing until and including the day that Total Availability is achieved;
- (iii) the Province shall pay the Contractor the School M&R Payment for each School that achieves School Availability prior to Total Availability, calculated in respect of each School from and including the later of July 1, 2014 and the first day following the day that the School achieves School Availability and continuing until and including the day that Total Availability is achieved;
- (iv) for the purposes of subclauses (ii) and (iii) above, Adjusted School Capital Payments and School M&R Payments for each School shall be prorated as follows:
  - (A) where School Availability at the applicable School and Total Availability are achieved within the same month, the School Capital Payment and the School M&R Payment for that School shall be prorated according to the number of days in that month that the applicable School is available calculated from but excluding the day that School Availability is achieved to and including the day that Total Availability is achieved; and
  - (B) where School Availability at the applicable School is achieved in one month and Total Availability is achieved in a subsequent month, the School Capital Payments and the School M&R Payments for that School shall be prorated for each partial month calculated for the month in which School Availability is achieved from but excluding the day that School Availability is achieved to and including the last day of that month and calculated for the month in which Total Availability is achieved from and including the first day of that month to and including the day that Total Availability is achieved;



- (v) the Contractor shall, not later than five Business Days after the end of each month, provide the Province with the Contractor's invoice setting out the details of the calculation of the Adjusted School Capital Payments and the School M&R Payments for the preceding month and the Province shall pay the Adjusted School Capital Payments and the School M&R Payments to the Contractor in the form of a single monthly payment within 10 Business Days of receipt by the Province of the Contractor's invoice;
- (vi) the Adjusted School Capital Payments and the School M&R Payments shall be subject to the amount of any holdbacks made by the Province in accordance with Sections 5.16 and 5.17, the amount of any Payment Adjustments made by the Province in accordance with Section 10.2 and any amount set off by the Province in accordance with Section 9.7;
- (vii) the School M&R Payments shall be subject to the adjustments contemplated in Section 10.1;
- (viii) the first Payment contemplated in Section 9.2 shall be for the number of days from but excluding the day that Total Availability is achieved to and including the last day of the month prior to the month in which the first Payment is due and payable, and the final Payment contemplated in Section 9.2 shall be for the number of days, from and including the first day of the month in which the Term expires to and including the day the Term expires;

it being the mutual intent of the parties that in such event, both the M&R Period and the aggregate amounts of Capital Payments and M&R Payments payable over the Term shall be reduced in accordance with the foregoing.

## **9.6 No GST**

The Province represents and warrants that it is not, and will not become, obligated to pay the goods and services tax or a harmonized sales tax ("GST") under Part IX of the *Excise Tax Act* (Canada), and that its GST registration number is 124072513RT0001. No amount payable by the Province under this Agreement is subject to GST.

In the event that the Province is or becomes obligated, in connection with this Agreement and in respect of any period during the Construction Period or the Term, to collect from the Contractor and remit any amounts in respect of GST or any successor goods and services tax or harmonized sales tax pursuant to Part IX of the *Excise Tax Act* (Canada) or any successor legislation, then the Contractor shall pay such amounts to the Province within 30 days of receipt by the Contractor of an invoice for such amounts containing the information required by the applicable legislation. The Contractor acknowledges and

agrees that any amounts paid by the Contractor to the Province pursuant to this Agreement (including payments in kind in the form of property or services) are exclusive of GST.

### **9.7 Set-off**

The Province is entitled to set off against any Payment, any Progress Payment, any Adjusted School Capital Payment and any School M&R Payment only an amount:

- (a) finally determined (that is, no longer subject to the Dispute Resolution Procedure) to be payable by the Contractor to the Province under this Agreement;
- or
- (b) paid by the Province under and in accordance with any statute in respect of any lien or claim arising from any act or omission of the Contractor, or those for whom it is legally responsible, in relation to the Project or the M&R.

The Province, upon becoming aware that it is or may become obligated to pay and before paying an amount contemplated by clause (b) such that a right of set-off may arise under clause (b), shall give the Contractor such advance notice as may be practicable in the circumstances (without exposing the Province to any risk of being obliged to pay the same amount twice), with a view to affording the Contractor an opportunity to dispute (provided the Province is satisfied the dispute is bona fide), or make arrangements to remove or eliminate the lien or claim.

### **9.8 Interest on Overdue Payments**

Except as otherwise provided in Section 17.5(b)(i), any amount payable under this Agreement and not paid when it becomes due shall bear interest at Prime plus 2%, without compounding, from the due date of the amount payable until the date (or dates) of payment. Where pursuant to the Dispute Resolution Procedure a disputed amount is determined to have been payable, then subject to any contrary determination pursuant to the Dispute Resolution Procedure, interest at Prime plus 2%, without compounding, shall be payable from the date when such amount ought to have been paid until the date (or dates) of payment.

## **10. INDEXING AND PAYMENT ADJUSTMENTS**

### **10.1 Indexing of M&R Payment**

The M&R Payment component of the Payment (but not the Capital Payment component of the Payment) is subject to annual indexing for inflation in the manner and at the times set out in Schedule 10 (Index Factor).

## 10.2 Payment Adjustments

The Payment, any Adjusted School Capital Payment and any School M&R Payment, are subject to Payment Adjustments on the basis set out in Schedule 18 (Technical Requirements) and as summarized in Schedule 15 (Payment Adjustments Summary), applied at the times and in the manner set out in Schedule 18. In the event of any inconsistency between the criteria for and descriptions of the Payment Adjustments set out in Schedule 18 and the summaries of such criteria and such descriptions included in Schedule 15, the more detailed provisions of Schedule 18 shall govern. All Payment Adjustments and the threshold amount referenced in Section 16.8(m) shall be subject to annual indexing for inflation in the manner and at the times set out in Schedule 10 (Index Factor).

## 10.3 Notification of Payment Adjustments

Each of the Contractor and the Province shall notify the other in a timely manner upon becoming aware of circumstances that give rise to a Payment Adjustment. Failure by either party to give such notice in a timely manner shall not in any event disqualify the Province from claiming the Payment Adjustment, but either party may assert against the other a claim for any damages resulting from the failure to give notice in a timely manner.

## 10.4 Replacement of Subcontractor

The Province acknowledges that where it becomes necessary for the Contractor to replace the subcontractor performing the M&R (the “**M&R Subcontractor**”), a replacement M&R Subcontractor can most efficiently be procured only if the consequences of future Payment Adjustments are “reset” to zero. Accordingly, where the M&R Subcontractor is replaced either by the Contractor or pursuant to the Direct Lender Agreement, then provided that:

- (a) the replacement M&R Subcontractor is at arm’s length from the replaced M&R Subcontractor; and
- (b) the M&R Subcontractor has not previously been replaced more than once in the immediately preceding five year period;

the first circumstance thereafter giving rise to a Payment Adjustment shall be deemed to be the first Payment Adjustment under this Agreement. Nothing in this Section shall operate to relieve the Contractor against any Payment Adjustments arising prior to the replacement of the M&R Subcontractor.

## **11. INSURANCE, DAMAGE AND DESTRUCTION**

### **11.1 Insurance Requirements**

The Contractor shall:

(a) maintain in place all of the insurance specified in section 3.1 of Schedule 11 (Insurance Requirements); and

(b) require and ensure that its subcontractors maintain and provide evidence as reasonably requested by the Province of the insurance required in section 4.1 of Schedule 11, as applicable.

### **11.2 Other Requirements**

All insurance required under Section 11.1:

(a) shall be primary and shall not require the pro rata sharing of any loss by any insurer of the Province; and

(b) shall be endorsed to provide the Province and the School Boards with 30 days advance written notice of:

(i) material change restricting coverage (with the exception of the automobile insurance coverage required under sections 3.1(d) and 4.1(a) of Schedule 11 (Insurance Requirements); and

(ii) cancellation.

### **11.3 [INTENTIONALLY DELETED]**

### **11.4 Evidence of Insurance**

The Contractor shall deliver or cause to be delivered to the Province:

(a) in relation to the insurance required from the Execution of this Agreement, evidence satisfactory to the Province acting reasonably (which evidence may include but not be limited to detailed insurance cover notes and detailed certificates of insurance and written confirmation from the Contractor's insurance broker that all insurance required by this Section 11 is in effect and complies with each of the insurance requirements in Section 11 and Schedule 11) of all insurance required to be obtained and maintained by the Contractor and its subcontractors by this Section 11, at least five days prior to the Contractor making any entry upon any School Site. The Contractor shall deliver or cause to be delivered to the Province certified copies of all insurance policies evidencing the insurance required to be obtained and maintained by the Contractor and its

subcontractors from the Execution of this Agreement by this Section 11 as soon as reasonably practicable, and in any event within 30 days after Execution of this Agreement; and

(b) in relation to the insurance required from the time that a School achieves School Availability, certified copies of all insurance policies evidencing the insurance required to be obtained and maintained by the Contractor and its subcontractors by this Section 11 prior to and as a precondition to School Availability of each School;

and shall provide or cause to be provided, not less than 10 days prior to expiration of any then current policy, documentation evidencing to the satisfaction of the Province (acting reasonably) the renewal, extension or replacement of such insurance and as soon as reasonably practicable, and in any event within 30 days after expiration of any then current policy, certified copies of policies evidencing to the satisfaction of the Province (acting reasonably) the renewal, extension or replacement of such insurance. Delivery to and examination by the Province of any policy of insurance or certificate or other form of documentation evidencing such insurance shall not relieve the Contractor of any of its obligations pursuant to the provisions of this Section 11 and shall not operate as a waiver by the Province of any rights.

The Contractor consents to the Province providing to the School Boards copies of all insurance policies received by the Province pursuant to this Section.

### **11.5 Province May Insure**

If the Contractor at any time fails to furnish the Province with evidence of all required insurance in the manner specified by Section 11.4, or if subsequent to providing evidence of all required insurance the Contractor's insurance is subject to a material change restricting coverage or is cancelled, the Province may upon five Business Days' notice to the Contractor obtain the required insurance not so evidenced or restricted or cancelled, and may set off the cost of the insurance so obtained against any amount payable to the Contractor under this Agreement.

### **11.6 Review and Benchmarking of Insurance**

At any time during the M&R Period but not more frequently than annually, at the request of either the Contractor or the Province, the Contractor and the Province shall jointly review Schedule 11 (Insurance Requirements), and shall:

(a) amend that Schedule as necessary to maintain reasonably appropriate coverage in light of any changes in applicable industry standards since the date of Execution of this Agreement or the date of the last review, as the case may be; and

(b) adjust, upwards or downwards, the M&R Payments coming due from and

after the first anniversary of the Execution of this Agreement to follow the review so as to reflect generally applicable changes to insurance premiums payable by building maintenance contractors in Alberta (having regard to any changes in coverage arising under clause (a) and otherwise having regard only to the insurance required by section 3.1 (d), (e), (f) and (g) of Schedule 11 and not to any other insurance required by Schedule 11 or any additional insurance the Contractor chooses to carry), determined as of such anniversary on the basis of industry standard insurance premiums for services in Alberta approximating the M&R Requirements (the “**Benchmark Insurance Premium**”), which adjustment shall be calculated in accordance with cost increases indicated by the Benchmark Insurance Premium but subject to the following:

- (i) the calculation shall take into account the application of the indexing factor in Section 10.1, so as to avoid double-counting; and
- (ii) no upwards adjustment shall exceed the increase in the Contractor's actual cost of the insurance required by section 3.1 (d), (e), (f) and (g) of Schedule 11.

In the event of disagreement regarding currently applicable industry standards or the insurance coverage appropriate in light of those standards, or the calculation or application of the Benchmark Insurance Premium, either party may refer the matter to the Dispute Resolution Procedure.

The Property Damage Amount shall be subject to annual indexing for inflation in the manner and at the times set out in Schedule 10 (Index Factor).

### **11.7 Repair of Damage – Prior to School Availability**

In respect of each School, the Contractor shall repair all damage to the School that occurs prior to School Availability being achieved, of whatever nature and however caused, excepting only: damage caused by a Force Majeure Event (in which case Sections 12.1 and 12.3 apply); or Environmental Damage or Degradation described in the exceptions set out in Section 4.5(e) (in which case Section 4.5(e) applies), or damage caused by the Province, a School Board or their respective agents or contractors or subcontractors (except the Contractor and its subcontractors) or those for whom the Province or the School Boards are respectively legally responsible.

As soon as reasonably practicable upon the Contractor becoming aware of the occurrence of damage to a School, the Contractor shall give the Province notice of the damage, including reasonable details of the anticipated effect of the damage upon the Contractor's performance of this Agreement, and thereafter the parties shall on an ongoing basis communicate and consult with each other with a view to monitoring, remedying, mitigating or otherwise addressing the consequences of the damage.

If a School would have achieved School Availability on or prior to the Total Availability

Target Date but for damage that occurs to that School, then if:

- (a) the damage was not caused by the Contractor or its agents or subcontractors or others for whom the Contractor is legally responsible;
- (b) the Contractor takes all reasonable action to diligently repair the damage and mitigate the delay; and
- (c) the Contractor maintained any insurance required by Section 11.1 that is relevant to the damage;

then the Contractor's Construction Schedule, the dates in Section 5.11 and the date specified for adjustment in clauses (g), (h), (i) and (j) of Section 16.8 shall be adjusted, in respect only of that School, commensurately to the period during which the Contractor is taking all reasonable action to diligently repair the damage and mitigate the delay, and the Province will, in respect only of delay caused directly by the damage and to the extent the damages occasioned to the Contractor by the delay is not insured against, compensate the Contractor for the damages occasioned by School Availability at that School not being achieved on or prior to the Total Availability Target Date, in which event the Province shall make payment on account of such damages as follows (without duplication):

- (d) if Total Availability would have been achieved by the Total Availability Target Date but for the damage, then the Contractor shall be entitled to receive each of the following amounts:
  - (i) the School Capital Payments for each School for which School Availability would have been achieved on or prior to the Total Availability Target Date but for the damage calculated from but excluding the Total Availability Target Date to and including the earlier of the revised date that School Availability is scheduled to be achieved as a result of the damage and the date that School Availability is achieved for each such School; and
  - (ii) for those Schools that achieved School Availability by the Total Availability Target Date and for those Schools that would have achieved School Availability on or prior to the Total Availability Target Date but for the damage but that achieve School Availability prior to Total Availability, the 20% of the School Capital Payments not included in the Adjusted School Capital Payments for such Schools calculated from but excluding the later of the Total Availability Target Date and the date that School Availability is achieved for each such School to and including the earlier of the revised date on which Total Availability is scheduled to be achieved as a result of the damage and the date that Total Availability is achieved, provided that if a School that would have achieved School Availability on or prior to the Total Availability Target Date but for the

damage fails to achieve School Availability by the revised date scheduled for School Availability at that School then, from and after that revised date, no payments shall be made pursuant to this subparagraph in respect of any School,

payment for which shall be made on a monthly basis on the dates that the Payments would have been payable had the damage not occurred;

(e) if Total Availability would not have been achieved by the Total Availability Target Date notwithstanding the occurrence of the damage, then the Contractor shall be entitled to receive:

(i) the Adjusted School Capital Payments for each School that would have achieved School Availability on or prior to the Total Availability Target Date but for the damage calculated for each such School from but excluding the Total Availability Target Date to and including the day that Total Availability would have been achieved but for the Schools affected by the damage;

(ii) School Capital Payments for each School that would have achieved School Availability on or prior to the Total Availability Target Date but for the damage calculated from but excluding the date that Total Availability would have been achieved but for the Schools affected by the damage to and including the earlier of the revised date that School Availability is scheduled to be achieved as a result of the damage and the date that School Availability is achieved for each such School; and

(iii) for those Schools that achieved School Availability by the Total Availability Target Date and for those Schools that would have achieved School Availability on or prior to the Total Availability Target Date but for the damage but that achieve School Availability prior to Total Availability, the 20% portion of the School Capital Payments not included in the Adjusted School Capital Payments for such Schools, calculated from but excluding the later of the day that Total Availability would have been achieved but for the Schools affected by the damage and the date that School Availability is achieved for each such School to and including the earlier of the revised date that Total Availability is scheduled to be achieved as a result of the damage and the date that Total Availability is achieved, provided that if a School that would have achieved School Availability on or prior to the Total Availability Target Date but for the damage fails to achieve School Availability by the revised date scheduled for School Availability at that School then, from and after that revised date, no payments shall be made pursuant to this subparagraph in respect of any School,

payment for which shall be made on a monthly basis on the dates that



Adjusted School Capital Payments would have been payable had the damage not occurred; and

(f) in the event that the parties cannot, for the purpose of determining the payment amounts pursuant to clauses (d) and (e), agree on the date that Total Availability would have been achieved or the date that a School would have achieved School Availability but for the damage, or the revised date on which Total Availability should be scheduled to be achieved or on which a School should be scheduled to achieve School Availability following the occurrence of the damage, having used reasonable commercial efforts to resolve their dispute through negotiation, then either the Contractor or the Province may refer the matter to the Project Adjudicator (as defined in Schedule 5 (Design and Plan Certification Process and Review Procedure)) for determination in accordance with the procedure set out in section 4 of Schedule 5.

### **11.8 Repair of Damage – School M&R Period and M&R Period**

In respect of each School, from and after the date that School Availability is achieved, and during the School M&R Period and the M&R Period:

(a) the Province will:

(i) bear the risk of damage to the School caused by Damage Events; and

(ii) provided that the Contractor has made a claim under the Contractor's property insurance required under Schedule 11 (Insurance Requirements) and the amount of the property damage claim accepted by the insurer exceeds the Property Damage Amount, pay the Contractor the lesser of the Property Damage Amount and the actual deductible applicable to the claim pursuant to the Contractor's property insurance where:

(A) the damage is the direct and obvious result of vandalism (where vandalism means the deliberate, mischievous or malicious destruction of property), except vandalism by the Contractor, its agents or subcontractors or others for whom the Contractor is legally responsible; or

(B) the damage is directly caused by the Province or the School Board or their respective agents or contractors (except the Contractor) or those for whom the Province or the School Boards are respectively legally responsible, or by the students, staff, invitees, tenants or licensees of the School Board;

(b) the Contractor shall bear the risk of damage to the School, except:

(i) damage caused by Damage Events;

- (ii) damage caused by Force Majeure Events (in which case Sections 12.2 and 12.3 apply); and
  - (iii) in respect of the amount payable by the Province in accordance with Section 11.8(a)(ii);
- (c) all proceeds from the Contractor's property insurance required under Schedule 11 (Insurance Requirements), except for the proceeds of any business interruption insurance or similar insurance protecting against lost revenues that the Contractor may choose to carry and that may be associated with the Contractor's property insurance required under Schedule 11, in respect of any loss or damage to a School must be applied by the Contractor to repair, reinstate and replace each part or parts of the School in respect of which the proceeds are payable;
- (d) the repair of all damage to a School, including repairs arising from a Damage Event, shall be carried out in accordance with the requirements of section 5.11.4 of Schedule 18;
- (e) if by reason of damage occurring during the School M&R Period or the M&R Period and caused other than by a Force Majeure Event all or any portion of the Schools are closed to occupancy, then the M&R Payment shall abate in the same manner as is set out in Section 12.2 in respect of closure occasioned by a Force Majeure Event, and notwithstanding Section 16.4, applicable Payment Adjustments shall also apply; and
- (f) notwithstanding that the Province bears the risk of damage to the School caused by Damage Events, where the Contractor's property insurance required under Schedule 11 provides coverage for the loss arising from a Damage Event the Contractor shall put forth a claim under such property insurance at the option and for the benefit of the Province, and in that case the Province shall pay the direct costs associated with making the claim.

## **11.9 Uninsurability**

Notwithstanding Section 11.1(a), the Contractor shall not be obligated during the School M&R Period or the M&R Period to maintain insurance against a risk that has become uninsurable. A risk shall be considered to have become uninsurable only if:

- (a) insurance against that risk is generally not available to Canadian building maintenance contractors with reputable insurers in good standing; or
- (b) the terms and conditions generally required by insurers for insuring such risk are such that the risk is generally not being insured against by Canadian building maintenance contractors;

and shall only be considered an uninsurable risk during such period when the Contractor has not obtained insurance against the risk. Upon the Contractor becoming aware of an uninsurable risk, the Contractor shall in a timely manner give the Province notice of the uninsurable risk, including any details as may be reasonably requested by the Province.

For so long as a risk is uninsurable, the M&R Payment shall abate by the amount of any reduction in the insurance premiums paid by the Contractor (or that would have been paid by the Contractor had the Contractor obtained insurance in accordance with Schedule 11) as a result of no longer being required to insure against such risk.

In the event that, subsequent to the date of the Contractor's Proposal, a risk becomes an uninsurable risk, and if the Contractor would have been required under Section 11.1(a) to insure against that risk but for the risk having become an uninsurable risk during the M&R Period, and if a loss occurs in respect of that risk, then the Province shall, at its option and upon notice to the Contractor, either:

(c) assume responsibility for the loss, to the extent of the insurance proceeds that would have been payable if the insurance specified in sections 3.1(d), (e), (f) or (g) of Schedule 11 had been available to and was obtained by the Contractor (having regard to the coverage limits specified in sections 3.1(d), (e), (f) and (g) of Schedule 11 and any applicable deductibles) and in the event that the loss includes damage to Schools, then the Contractor shall proceed as if the repairs necessitated by the loss were requested by the Province pursuant to a Change Order Directive under Schedule 1 (Change Orders); or

(d) declare a Force Majeure Termination, pay the Termination Payment required by Section 18.8 and, if applicable, assume responsibility for the loss arising from the occurrence to the extent of the insurance proceeds that would have been payable if the insurance specified in sections 3.1(d), (e), (f) or (g) of Schedule 11 had been available to and was obtained by the Contractor (having regard to the coverage limits specified in sections 3.1(d), (e), (f) and (g) of Schedule 11 and any applicable deductibles);

provided that the Province shall not declare a Force Majeure Termination under clause (d) unless:

(e) the Province has incurred a liability under this Section 11.9 of at least \$5,000,000 in any calendar year or at least \$10,000,000 in aggregate during any period of 10 calendar years; and

(f) the Province has first afforded the Contractor a reasonable opportunity to meet with the Province to discuss alternative ways to address risks that have become uninsurable.

## **12. FORCE MAJEURE**

### **12.1 Force Majeure During Construction Period**

If a Force Majeure Event occurs during the Construction Period, then notwithstanding any other provision of this Agreement:

(a) to the extent that and for so long as either party is prevented by the Force Majeure Event from performing any obligation under this Agreement, that party is relieved from any liability or consequence under this Agreement arising from its inability to perform or delay in performing that obligation;

(b) if the Force Majeure Event affecting a School wholly or substantially prevents the Contractor from proceeding with that School for a period of at least 21 days (measured on a critical path basis having regard to the Contractor's Construction Schedule), then the Contractor's Construction Schedule, the dates in Section 5.11 and the date specified for adjustment in clauses (g), (h), (i) and (j) of Section 16.8 shall be adjusted, in respect only of that School, commensurately to the period during which the Contractor is prevented by the Force Majeure Event from proceeding with that School;

(c) no non-performance of any obligation under this Agreement shall give rise to a Termination Event, to the extent that and for so long as performance of the obligation is prevented by the Force Majeure Event;

(d) the Total Availability Target Date shall not be adjusted, but if a School would have achieved School Availability on or prior to the Total Availability Target Date but for the Force Majeure Event, then the Province shall, in respect only of delay caused directly by the Force Majeure Event, pay to the Contractor its damages resulting from School Availability at that School not being achieved on or prior to the Total Availability Target Date, provided that such damages and such payment shall, in respect of damages resulting from delayed payment of School Capital Payments or Adjusted School Capital Payments, be comprised of an amount equal to the following (without duplication):

(i) if Total Availability would have been achieved by the Total Availability Target Date but for the Force Majeure Event, then the Contractor shall be entitled to receive each of the following amounts:

(A) the School Capital Payments for each School for which School Availability would have been achieved on or prior to the Total Availability Target Date but for the Force Majeure Event calculated from but excluding the Total Availability Target Date to and including the earlier of the revised date that School Availability is scheduled to be achieved as a result of the Force Majeure Event and the date that School Availability is achieved for

each such School; and

(B) for those Schools that achieved School Availability by the Total Availability Target Date and for those Schools that would have achieved School Availability on or prior to the Total Availability Target Date but for the Force Majeure Event but that achieve School Availability prior to Total Availability, the 20% of the School Capital Payments not included in the Adjusted School Capital Payments for such Schools calculated from but excluding the later of the Total Availability Target Date and the date that School Availability is achieved for each such School to and including the earlier of the revised date on which Total Availability is scheduled to be achieved as a result of the Force Majeure Event and the date that Total Availability is achieved, provided that if a School that would have achieved School Availability on or prior to the Total Availability Target Date but for the Force Majeure Event fails to achieve School Availability by the revised date scheduled for School Availability at that School then, from and after that revised date, no payments shall be made pursuant to this subparagraph in respect of any School,

payment for which shall be made on a monthly basis on the dates that the Payments would have been payable had the Force Majeure Event not occurred;

(ii) if Total Availability would not have been achieved by the Total Availability Target Date notwithstanding the occurrence of the Force Majeure Event, then the Contractor shall be entitled to receive:

(A) the Adjusted School Capital Payments for each School that would have achieved School Availability on or prior to the Total Availability Target Date but for the Force Majeure Event calculated for each such School from but excluding the Total Availability Target Date to and including the day that Total Availability would have been achieved but for the Schools affected by the Force Majeure Event;

(B) School Capital Payments for each School that would have achieved School Availability on or prior to the Total Availability Target Date but for the Force Majeure Event calculated from but excluding the date that Total Availability would have been achieved but for the Schools affected by the Force Majeure Event to and including the earlier of the revised date that School Availability is scheduled to be achieved as a result of the Force Majeure Event and the date that School Availability is achieved for each such School; and

(C) for those Schools that achieved School Availability by the Total Availability Target Date and for those Schools that would have achieved School Availability on or prior to the Total Availability Target Date but for the Force Majeure Event but that achieve School Availability prior to Total Availability, the 20% portion of the School Capital Payments not included in the Adjusted School Capital Payments for such Schools, calculated from but excluding the later of the day that Total Availability would have been achieved but for the Schools affected by the Force Majeure Event and the date that School Availability is achieved for each such School to and including the earlier of the revised date that Total Availability is scheduled to be achieved as a result of the Force Majeure Event and the date that Total Availability is achieved, provided that if a School that would have achieved School Availability on or prior to the Total Availability Target Date but for the Force Majeure Event fails to achieve School Availability by the revised date scheduled for School Availability at that School then, from and after that revised date, no payments shall be made pursuant to this subparagraph in respect of any School,

payment for which shall be made on a monthly basis on the dates that Adjusted School Capital Payments would have been payable had the Force Majeure Event not occurred;

subject to the Contractor's obligation to take reasonable steps to mitigate the delay and to mitigate its damages;

(e) no damages are payable under clause (d) to the extent that the damages are covered (or would have been covered but for the Contractor's failure to comply with Section 11) by insurance maintained by or for the benefit of the Contractor;

(f) if the Force Majeure Event occurs during the School M&R Period, then Sections 12.2(b) and 12.2(d) shall apply;

(g) in the event that the parties cannot, for the purpose of determining the payment amounts pursuant to clause (d), agree on the date that Total Availability would have been achieved or the date that a School would have achieved School Availability but for the Force Majeure Event, or the revised date on which Total Availability should be scheduled to be achieved or on which a School should be scheduled to achieve School Availability following the occurrence of the Force Majeure Event, having used reasonable commercial efforts to resolve their dispute through negotiation, then either the Contractor or the Province may refer the matter to the Project Adjudicator (as defined in Schedule 5 (Design and Plan Certification Process and Review Procedure)) for determination in accordance

with the procedure set out in section 4 of Schedule 5; and

(h) if the Contractor anticipates that the Force Majeure Event will delay Total Availability, but is of the opinion the delay can be avoided or mitigated through extraordinary measures, the Contractor may propose to the Province that such extraordinary measures be taken by the Contractor at the Province's expense.

## **12.2 Force Majeure During M&R Period**

If a Force Majeure Event occurs during the M&R Period, then notwithstanding any other provision of this Agreement:

(a) to the extent that and for so long as either party is prevented by the Force Majeure Event from performing any obligation under this Agreement, that party is relieved from any liability or consequence under this Agreement arising from its inability to perform or delay in performing that obligation;

(b) no Payment Adjustment shall be applicable in respect of Schools affected by the Force Majeure Event, to the extent that and for so long as the relevant performance was prevented by the Force Majeure Event;

(c) no non-performance of any obligation under this Agreement shall give rise to a Termination Event, to the extent that and for so long as performance of the obligation is prevented by the Force Majeure Event; and

(d) if and for so long as all or any portion of the Schools are closed to occupancy as a result of the Force Majeure Event, then the M&R Payment, exclusive of the Renewal Payment, shall abate proportionately during the period of closure due to the Force Majeure Event, and in that event:

(i) subject to subclause (ii), the proportionate abatement shall be based on the Gross Floor Area of the School Building or School Buildings or portions thereof that is not open to occupancy relative to the Gross Floor Area of all of the School Buildings combined; and

(ii) if the Contractor demonstrates to the satisfaction of the Province, acting reasonably, that the actual reduction in the Contractor's costs of performing the M&R is other than in proportion to the Gross Floor Area not occupied, then the proportionate abatement shall be the actual reduction in costs as demonstrated by the Contractor to the satisfaction of the Province, acting reasonably.

## **12.3 Procedure on Force Majeure Event**

Upon either party becoming aware of the occurrence of a Force Majeure Event that may prevent that party from performing any obligation under this Agreement, that party shall

in a timely manner give the other party notice of the Force Majeure Event, including reasonable details of the anticipated effect of the Force Majeure Event upon performance of this Agreement, and thereafter the parties shall on an ongoing basis consult with each other with a view to remedying or mitigating the Force Majeure Event and, if applicable, rebuilding the Project or otherwise addressing the consequences of the Force Majeure Event.

Except to the extent that damage caused to the Schools by a Force Majeure Event is insured against or required to be insured against by the Contractor, the Province shall be responsible for repairing the damage, provided that:

- (a) the Province may in its discretion, having regard to the nature and extent of the damage and acting reasonably, decline to repair the damage, and if the Province declines to repair the damage it shall provide notice of this decision to the Contractor as soon as reasonably practicable;
- (b) if the Province, pursuant to clause (a), declines to repair the damage, then, subject to Section 12.4 and Section 13.2, that shall constitute a Relief Event under Section 13.2(n) (but without prejudice to any termination right arising under Section 17.4); and
- (c) if the Province chooses to repair the damage then the Province must issue a Change Order Directive to the Contractor for the necessary repairs in accordance with Schedule 1 (Change Orders).

#### **12.4 Force Majeure Event Affecting Only Certain Schools**

Notwithstanding Section 17.4, where a Force Majeure Event has occurred and continues for a continuous period of at least 120 days during the Construction Period or at least 180 days during the M&R Period and has prevented the Contractor from carrying out its obligations under this Agreement in respect of not more than three Schools, as the case may be, and, if applicable, the Province has exercised its discretion in Section 12.3(a) and declined to repair damage to the affected School or Schools, then the affected School or Schools shall cease to be subject to this Agreement effective on the 121<sup>st</sup> day or the 181<sup>st</sup> day, as applicable following the Force Majeure Event. If the Force Majeure Event occurs during the Construction Period, then the Province shall pay to the Contractor the amount determined in accordance with Section 18.7 applied on a prorata basis in respect only of the affected School or Schools. If the Force Majeure Event occurs during the M&R Period, then the Province shall, at its option, either continue to pay to the Contractor as part of the Payment the School Capital Payment for the affected Schools, or pay a lump sum to the Contractor determined in accordance with Section 18.8, applied on a prorata basis in respect only of the affected School or Schools and having regard to the aggregate Initial Capacity of the affected School or Schools as a proportion of Total Initial Capacity.

The Capital Payments in Schedule 14 (Payment Schedule) shall be adjusted accordingly



and consequential amendments to this Agreement shall be made.

The School M&R Payment, including amounts attributable to the Renewal Payment, attributable to each affected School, shall cease to be payable by the Province to the Contractor from and after the day that the Force Majeure Event occurs and in that event:

- (a) subject to subclause (b), the proportionate abatement shall be based on the Gross Floor Area of School Buildings of each affected School relative to the Gross Floor Area of all of the School Buildings combined; and
- (b) if the Contractor demonstrates to the satisfaction of the Province, acting reasonably, that the actual reduction in the Contractor's costs of performing the M&R is other than in proportion to the Gross Floor Area of the affected Schools, then the proportionate abatement shall be the actual reduction in costs as demonstrated by the Contractor to the satisfaction of the Province, acting reasonably.

### **13. RELIEF EVENTS**

#### **13.1 Definitions**

In Section 13.2, the following expressions have the following meanings:

- (a) **“Designated Change in Law”** means the following and no other changes in any applicable statute, regulation or other subordinate legislation or other law (whether federal, provincial or municipal, and including common law), including any change in binding judicial interpretation of any applicable law:
  - (i) a change directed specifically at the building construction or maintenance industries in Alberta or directed specifically at the Contractor, the Project, the M&R, the Schools or public-private arrangements of the nature of this Agreement;
  - (ii) a change affecting the transportation of over dimensional loads on the Province's highways;
  - (iii) a change of a standard incorporated by reference in the Technical Requirements, or a change to applicable building codes or fire codes, or any other change that is tantamount to a modification of the Technical Requirements;
  - (iv) changes in applicable laws relating to environmental approvals required or not required, as the case may be, for the Project, including related administrative practices and policies pursuant to such laws that are material to the requirement or absence thereof to obtain environmental

approvals for the Project;

(v) changes in applicable municipal laws in relation to building permits required or not required, as the case may be, for the Project; or

(vi) the enactment of a general consumer goods and services sales tax in Alberta which is applied to any good or service exclusively consumed, used or supplied, or to be exclusively consumed, used or supplied, by the Contractor in the course of carrying out the Project or the M&R, to the extent that the Contractor is unable to recover or be credited with input tax credits, refunds, rebates or exemptions for taxes payable by the Contractor under such sales tax; and

(b) “**Heritage Find**” means property of archaeological, palaeontological or heritage significance or historical resources located in, under or on the School Sites.

### **13.2 Relief Event Defined**

In this Agreement, “**Relief Event**” means any of the following events that prevents, delays, interrupts or renders more expensive to the Contractor the performance of any obligation of the Contractor under this Agreement:

- (a) breach of any provision of this Agreement by the Province;
- (b) in the circumstances specified in Section 5.10, a stop work order issued by the Province;
- (c) a Designated Change in Law coming into effect after submission of the Contractor’s Proposal;
- (d) any Environmental Damage or Degradation in, on, under or around any School Site that was unknown to the Contractor at the time of submission of the Contractor’s Proposal or was subsequently caused by parties other than the Contractor or its agents or subcontractors or those for whom the Contractor is legally responsible;
- (e) the presence in, under or on any School Site, of Heritage Finds, which presence was unknown to the Contractor at the time of submission of the Contractor’s Proposal;
- (f) an order granted by a Court directly resulting from:
  - (i) a challenge to the selection process under which the Contractor was awarded the opportunity to enter into this Agreement;

- (ii) a third party claim of an interest in the School Sites or a portion thereof;
  - (iii) any other proceeding brought against the Province or a School Board or to which the Province or a School Board is a party;
  - (iv) any proceeding brought against the Contractor or its principal subcontractor engaged to construct the Project identified in Schedule 17 (Subcontractors), provided the proceeding relates to the nature of the Project and not to any wrongful or negligent act of the Contractor or such subcontractor or those for whom either of them is legally responsible; or
  - (v) any proceeding seeking the repeal, cancellation, revocation or termination of any permit, license or approval issued in connection with carrying out the Project;
- (g) during the Construction Period, a general strike or other labour disruption in Alberta that is applicable broadly to the building construction industry in Alberta or is directed at the Province;
- (h) any interference with the Project or the M&R by persons claiming aboriginal title or treaty rights in respect of any School Site;
- (i) in the circumstances specified in Section 16.6(f), any Remedial Action (as defined in Section 16.6) taken by the Province;
- (j) if, despite the Contractor taking all commercially reasonable measures to mitigate any cost, delay or inconvenience (including providing the Province with timely notice of the cost, delay or inconvenience encountered), the Contractor incurs increased costs or the Contractor's activities in carrying out the Project or the M&R are delayed or prevented as a result of any encumbrances, other than Identified Encumbrances, that pertain to the School Sites;
- (k) the Contractor's activities in carrying out the Project or the M&R are delayed or prevented as a result of a challenge or other interference made by a Municipality to the Contractor's rights to access the School Sites;
- (l) protest actions by persons protesting the construction of the Project or any other protest action at the School Sites or the Schools directed at the Province or a School Board;
- (m) the presence on or around any School Site of animal or plant species protected by applicable environmental laws, which presence was unknown to the Contractor at the time of submission of the Contractor's Proposal;
- (n) in the circumstances specified in Section 12.3, a failure by the Province to

repair, within a timeframe that is reasonable having regard to the circumstances, damage caused by a Force Majeure Event;

(o) any environmental assessment process or environmental impact assessment report directed under applicable legislation, except where such direction arises as a result of activities or actions (whether planned or actually carried out) by the Contractor (or those for whom it is in law responsible) in circumstances where:

(i) it was reasonably foreseeable that such activities or actions could lead to such assessment process or report being directed; and

(ii) having regard to the Contractor's Designs generally, the Contractor could reasonably have carried out the Project without such activities or actions;

(p) during the M&R Period, a general strike or other labour disruption in Alberta that is applicable to school boards and their staff in Alberta;

(q) if, despite the Contractor taking all commercially reasonable measures to mitigate any cost, delay or other impact (including providing the Province with timely notice of the cost, delay or other impact encountered), the Contractor incurs increased costs or the Contractor's activities in carrying out the Project or the M&R are delayed, prevented or otherwise impacted as a direct result of any acts or omissions to act on the part of the Adjacent Operator; or

(r) if the applicable Municipality either prevents the Contractor from commencing work in furtherance of the Project at a School Site or requires that the Contractor stop work in furtherance of the Project at a School Site because one or more of the following conditions set out in certain Development Permit approvals have not been satisfied:

(i) conditions 10 and 11 set out in the notice of decision dated June 26, 2012 from the Town of Cochrane in respect of development permit 2012-048;

(ii) condition 8 set out in the notice of decision dated June 27, 2012 from the City of Red Deer in respect of development permit 1120041; or

(iii) condition 7 set out in the notice of decision dated June 27, 2012 from the City of Red Deer in respect of development permit 1120104;

but excluding in any case any event to the extent caused by the negligence or unlawful act of the Contractor (or those for whom it is in law responsible) or any act or omission of the Contractor in breach of the provisions of this Agreement.

### 13.3 Relief Event During Construction Period

If a Relief Event occurs during the Construction Period, then notwithstanding any other provision of this Agreement:

(a) to the extent that and for so long as the Contractor is prevented by the Relief Event from performing any obligation under this Agreement, the Contractor is relieved from any liability or consequence under this Agreement arising from its delay in performing that obligation;

(b) if the Relief Event wholly or substantially prevents the Contractor from proceeding with a School for a period of at least 10 days, or if multiple Relief Events when taken together wholly or substantially prevent the Contractor from proceeding with that School for a period of at least 10 days and each such Relief Event wholly or substantially prevents the Contractor from proceeding with that School for a period of at least two days (where all such periods of delay are measured on a critical path basis having regard to the Contractor's Construction Schedule), then the Contractor's Construction Schedule, the dates in Section 5.11, and the date specified for adjustment in clauses (g), (h), (i) and (j) of Section 16.8 shall be adjusted, in respect only of that School, commensurately to the period during which the Contractor is prevented by the Relief Event from proceeding with that School;

(c) no non-performance of any obligation of the Contractor under this Agreement shall give rise to a Termination Event, to the extent that and for so long as performance of the obligation is prevented by the Relief Event;

(d) the Total Availability Target Date shall not be adjusted, but if a School would have achieved School Availability on or prior to the Total Availability Target Date but for the Relief Event, then the Province shall, in respect only of delay caused directly by the Relief Event, pay to the Contractor its damages resulting from School Availability at that School not being achieved on or prior to the Total Availability Target Date as a result of the Relief Event, provided that such damages and such payment shall, in respect of damages resulting from delayed payment of School Capital Payments or Adjusted School Capital Payments, be comprised of an amount equal to the following (without duplication):

(i) if Total Availability would have been achieved by the Total Availability Target Date but for the Relief Event, then the Contractor shall be entitled to receive each of the following amounts:

(A) the School Capital Payments for each School for which School Availability would have been achieved on or prior to the Total Availability Target Date but for the Relief Event calculated from but excluding the Total Availability Target Date to and including the earlier of the revised date that School Availability is scheduled

to be achieved as a result of the Relief Event and the date that School Availability is achieved for each such School; and

(B) for those Schools that achieved School Availability by the Total Availability Target Date and for those Schools that would have achieved School Availability on or prior to the Total Availability Target Date but for the Relief Event but that achieve School Availability prior to Total Availability, the 20% of the School Capital Payments not included in the Adjusted School Capital Payments for such Schools calculated from but excluding the later of the Total Availability Target Date and the date that School Availability is achieved for each such School to and including the earlier of the revised date on which Total Availability is scheduled to be achieved as a result of the Relief Event and the date that Total Availability is achieved, provided that if a School that would have achieved School Availability on or prior to the Total Availability Target Date but for the Relief Event fails to achieve School Availability by the revised date scheduled for School Availability at that School then, from and after that revised date, no payments shall be made pursuant to this subparagraph in respect of any School,

payment for which shall be made on a monthly basis on the dates that the Payments would have been payable had the Relief Event not occurred;

(ii) if Total Availability would not have been achieved by the Total Availability Target Date notwithstanding the occurrence of the Relief Event, then the Contractor shall be entitled to receive:

(A) the Adjusted School Capital Payments for each School that would have achieved School Availability on or prior to the Total Availability Target Date but for the Relief Event calculated for each such School from but excluding the Total Availability Target Date to and including the day that Total Availability would have been achieved but for the Schools affected by the Relief Event;

(B) School Capital Payments for each School that would have achieved School Availability on or prior to the Total Availability Target Date but for the Relief Event calculated from but excluding the date that Total Availability would have been achieved but for the Schools affected by the Relief Event to and including the earlier of the revised date that School Availability is scheduled to be achieved as a result of the Relief Event and the date that School Availability is achieved for each such School; and

(C) for those Schools that achieved School Availability by the Total Availability Target Date and for those Schools that would have achieved School Availability on or prior to the Total Availability Target Date but for the Relief Event but that achieve School Availability prior to Total Availability, the 20% portion of the School Capital Payments not included in the Adjusted School Capital Payments for such Schools, calculated from but excluding the later of the day that Total Availability would have been achieved but for the Schools affected by the Relief Event and the date that School Availability is achieved for each such School to and including the earlier of the revised date that Total Availability is scheduled to be achieved as a result of the Relief Event and the date that Total Availability is achieved, provided that if a School that would have achieved School Availability on or prior to the Total Availability Target Date but for the Relief Event fails to achieve School Availability by the revised date scheduled for School Availability at that School then, from and after that revised date, no payments shall be made pursuant to this subparagraph in respect of any School,

payment for which shall be made on a monthly basis on the dates that Adjusted School Capital Payments would have been payable had the Relief Event not occurred;

subject to the Contractor's obligation to take reasonable steps to mitigate the delay and to mitigate its damages;

(e) if the Contractor anticipates that the Relief Event will delay Total Availability, but is of the opinion the delay can be avoided or mitigated through extraordinary measures, the Contractor may propose to the Province that such extraordinary measures be taken by the Contractor at the Province's expense;

(f) if the Relief Event, when aggregated with the effect of any other Relief Event or Relief Events occurring during the Construction Period and not previously claimed for by the Contractor increases the Contractor's cost of carrying out the Project by at least \$50,000, then subject to Section 13.5 and subject in every case to the Contractor's obligation to take reasonable steps to mitigate the increase in its costs, and without duplicating any amount payable under clause (d), the Province shall, as soon as practicable following receipt from the Contractor of appropriate documentation establishing the amount payable, pay to the Contractor, without duplication:

(i) if the Relief Event is a breach by the Province of any of its obligations under this Agreement, the amount payable under the indemnity in Section 16.2;

- (ii) if the effect of the Relief Event is tantamount to a change in the Project Requirements, the amount that would have been payable by the Province if the change in the Project Requirements had been a Change Order governed by Section 7.1 and requested by the Province pursuant to a Change Order Directive; and
  - (iii) in any other case, the Contractor's reasonable damages;
- (g) no damages are payable under this Section 13.3 to the extent that the damages are covered (or would have been covered but for the Contractor's failure to comply with Section 11) by insurance maintained by or for the benefit of the Contractor;
- (h) if the Relief Event occurs during the School M&R Period, then Sections 13.4(b) and 13.4(d) shall apply; and
- (i) in the event that the parties cannot, for the purpose of determining the payment amounts pursuant to clause (d), agree on the date that Total Availability would have been achieved or the date that a School would have achieved School Availability but for the Relief Event, or the revised date on which Total Availability should be scheduled to be achieved or on which a School should be scheduled to achieve School Availability following the occurrence of the Relief Event, having used reasonable commercial efforts to resolve their dispute through negotiation, then either the Contractor or the Province may refer the matter to the Project Adjudicator (as defined in Schedule 5 (Design and Plan Certification Process and Review Procedure)) for determination in accordance with the procedure set out in section 4 of Schedule 5.

#### **13.4 Relief Event During M&R Period**

If a Relief Event occurs during the M&R Period, then notwithstanding any other provision of this Agreement:

- (a) to the extent that and for so long as the Contractor is prevented by the Relief Event from performing any obligation under this Agreement, the Contractor is relieved from any liability or consequence under this Agreement arising from its delay in performing that obligation;
- (b) no Payment Adjustment shall be applicable in respect of Schools affected by the Relief Event, to the extent that and for so long as the relevant performance was prevented by the Relief Event;
- (c) no non-performance of any obligation of the Contractor under this Agreement shall give rise to a Termination Event, to the extent that and for so long as performance of the obligation is prevented by the Relief Event; and



(d) if the Relief Event, when aggregated with the effect of any other Relief Event occurring in the same calendar year and not previously claimed for by the Contractor, will increase the Contractor's net cost of carrying out the M&R Requirements or the Handback Requirements or the Handback on Expiry Requirements by at least \$5,000 over the remainder of the Term, then subject to Section 13.5 and subject in every case to the Contractor's obligation to take reasonable steps to mitigate the increase in its costs, and without duplication:

(i) if the Relief Event is a breach by the Province of any of its obligations under this Agreement, the Province shall pay to the Contractor the amount payable under the indemnity in Section 16.2;

(ii) if the effect of the Relief Event is tantamount to a change in the M&R Requirements, then the M&R Payments in the Payment Schedule shall be adjusted as if the change in the M&R Requirements had been a Change Order governed by Section 7.2 and requested by the Province pursuant to a Change Order Directive; and

(iii) in any other case, the Province shall pay to the Contractor the Contractor's reasonable damages arising from the Relief Event.

### **13.5 Procedure on Relief Event**

Immediately upon the Contractor becoming aware of the occurrence of an event that is or may be or is likely to become a Relief Event, it shall give the Province notice of the Relief Event, including reasonable details of the anticipated effect of the Relief Event upon the Contractor's performance of this Agreement, and thereafter the parties shall on an ongoing basis communicate and consult with each other with a view to monitoring, remedying, mitigating or otherwise addressing the consequences of the Relief Event. Failure by the Contractor to provide such notice in such manner shall not thereafter disqualify the Contractor from providing notice of and claiming relief under the Relief Event, but the Province may in that event assert a claim for damages arising from such failure.

## **14. CONTRACTOR'S REPRESENTATIONS AND OBLIGATIONS**

### **14.1 Contractor's Representations**

The Contractor represents and warrants to the Province that, as of the date of Execution of this Agreement:

(a) the Contractor is a general partnership. One of the Contractor's two general partners is a corporation; the other is a limited partnership. The Contractor is duly formed, validly existing, and registered and otherwise lawfully authorized to do business under the laws of Alberta, and each of its two general partners have the

capacity, power and authority as the general partners of the Contractor to enter into this Agreement for and on behalf of the Contractor and to perform its obligations hereunder. Each of the Contractor's two general partners is duly organized, validly existing, in good standing, and registered and otherwise lawfully authorized to do business under the laws of Alberta;

(b) this Agreement has been duly authorized on behalf of the Contractor, and upon its execution and delivery constitutes a legal, valid and binding obligation of the Contractor;

(c) the Contractor is a "special purpose vehicle" that has not carried on business other than directly in relation to, in anticipation of, and for the purposes of this Agreement;

(d) all partnership interests in the Contractor, all direct shareholdings and ownership interests in the general partners of the Contractor, details of the indirect ownership interests in each of such general partners, and the nature of the ultimate ownership of each such general partners, at the time of Execution of this Agreement have been disclosed to the Province;

(e) the Contractor is relying only on its own investigation and due diligence in relation to the risks assumed by it under the provisions of this Agreement, and is not relying on any information received from or representation made by the Province, with the exception only of the Province's representations in Section 15.1;

(f) the Contractor's Proposal, to the extent it consists of statements of fact, is at the time of Execution of this Agreement in every material respect true and not misleading (except as has been disclosed in writing to and accepted in writing by the Province prior to Execution of this Agreement); and

(g) the Contractor, either in the Contractor's Proposal or in formal communications with the Province under the RFP, has made plain and true disclosure to the Province of all facts and circumstances regarding the Contractor, its general partners, its intended subcontractors, and the Project Financing that might reasonably be material to the willingness of the Province to enter into this Agreement with the Contractor having regard to the information requested by the Province in the RFP.

## **14.2 Reporting Requirements**

In addition to all specific reports and notices required by the Technical Requirements, the Contractor shall provide the following reporting to the Province:

(a) during the Construction Period, a monthly report on the progress of the Project, including but not limited to a report of any material events, developments

or circumstances arising in relation to the Project since the last monthly report, all in a form and format prescribed or approved from time to time by the Province, acting reasonably;

(b) during the School M&R Period and the M&R Period, a monthly report noting all circumstances known to the Contractor that trigger or, if continued, will trigger a Payment Adjustment and any other events, developments or circumstances material to the Contractor's performance of the M&R and the M&R Requirements, and an annual report summarizing the Contractor's expenditures on major renewal of the Schools, all in a form and format prescribed or approved from time to time by the Province, acting reasonably;

(c) throughout both the Construction Period and the M&R Period, copies of its quarterly financial statements and annual financial statements (each of which may be delivered in confidence), in each case prepared in accordance with generally accepted accounting principles;

(d) copies of all financial reporting (in addition to the reporting under clause (c)) provided from time to time to any lender providing all or any part of the Senior Debt Financing;

(e) such other periodic reports as the Province may from time to time reasonably require; and

(f) throughout both the Construction Period and the M&R Period, a response delivered in a timely manner to any inquiry reasonably made by the Province in relation to any aspect of the business of the Contractor, the Project, the Project Requirements, the M&R, the M&R Requirements, or this Agreement;

provided that, to the extent that such reporting includes commercially sensitive information, it may be delivered to the Province expressly in confidence and marked as confidential.

### **14.3 Records**

The Contractor shall, following Execution of this Agreement and for a period of two years following expiry of the Term or earlier termination of this Agreement, (i) maintain in an appropriate form full accounting and other records in respect of performance by it of its obligations under this Agreement, and (ii) keep those records available for inspection by the Province (including the Auditor General of the Province or any other representative designated by the Province for that purpose) at all reasonable times upon reasonable notice, for the purpose of determining the Contractor's compliance with this Agreement. Apart from this right of inspection and the obligation of the Contractor under Section 17.5(c) upon termination of this Agreement, the records of the Contractor shall be in the exclusive custody and control of the Contractor, and the Province shall have no general right to access or obtain copies of such files and records. Upon expiry of

the Term, the Contractor shall, upon request by the Province and at no cost to the Province, hand over to the Province copies of all records that relate to the Contractor's performance of the M&R that are of a kind or nature that the Province, acting reasonably, indicates will be of utility to the Province, the School Board or their respective contractors assuming responsibility for performing the M&R. The Contractor shall not be required to hand over to the Province copies of any records that constitute proprietary information in the nature of trade secrets.

#### **14.4 Access, Inspection and Testing**

The Contractor acknowledges and agrees that, at all times until the end of the Term, the Province shall have full and free access to:

- (a) the School Sites and the Schools; and
- (b) on reasonable prior notice, any site occupied by the Contractor or to which the Contractor has access, where materials to be used in the Project or the M&R are fabricated or stored;

for the purpose of inspecting the School Sites and the Schools or materials to be used in the Project or the M&R so as to be able to determine compliance by the Contractor with the terms of this Agreement; and such access shall not of itself be construed as constituting disturbance or interference with the Contractor's uninterrupted access to the School Sites and the Schools; provided however that the Contractor may exercise reasonable control over such access for reasons of safety and operational efficiency. For the purpose of such inspection, the Province may at all reasonable times and subject to the reasonable requirements of third party suppliers, perform any measurement, test or other observation or investigation. The Contractor shall provide reasonable cooperation (but without obligation to incur material expense) to facilitate any such measurements, tests or other observations or investigations. The Province shall conduct all such measurements, tests, observations and investigations in a manner that will not materially disturb, interfere with or disrupt the Project or the M&R.

#### **14.5 Safety**

The Contractor shall observe all safety requirements specifically set out in Schedule 16 (Safety Requirements) or in the Technical Requirements, and shall in all respects and at all times carry out the Project Requirements and the M&R Requirements with due regard for public security and safety, including without limitation the security and safety of students and staff at each School.

#### **14.6 Contractor's Other Obligations**

The Contractor covenants to do all things specified in the Schedules to this Agreement to be done by the Contractor, in such manner and at such times as specified in the Schedules to this Agreement. The Contractor shall take all such actions in the context of the Project

and the M&R as are from time to time required in order to allow the Province, the School Boards, the Municipalities, other governmental authorities, police services and emergency response services to carry out their respective statutory duties in relation to the Schools.

## **15. PROVINCE'S REPRESENTATIONS AND OBLIGATIONS**

### **15.1 Province's Representations**

The Province represents and warrants to the Contractor, as of the date of Execution of this Agreement, that:

- (a) the Province has all requisite capacity, power and authority to enter into and perform its obligations under this Agreement;
- (b) this Agreement has been duly authorized on behalf of the Province, and upon execution and delivery constitutes a legal, valid and binding obligation of the Province;
- (c) officials of the Province's Infrastructure Department and Education Department that have been directly involved in the RFP, this Agreement or the procurement of the Project have no actual knowledge of any material inaccuracies or materially misleading statements in any reports, studies or other information formally made available by the Province to the Contractor in relation to the preparation and submission of the Contractor's Proposal, except as expressly identified in written communications between the Province and the Contractor (including any written communications, prior to incorporation or other legal creation of the Contractor, between the Province and the Contractor's Contact Organization); and
- (d) the Schools will be used for Educational Activities, Educational Support Activities, Adhoc School Use, Community Use, and Acceptable Third Party Use, each as defined in Schedule 18 (Technical Requirements).

### **15.2 Province's General Obligation**

The Province covenants to do all things specified in the Schedules to this Agreement to be done by the Province, in such manner and at such times as specified in the Schedules to this Agreement.

### **15.3 Contractor's Reliance on Information**

The representation by the Province in Section 15.1(c) shall not be construed as importing any duty of care to the Contractor on the part of the Province in relation to the accuracy of such reports, studies or other information, it being mutually understood and agreed that

the Contractor will perform its own research, investigation and due diligence. However, the Contractor may rely on the accuracy and completeness for their intended purpose of the clearance documents for archeological and historical resources dated January 10, 2012, January 11, 2012, January 27, 2012, January 30, 2012, January 31, 2012, February 9, 2012 and February 10, 2012, respectively, issued by Alberta Culture and Community Spirit in respect of the School Sites.

#### **15.4 Assistance with Permits and Approvals**

The Contractor shall provide the Province with prompt notice of each application that the Contractor makes to a Municipality for permits in respect of a School.

Without derogating from the Contractor's responsibilities under Section 5.6 to obtain all permits and municipal approvals required for the Project, the Contractor's responsibilities under section 4.9.3.2 (CESD Variations) of Schedule 18 to obtain the permission of the Town of Penhold to access the existing Penhold Regional Multiplex building envelope (as the Contractor's proposed method and timing of the necessary work needs to be co-ordinated with the Town of Penhold) and the Contractor's responsibility to make all required arrangements relating to utilities, the Province shall, in response to any reasonable request by the Contractor in relation to such permits and approvals and required arrangements, provide the Contractor with such reasonable assistance as the Province is able to offer or arrange with the School Boards or the Municipalities without unduly fettering its executive discretion or pursuing amendment of any legislation or subordinate legislation, but otherwise including, in any case where the Province concludes that a third party is acting unreasonably in relation to the negotiation or issuance of such permits and approvals and required arrangements, the exercise by the Province of all legal rights and remedies available to it in relation to such third party, to the extent it is reasonable in the circumstances for the Province to exercise such legal rights and remedies.

The Contractor shall provide notice to the Province of unreasonable delay experienced by the Contractor in obtaining permits and municipal approvals required for the Project as soon as practicable after becoming aware of the delay, including details of the cause or perceived cause of the delay and the efforts to date and anticipated further efforts of the Contractor to prevent or minimize the duration of the delay.

## **16. DEFAULT, REMEDIES AND TERMINATION EVENTS**

### **16.1 Contractor's Indemnity**

Subject to Section 16.3, the Contractor shall indemnify and hold harmless the Province, the School Boards and the Municipalities and their respective officials and employees against all damages, losses and costs, including third party claims (and including the reasonable cost of defending third party claims, on a solicitor and client basis), arising

from:

- (a) the Contractor's breach of any provision of this Agreement;
- (b) the negligence or other tortious conduct of the Contractor or any official, director, officer, employee, agent or subcontractor of the Contractor in relation to the Project or the M&R; or
- (c) any third party claim alleging infringement by the Contractor or its subcontractors, in relation to the Project or the M&R, of any intellectual property rights of third parties.

## **16.2 Province's Indemnity**

Subject to Section 16.3, the Province shall indemnify and hold harmless the Contractor and its officials, directors, officers and employees against all damages, losses and costs, including third party claims (and including the reasonable cost of defending third party claims, on a solicitor and client basis), arising from the Province's breach of any provision of this Agreement or arising from the negligence or other tortious conduct of the Province or any official, employee or agent of the Province in relation to the subject matter of this Agreement.

## **16.3 Calculation of and Limitation on Claims**

Where any provision of this Agreement entitles the Contractor to recover damages or losses from the Province upon the occurrence of a specified event, then except as otherwise expressly indicated, the intent is to afford the Contractor the equivalent of the ordinary contractual measure of damages, that is, that such recovery will place the Contractor (and by extension, the subcontractors of the Contractor and persons contracting with the Contractor in relation to the Project Financing) in the same position it would have been in but for the occurrence of the specified event, having regard to the following circumstances and limitations but otherwise without limiting the generality of the foregoing:

- (a) the obligations and arrangements contemplated by the Contractor's Proposal (including obligations to and arrangements with parties specified in the Contractor's Proposal, but also including corresponding obligations to and arrangements with replacement parties), including but not limited to the Contractor's obligations to its subcontractors and obligations arising in relation to monoline insurance or other arrangements reasonably entered into with a view to credit enhancement, but in each case premised upon breakage costs that are commercially reasonable and consistent with market practice, in accordance with the following:
  - (i) break fees payable to the Contractor's subcontractors and others contracting with the Contractor must be commercially reasonable, having

regard to customarily negotiated break fees between parties at arm's-length from one another, and subject in every case to a duty on the part of the subcontractor or other contracting party to mitigate its damages; and

(ii) in the case of monoline insurance, break fees shall only be payable to the extent necessary to ensure that the monoline insurer receives a total of 10 years premiums taking into account all premiums paid prior to the occurrence of the specified event, and such break fees shall be calculated using a net present value basis (discounting at the average interest rate on the Senior Debt Financing taking into account Canadian dollar interest rate hedges, if applicable);

(b) participation by the Contractor directly, or indirectly by arrangement with the holders of the Senior Debt Financing (if under such arrangement the risks and benefits of the hedging flow through to the Contractor), in hedging arrangements specifically in relation to changes in Canadian dollar interest rates (and specifically excluding any foreign exchange transactions), provided:

(i) the hedging arrangements are entered into on an arm's-length basis or else are on commercial terms equivalent to those that would have been available on an arm's-length basis;

(ii) particulars of the hedging arrangements are communicated to the Province within five Business Days after the hedging arrangements are entered into; and

(iii) the hedging arrangements are not entered into in anticipation of an imminent termination of this Agreement; and

(c) the Contractor's duty in every instance to take all commercially reasonable measures to mitigate its damages or losses (and the Contractor's corresponding right to include in its damages or losses the reasonable costs of such measures).

Subject to the foregoing, no claim by either party arising from any breach of this Agreement or under any indemnity given by this Agreement, shall include any claim by such party against the other for punitive or exemplary damages, indirect or consequential damages, or any claim for pure economic loss, whether or not the other party has been advised of the possibility of pure economic loss, and regardless of whether the action is framed in contract or in negligence; except nothing in this paragraph shall preclude the Contractor from claiming for lost profits as part of a recovery of damages that the Contractor is entitled to under any provision of this Agreement, including without limitation a claim by the Contractor for damages under Section 18.9(b) and where this Agreement provides for a Payment, a School Capital Payment or an Adjusted School Capital Payment, such payment may include a profit component.

The Province and the Contractor acknowledge that the Contractor will not be precluded



from advancing any claim or seeking any relief under this Agreement solely by the reason that the Contractor is not liable to the applicable subcontractor identified in Schedule 17 (Subcontractors) under the applicable agreement between the Contractor and such subcontractor identified in Schedule 17 until such claim or relief is granted by the Province to the Contractor under this Agreement. Nothing in this paragraph creates any contract or obligation directly between the Province, the Contractor and the applicable subcontractor identified in Schedule 17.

#### **16.4 Exclusivity of Specified Remedies**

The Province shall not be entitled to claim damages or indemnification in respect of specific events or circumstances which constitute (or would constitute, if the applicable threshold set out in the Technical Requirements were met) grounds for a Payment Adjustment. The Contractor shall not be entitled to damages or indemnification in respect of any breach by the Province under this Agreement that would duplicate compensation to the Contractor under Section 13 arising from a Relief Event.

Every right to claim damages or indemnification or reimbursement or to set off or hold back any amount under this Agreement shall be construed so that recovery is without duplication to any other amount recoverable under this Agreement, and shall not be construed in such manner as would allow a party to recover the same loss or amount twice.

#### **16.5 Exclusivity of Termination Provisions**

Neither party shall have any right to terminate this Agreement except as expressly set out in Sections 17.2, 17.3 or 17.4; and without limiting the generality of the foregoing neither party shall in any event be entitled to terminate this Agreement on the basis of fundamental breach.

#### **16.6 Province's Step-in Rights**

Except in respect of matters that are subject to section 5.11.3.2 of Schedule 18 (Technical Requirements), if at any time during either the Construction Period or the M&R Period the Province reasonably believes that it needs to take action in relation to the Project or the M&R:

- (a) because a serious risk exists to public security and safety (including without limitation students' security and safety) or to the environment;
- (b) in order to discharge a statutory duty or enable performance by any other person of a statutory duty;
- (c) if necessary in order to prevent the Contractor or its subcontractors from excluding or limiting use of the Schools (other than for purposes expressly contemplated by the M&R Requirements); or

(d) because a Default (as defined in Section 16.7) has occurred and the Contractor is not diligently pursuing a cure of the Default, or where the Default is an Incurable Default, the Contractor is not diligently pursuing a course of action designed to mitigate the consequences of the Incurable Default, or because the Contractor is not diligently pursuing the Project or the M&R,

then the Province may, upon notice to the Contractor (which notice shall specify all pertinent details of the intended action) take such action (the “**Remedial Action**”) in relation to the Project or to the M&R as the Province reasonably considers necessary to mitigate the risk, discharge the statutory duty, keep the Schools open for use or remedy the Default or advance the Project or the M&R, and in that event:

(e) the Province shall carry out the Remedial Action as quickly as is practicable, and in such manner as will minimize interference with the Contractor’s performance of its obligations under this Agreement;

(f) if the need for the Remedial Action does not arise as a result of any breach by the Contractor of its obligations under this Agreement, then the Remedial Action shall, subject to Section 13.2, constitute a Relief Event under Section 13.2(i); and

(g) to the extent that the need for the Remedial Action arises as a result of any breach by the Contractor of its obligations under this Agreement, then the Contractor shall indemnify the Province against all costs and expenses reasonably incurred by the Province in carrying out the Remedial Action.

## **16.7 Termination Event Defined Terms**

In Section 16.8(o), the following expressions have the following meanings:

“**Default**” means any breach by the Contractor of any provision of this Agreement, including the material inaccuracy, when made, of any representation given by the Contractor in Section 14.1;

“**Incurable Default**” means a Default that is by its nature or by reason of prevailing circumstances incapable of being cured in all material respects, but does not include any Default that is a failure to carry out a particular obligation by a particular date or within a particular period where it is possible to subsequently perform that obligation, albeit not by or within the relevant date or period;

“**Material Adverse Effect**” occurs when a Default, taken together with any other Defaults of a similar nature:

(i) creates a material risk to public security and safety (including, without limitation, the security and safety of students and staff) or to the environment;

(ii) creates a material risk of significant liability to third parties on the part of the Province, any School Board or any Municipality; or

(iii) demonstrates a marked or persistent inability or unwillingness on the part of the Contractor to adhere to its obligations under this Agreement;

and includes any material breach by the Contractor of:

(iv) its insurance obligations under Sections 11.1 through 11.4;

(v) its reporting obligations under Section 14.2 (provided, to the extent the Province knows the Contractor is in breach of such reporting obligations, the Province shall give the Contractor notice of such breach); or

(vi) its obligations under Section 14.3; and

“**Notice of Default**” means a notice from the Province to the Contractor specifying a Default.

## **16.8 Termination Events**

The following shall constitute Termination Events, except where caused directly and specifically by the Province withholding any amount payable under this Agreement except to the extent disputed by the Province in good faith:

(a) if the Contractor is declared or adjudged a bankrupt, makes a general assignment for the benefit of creditors, or takes the benefit of any legislation in force for (i) protection against creditors, (ii) orderly payment of debts, or (iii) winding up or liquidation;

(b) if a receiver or receiver-manager is appointed for the business of the Contractor (other than by one or more lenders or any trustee or representative on behalf of such lender or lenders of any of the Senior Debt Financing), unless the appointment is canceled within 21 days;

(c) if any material part of the property of the Contractor is seized or attached and such seizure or attachment is not successfully contested by the Contractor within 21 days;

(d) if the Contractor ceases active business operations;

(e) if the Contractor carries on any business unrelated to the subject matter of this Agreement and does not cease to carry on such business within two Business Days of receiving notice to do so from the Province (in which context neither (i)

any lending between the Contractor, its general partners and any of their shareholders or partners or any subsidiaries of their shareholders or partners, nor (ii) any other non arm's-length financial transactions, shall be considered to be carrying on a business unrelated to the subject matter of this Agreement);

(f) if, having regard to the Contractor's Construction Schedule, during the Construction Period, the Contractor (by its own actions, and not merely by the actions of the subcontractor retained by the Contractor in respect of the Project unless the Contractor fails to diligently take action in response to abandonment of the Project by the subcontractor) abandons the Project in respect of any School;

(g) if the condition in Section 3.5 for release of the Financing and Initial Performance Letter of Credit is not achieved by June 30, 2013 or, in the event that the Contractor has delivered the Financing and Initial Performance Letter of Credit in the form of two or more letters of credit as contemplated in Section 3.3, the condition in Section 3.5 for release of one or more of the letters of credit together totaling \$5 million is not achieved by June 30, 2013; for clarity, if any School or Schools are delayed by events resulting in an adjustment to the date above mentioned in this clause in respect of such School or Schools as contemplated in the third paragraph of Section 11.7 or in Sections 12.1(b) or 13.3(b), then a Termination Event shall occur if the condition in Section 3.5 for release of the Financing and Initial Performance Letter of Credit (or for release of one or more of the letters of credit together totaling \$5 million comprising the Financing and Initial Performance Letter of Credit, if applicable) is not achieved by June 30, 2013 in respect of the Schools not affected by such events;

(h) if it is determined by arbitration pursuant to the Dispute Resolution Procedure and on a basis consistent with section 2.1(a) and section 2.1(b) of Schedule 19 (Provincial Funding Progress Payments) that the Contractor has failed to achieve 30% completion of the Project by March 1, 2014; for clarity, if any School or Schools are delayed by events resulting in an adjustment to the date above mentioned in this clause in respect of such School or Schools as contemplated in the third paragraph of Sections 11.7 or in Sections 12.1(b) or 13.3(b), then a Termination Event shall occur if it is determined by arbitration pursuant to the Dispute Resolution Procedure and on a basis consistent with section 2.1(a) and section 2.1(b) of Schedule 19 (Provincial Funding Progress Payments) that the Contractor has failed to achieve 30% completion of all Schools not affected by such events by March 1, 2014, and a Termination Event shall occur if it is determined by arbitration pursuant to the Dispute Resolution Procedure and on a basis consistent with section 2.1(a) and section 2.1(b) of Schedule 19 (Provincial Funding Progress Payments) that the Contractor has failed to achieve 30% completion of any School affected by such events by the adjusted date for the purposes of this clause applicable to that School;

(i) if the Contractor fails to achieve Total Availability by June 30, 2015; for clarity, if any School or Schools are delayed by events resulting in an adjustment

to the date above mentioned in this clause in respect of such School or Schools as contemplated in the third paragraph of Section 11.7, or in Sections 12.1(b) or 13.3(b), then a Termination Event shall occur if the Contractor fails to achieve School Availability at all Schools not affected by such event or events by June 30, 2015, and a Termination Event shall occur if the Contractor fails to achieve School Availability at any School affected by such events by the adjusted date for the purposes of this clause applicable to that School;

(j) if at any time after December 1, 2013 it is determined by arbitration pursuant to the Dispute Resolution Procedure that there is no reasonable possibility of the Contractor achieving Total Availability by June 30, 2015; for clarity, if any School or Schools are delayed by events resulting in an adjustment to the June 30, 2015 date above mentioned in this clause in respect of such School or Schools as contemplated in the third paragraph of Sections 11.7 or in Sections 12.1(b) or 13.3(b), then a Termination Event shall occur if at any time after December 1, 2013 it is determined by arbitration pursuant to the Dispute Resolution Procedure that there is no reasonable possibility of the Contractor achieving School Availability at all Schools not affected by such events by June 30, 2015, and a Termination Event shall occur if at any time after December 1, 2013 it is determined by arbitration pursuant to the Dispute Resolution Procedure that there is no reasonable possibility of the Contractor achieving School Availability at any School affected by such events by the adjusted date for the purposes of this clause applicable to that School;

(k) if during the School M&R Period or the M&R Period the Contractor (by its own actions, and not merely by the actions of the subcontractor retained by the Contractor in respect of the M&R unless the Contractor fails to diligently take action in response to abandonment of the M&R by the subcontractor) abandons the business of carrying out the M&R at any School;

(l) if the Contractor, having become subject to Payment Adjustments specified in section 5.12.6.4 of Schedule 18 (Technical Requirements) as a potential Termination Event, fails to within 10 days of receiving notification from the Province to do so submit to the Province a reasonable remedial plan for achieving due future performance of the M&R, or fails thereafter (but within the lesser of the duration of the remedial plan as specified therein or twelve months) to diligently implement and carry out such remedial plan;

(m) if the Contractor, having become subject to Building Performance Failure (as such term is defined in Schedule 18 (Technical Requirements)) Payment Adjustments in any 12 month period that in aggregate exceed \$125,000 during that 12 month period, fails to within 10 days of receiving notification from the Province to do so submit to the Province a reasonable remedial plan for achieving due future performance of the M&R, or fails thereafter to diligently implement and carry out such remedial plan;

(n) if after School Availability at a School the Contractor or its agents or subcontractors or others for whom the Contractor is legally responsible, other than:

(i) for purposes expressly contemplated by Schedule 18 (Technical Requirements); or

(ii) for reasons of public security and safety, exercised on a temporary basis;

takes any steps to exclude or limit the applicable School Board or the applicable Municipality from lawfully using that School or to prevent the performance by the Province, the applicable School Board or the applicable Municipality of any statutory duty; or

(o) if the Contractor, upon receiving a Notice of Default from the Province where the specified Default has a Material Adverse Effect (regardless of whether the Notice of Default so indicates), fails to:

(i) cure the Default within 21 days; or

(ii) where the Default cannot by reasonable commercial efforts be cured within 21 days, communicate to the Province and initiate within that 21 days a commercially reasonable course of action designed to cure the Default, and thereafter diligently pursue that course of action until the Default is cured; or

(iii) where the Default is an Incurable Default, within 21 days communicate to the Province and initiate a commercially reasonable course of action designed to mitigate the consequences of the Incurable Default to the maximum extent practicable, and thereafter diligently pursue that course of action until the consequences of the Incurable Default have been so mitigated.

## **17. TERMINATION**

### **17.1 Direct Lender Agreement**

All rights to terminate this Agreement, and all Termination Payments required to be made under Section 18, are in every case subject to the provisions of the Direct Lender Agreement.

### **17.2 Termination by Province**

The Province may terminate this Agreement by notice to the Contractor:

(a) upon or within a reasonable time (having regard to the provisions of the Direct Lender Agreement, and having regard to Section 21.3) after the Province becomes aware of the occurrence of a Termination Event; or

(b) at any time, in the absolute and unfettered discretion of the Province and for any reason whatsoever or for no reason at all, and at the convenience of the Province.

No notice of termination under this Section 17.2 shall be effective unless, in the case of a notice under clause (a), it specifies the Termination Event relied on, or in the case of a notice under clause (b), it states that the termination is for convenience.

### **17.3 Termination by Contractor**

Subject to Section 17.4, the Contractor may terminate this Agreement by notice to the Province only if:

(a) the Province has failed to pay any amount due to the Contractor under this Agreement (except to the extent that such amount is disputed in good faith through the Dispute Resolution Procedure) and does not remedy such failure within 21 days of the Contractor providing the Province with notice to do so;

(b) during the Construction Period, a Relief Event has occurred and continues for a continuous period in excess of 360 days and has wholly or substantially prevented the Contractor from proceeding with the Project during that period; or

(c) the Province is in breach of Section 22.4.

### **17.4 Termination Upon Force Majeure**

Subject to Section 12.4, either party may by notice to the other terminate this Agreement if:

(a) during the Construction Period, as a result of a Force Majeure Event, it has become impossible or impractical for the Contractor to proceed with the Project, and such status persists or is highly likely to persist for at least 120 days; or

(b) during the M&R Period, as a result of a Force Majeure Event, performance of all or a substantial portion of the M&R Requirements by the Contractor has become impossible or impractical, and such status persists or is highly likely to persist for at least 180 days.

### **17.5 Consequences of Termination**

Upon any termination of this Agreement under Sections 17.2, 17.3 or 17.4:

(a) the Payment (except for, in the case of a termination under Section 17.4, the Capital Payment) for the month during which the termination occurs shall be pro-rated according to the number of days in that month up to and including the day when termination occurs;

(b) the Province shall as soon as practicable:

(i) pay to the Contractor the amount of the Termination Payment under the pertinent Section of Article 18, together with interest thereon (it being acknowledged and agreed that interest on portions of the Termination Payment paid in advance shall only accrue from the date of termination until the date of the advanced payment) at Prime from the date of the termination until the date of payment (which rate of interest shall be, in the case of a termination under Section 18.9, without prejudice to any right of the Contractor to claim damages under Section 18.9(b)); or

(ii) enter into any alternative arrangement in respect of the Termination Payment that is provided for in the Direct Lender Agreement; and

(c) upon the Province providing confirmation to the Contractor that it is obligated to pay the Termination Payment under the pertinent Section of Article 18 (or in lieu of such payment to enter into any alternative arrangement provided for in the Direct Lender Agreement), then:

(i) the Contractor shall, upon request by the Province and at no cost to the Province, hand over to the Province copies of all records of any kind whatsoever that pertain to the Contractor's performance of, or may otherwise facilitate the Province, the School Boards or their respective contractors assuming responsibility for performing, the Project Requirements (if the termination is prior to Total Availability) or the M&R Requirements (if the termination is after Total Availability); provided that

(ii) the Contractor shall have no obligation to hand over copies of records that constitute proprietary information in the nature of trade secrets.

## **17.6 Survival of Obligations**

All obligations under this Agreement that necessarily extend beyond termination of this Agreement in order to fully achieve their intended purpose shall survive termination of this Agreement, including without limiting the generality of the foregoing:

(a) all indemnification and hold harmless obligations, insofar as they apply to events that occurred prior to termination of this Agreement;



- (b) the obligations of the Contractor under Section 17.5(c);
- (c) the obligation of the Province to make the Termination Payment specified in Section 18;
- (d) the obligations in relation to Confidential Information set out in Sections 19.4, 19.5, 19.6 and 19.7; and
- (e) the obligations in relation to the Dispute Resolution Procedure set out in Section 21.

## 18. TERMINATION PAYMENTS

### 18.1 Termination Payments Defined Terms

In this Section 18, the following expressions have the following meanings:

“**Canada Call Redemption Feature**” means the right of an issuer of bonds (the “**Bonds**”) to redeem the Bonds at the greater of the remaining par value and a price calculated to provide a yield to maturity equal to the Government of Canada Yield (as defined below) plus a spread equal to 25% of the Original Spread (as defined below) as of the date fixed for redemption, where:

(i) “**Government of Canada Yield**” means on any date the average of the bid-side market yield to maturity and the offer side market yield to maturity (“mid yield to maturity”) for spot settlement that a non-callable Government of Canada bond would yield if issued in Canadian dollars in Canada with 100% of the principal amount paid on the date equal to the average remaining life of the Bonds; and where no Government of Canada bond has a maturity equal to such average remaining life, or a bond matures on such date but is not actively traded, then the “Government of Canada Yield” will be the linearly interpolated yield between two actively traded bonds with maturity dates closest to such date, the first of which shall have a maturity date prior to such date and the second of which shall have a maturity date after such date, as determined by the Contractor and acceptable to the Province acting reasonably and where the market yield for the Government of Canada bonds will be calculated as the average of the mid yields to maturity determined by two major independent financial institutions active in the Canadian bond market selected by the Contractor and acceptable to the Province acting reasonably; and

(ii) “**Original Spread**” means the spread between the yield to maturity of the Bonds and the interpolated yield to maturity of a Government of Canada bond with a maturity equal to the average remaining life of the Bonds on the date of pricing;

**“Capital Amount”** means:

(i) the parties’ mutually agreed calculation of the net present value, as of:

(A) for purposes of Section 18.2 and Section 18.7, the effective date of the Construction Period Termination or the Force Majeure Termination, as the case may be; and

(B) for purposes of Section 18.8, the earlier of the Total Availability Target Date and Total Availability;

of the aggregate Capital Payments (calculated using as a discount rate the Contractor’s weighted average cost of capital for the Project Financing calculated as an effective annual rate as at the time of submission of the Contractor’s Proposal and having regard to the financial model included in the Contractor’s Proposal and, if applicable, the interest rate adjustment contemplated by the RFP and elected by the Contractor at the time of submitting the Contractor’s Proposal), but not in any event exceeding the total amount of Project Financing anticipated by the Contractor’s Proposal; plus

(ii) the amount of the Provincial Funding;

**“Construction Period Termination”** means termination of this Agreement by the Province under Section 17.2(a) prior to Total Availability;

**“Force Majeure Capital Amount”** means the Capital Amount, exclusive of the amount of the Provincial Funding;

**“Force Majeure Termination”** means termination of this Agreement by either party under Section 17.4 on account of a Force Majeure Event;

**“M&R Period Termination”** means termination of this Agreement by the Province under Section 17.2(a) on or after Total Availability;

**“Redemption Payment”** means the lesser of:

(i) the amount actually required to redeem the Senior Debt Financing (inclusive of hedging transactions, if applicable) in accordance with its terms; and

(ii) the amount that would be required to redeem the Senior Debt Financing:

(A) to the extent that the Senior Debt Financing is bond financing,

if it were bond financing issued with a Canada Call Redemption Feature;

(B) to the extent that the Senior Debt Financing is fixed rate bank financing, if it were issued with a prepayment amount premised only upon a net present value calculation consistent with reasonable commercial terms and without additional premium, bonus or penalty; and to the extent that the Senior Debt Financing is floating rate bank financing, if it were issued with no prepayment premium, bonus or penalty except swap receipts or payments under a hedge described in and within the provisos of Section 16.3(b); and

(C) to the extent that the Senior Debt Financing cannot reasonably be categorized as either bond financing or bank financing, if it were arranged with only such prepayment penalties as are commercially reasonable in the circumstances of the financing and are not unreasonably punitive;

**“Termination for Convenience”** means termination of this Agreement by the Province under Section 17.2(b);

**“Termination by Contractor”** means termination of this Agreement by the Contractor under Section 17.3.

## **18.2 Construction Period Termination**

Subject to Section 18.3, upon a Construction Period Termination, the Province shall pay to the Contractor a Termination Payment equal to the Capital Amount less:

(a) such portion of the Provincial Funding as the Contractor has received through Progress Payments;

(b) any Adjusted School Capital Payments that the Contractor has received multiplied by a factor of 1.25;

(c) the reasonable cost to the Province, established by competitive bidding process (and including out-of-pocket costs incurred by the Province in relation to that process), of completing the Project, where the competitive bidding process is premised on:

(i) a design-build or conventional contract with progress payments and standard industry warranty;

(ii) use of as much of the Contractor’s Designs as is practicable; and

(iii) a duty on the part of the Province to mitigate the cost of completing the Project and thereby minimize the amount deductible under this clause (c); and

(d) liquidated damages of \$10 million to compensate the Province for loss of its bargain.

### **18.3 Termination While Province Holds Financing and Initial Performance Letter of Credit**

Notwithstanding Section 18.2, if a Construction Period Termination occurs while the Province continues to hold the Financing and Initial Performance Letter of Credit and the condition for release set out in Section 3.5 has not occurred, then the Province shall not make a Termination Payment to the Contractor.

### **18.4 M&R Period Termination**

Upon an M&R Period Termination, the Province shall by notice to the Contractor elect to pay to the Contractor either a Termination Payment under Section 18.5 or a Termination Payment under Section 18.6. If the Province fails to make such election by notice to the Contractor within 10 Business Days after an M&R Period Termination, then the Province shall be irrevocably deemed to have elected to make a Termination Payment under Section 18.6.

If the Province elects to pay a Termination Payment under Section 18.5, the Province shall as soon as practicable thereafter (but in any event within 90 days) solicit expressions of interest in order to assess whether there are likely to be two suitable bidders (in which context, "suitable" shall be determined having regard to a bidder's relevant practical experience, appropriate qualifications, technical competence and resources available to it, including financial resources and subcontracts, all having regard to the obligations to be performed under this Agreement). If the Province fails to elicit within such 90 day period at least two bona fide expressions of interest from suitable potential bidders, it shall immediately re-elect to pay a Termination Payment under Section 18.6.

Between the time of the M&R Period Termination and the making of the Termination Payment, the Province shall make advance payments to the Contractor against the Termination Payment in accordance with and subject to the following:

- (a) the advance payments shall be made monthly, at the times and in the amounts that would have been payable by the Province as the Capital Payment had this Agreement not been terminated; and
- (b) if the Province reasonably concludes that making or continuing to make the advance payments may result in a negative net balance owing by the Province on account of the Termination Payment, then the Province shall have no obligation to make or continue to make (as the case may be) the advance payments.

In the event the Province, pursuant to clause (b), ceases to make or continue to make (as the case may be) the advance payments, then the Province shall immediately re-elect to pay a Termination Payment under Section 18.6, unless either (i) the Contractor agrees otherwise, or (ii) the bidding process has by the date of such cessation already progressed to receipt of final bids.

### **18.5 Payment Based on Sale of Contractual Rights**

If upon an M&R Period Termination the Province elects a Termination Payment under this Section 18.5, then the following provisions shall apply:

- (a) the Province shall within six months after the M&R Period Termination obtain at least two bona fide, fully committed bids, each from a suitable bidder (having regard to the same criteria as set out in Section 18.4), for acquiring all rights and obligations (both present and future) of the Contractor under this Agreement as if this Agreement had not been terminated;
- (b) the Province shall conduct the bidding process so as to obtain the maximum cash purchase price (but otherwise, to the extent practicable, generally in accordance with its usual procurement processes), and shall select the winning bidder accordingly;
- (c) the Province shall, as soon as practicable (having regard to clause (a)), implement and complete the bidding process and enter into an agreement with, and collect the purchase price from, the winning bidder;
- (d) upon receiving the purchase price from the winning bidder, the Province shall pay to the Contractor a Termination Payment consisting of:
  - (i) the purchase price received by the Province from the winning bidder; less
  - (ii) the Province's reasonable costs reasonably incurred in establishing and conducting the bidding process and entering into the new agreement;
- (e) if the Province fails to:
  - (i) within six months after the M&R Period Termination, obtain two bids in accordance with clause (a); or
  - (ii) within 12 months after the M&R Period Termination, enter into an agreement with, and collect the purchase price from, the winning bidder;

then the Province shall be deemed to have elected to make a Termination Payment under Section 18.6 rather than under this Section 18.5;

(f) subject to clause (g), no bid shall be capable of acceptance by the Province unless it would result in an amount greater than zero payable to the Contractor under Section 18.5, having regard to any advance payments made by the Province pursuant to Section 18.4; and

(g) if acceptance of the winning bid would not result in an amount greater than the amount described in clause (f), the Province may accept or not accept the bid, but in either event the Province shall be deemed to have re-elected to pay a Termination Payment under Section 18.6 in lieu of a Termination Payment under Section 18.5.

## **18.6 Payment of Fair Market Value**

If upon an M&R Period Termination the Province elects a Termination Payment under this Section 18.6, or if by Section 18.4 or Section 18.5(e) or (g) is deemed to have elected a Termination Payment under this Section 18.6, then the following provisions shall apply:

(a) the Province and the Contractor shall seek to arrive at agreement on the fair market value of the Contractor's rights and obligations under this Agreement, calculated:

(i) as of the date of the M&R Period Termination and as if this Agreement had not been terminated and no Termination Event had occurred or was imminent;

(ii) on the assumption that the purchaser would be responsible for curing any existing default (or, in the case of an "Incurable Default" as defined in Section 16.7, taking the remedial action contemplated by Section 16.8(o)(iii)) by the Contractor under this Agreement;

(iii) on the assumption of a willing and qualified purchaser and the Contractor as a willing vendor; and

(iv) having regard to the future Payments expected for the duration of the Term, the costs of curing or taking required remedial action in respect of any existing default, and the projected costs of carrying out all obligations during the M&R Period without incurring Payment Adjustments, including a reasonable allowance for contingencies;

(b) if the Province and the Contractor have not within 30 days after the election (or deemed election) arrived at agreement under clause (a), then the fair market value of the Contractor's rights and obligations under this Agreement shall be determined by the Dispute Resolution Procedure, applying the same assumptions as set out in clause (a); and

(c) upon the fair market value of the Contractor's rights and obligations under this Agreement being determined under clause (a) or clause (b), the Province shall pay to the Contractor as a Termination Payment an amount consisting of the fair market value so determined, less:

(i) the Province's reasonable costs reasonably incurred of calculating the fair market value; and

(ii) the Province's reasonable costs, or the Province's reasonable pre-estimate thereof, of selecting and entering into a new agreement with a new provider of services in lieu of the Contractor's performance of the M&R under this Agreement.

### **18.7 Force Majeure Termination - Construction Period**

Upon a Force Majeure Termination during the Construction Period, the Province shall pay to the Contractor a Termination Payment equal to the lesser of:

(a) the Capital Amount less the Progress Payments that the Contractor has received; and

(b) the amount actually expended (including any irrevocable commitment to purchase and pay for materials not readily returnable or readily deployable other than on the Project provided arrangements are made, satisfactory to the Province acting reasonably, to transfer to the Province ownership of such materials free and clear of any security interests) in furtherance of the design, build and financing of the Project by the Contractor, less the amount of any Progress Payments that the Contractor has received (but without duplication of any Progress Payments the Contractor had become entitled to receive from the Province but had not yet received),

less, in either case, any Adjusted School Capital Payments that the Contractor has received multiplied by a factor of 1.25 (but without duplication of Adjusted School Capital Payments the Contractor has become entitled to receive from the Province but has not yet received), and all insurance proceeds, if any, that would be payable to the Contractor, pursuant to insurance coverages required to be obtained by the Contractor pursuant to Section 11, and as a result of events occurring prior to the Force Majeure Termination and having a bearing on the Termination Payment determined in accordance with this Section 18.7, assuming that the applicable insurance policy was compliant with the requirements of Section 11 and Schedule 11 (Insurance Requirements), that the Contractor had fully complied with all terms of the applicable insurance policy and had made the required disclosures to the insurer, and assuming that the insurer is capable of paying; and less all other insurance proceeds received or to be received by the Contractor as a result of events occurring prior to the Force Majeure Termination and not applied by the Contractor against the loss for which the insurance was obtained.

### **18.8 Force Majeure Termination - M&R Period**

Upon a Force Majeure Termination during the M&R Period, the Province shall pay to the Contractor a Termination Payment equal to the Force Majeure Capital Amount less:

- (a) all principal repaid on the Senior Debt Financing prior to the Force Majeure Termination plus any amounts that could have been repaid based on any cash, cash equivalents or reserves (including loans or investments by the Contractor) available for repayment of or held as security for the Senior Debt Financing as at the date of the Force Majeure Termination (but excluding reserves in the form of surety bonds or letters of credit or similar instruments unless they are secured by cash, financial instruments or securities; and further provided that if any surety bonds, letters of credit or similar instruments have been drawn and the proceeds used, prior to the Force Majeure Termination, to repay principal on the Senior Debt Financing, such principal repayments shall not be included under this clause (a) to the extent that the reimbursement obligations remain outstanding);
- (b) all distributions on or return of Equity (including, in the case of subordinated debt, all payments of principal and interest) made prior to the Force Majeure Termination, and all such distributions that the Contractor, immediately prior to the Force Majeure Termination, could have made (on the basis of free cash in hand and any cash equivalents, investments, or reserves accessible by the Contractor) but had not yet made; but not exceeding, in aggregate, the amount of the Equity; and
- (c) all insurance proceeds, if any, that would be payable to the Contractor, pursuant to insurance coverages required to be obtained by the Contractor pursuant to Section 11, and as a result of events occurring prior to the Force Majeure Termination and having a bearing on the Termination Payment determined in accordance with this Section 18.8, assuming that the applicable insurance policy was compliant with the requirements of Section 11 and Schedule 11 (Insurance Requirements), that the Contractor had fully complied with all terms of the applicable insurance policy and had made the required disclosures to the insurer, and assuming that the insurer is capable of paying; and less all other insurance proceeds received or to be received by the Contractor as a result of events occurring prior to the Force Majeure Termination and not applied by the Contractor against the loss for which the insurance was obtained.

### **18.9 Termination for Convenience or by Contractor**

Upon a Termination for Convenience or a Termination by Contractor, the Province shall pay to the Contractor a Termination Payment calculated as follows:

- (a) the Redemption Payment; plus (without duplication)
- (b) the Contractor's reasonable damages (including for loss of its bargain)



calculated having regard to the principles set out in Section 16.3; less

(c) if the Termination for Convenience or Termination by Contractor occurs during the Construction Period, any amount of the Project Financing that has been drawn or, in the case of bond financing, issued, whether or not available to the Contractor, but not yet expended on the Project.

For greater certainty, the intention of clauses (a) and (c) is to ensure that the payment required to be made by the Province under this Section (without taking into account any amounts payable under clause (b)) will be an amount sufficient to enable the Contractor (having regard to any part of the Senior Debt Financing drawn or issued but not yet expended on the Project) to fully repay the Senior Debt Financing, provided any premiums on early repayment are within the parameters indicated within the definition of “Redemption Payment”.

### **18.10 Set-off Against Termination Payments**

The Province may set off against any Termination Payment the amounts of any Payment Adjustments triggered prior to the termination and not set off against a Payment; provided that where Section 18.9 applies the Province shall be entitled to claim a set-off only to the extent that the net Termination Payment is not reduced below the amount of the Redemption Payment.

### **18.11 Negative Amounts**

If the amount of the Termination Payment calculated under any of Sections 18.2, 18.5 or 18.6 is a negative number, the Province shall be entitled to claim that amount (stated as a positive number) from the Contractor.

### **18.12 Rescue Financing**

Notwithstanding the definitions of “Capital Amount” and “Force Majeure Capital Amount” in Section 18.1 and the definition of “Senior Debt Financing” in Section 1.1, if the Province expressly and by express reference to this Section 18.12 so agrees, in consideration of the Contractor raising financing in addition to the amount of the Project Financing in order to enable completion of the Project, then the amount of such additional financing up to a maximum of 10% of the initial amount of the Senior Debt Financing shall be known as “**Rescue Financing**”, and in that event:

- (a) the Capital Amount and the Force Majeure Capital Amount shall be adjusted so as to include the value of the Rescue Financing; and
- (b) for the purposes of the Redemption Payment, the Rescue Financing shall be deemed to be part of the Senior Debt Financing.

### **18.13 Delivery of Information**

Upon any termination of this Agreement, each party shall as soon as practicable deliver to the other all information within the possession of, or that thereafter from time to time comes into the possession of, that party that is relevant to the determination and calculation of the Termination Payment.

Upon the initial closing of the Senior Debt Financing, the Contractor shall deliver to the Province particulars of:

- (a) the amount of the Senior Debt Financing;
- (b) the basis for determining the amount by which the Senior Debt Financing by its terms can be redeemed in advance of its maturity;
- (c) any hedging transactions material or potentially material to any Termination Payment that may in future become payable under this Agreement; and
- (d) the Original Spread as defined in the definition of “Canada Call Redemption Feature” in Section 18.1 as well as the benchmark yield to which the Original Spread is applied, including full details on how it was determined;

and after the initial closing of the Senior Debt Financing, the Contractor shall deliver to the Province particulars of any material changes in or additions to the information delivered under clause (a), within five Business Days of those changes or additions being effected.

## **19. COMMUNICATIONS**

### **19.1 Notices**

Any notice, consent, approval or other communication under any provision of this Agreement must be in writing to be effective, and is effective when delivered by any means, including fax transmission or e-mail, to the following respective addresses:

- (a) if to the Province:

Alberta Infrastructure  
 3<sup>rd</sup> Floor, 6950 – 113 Street  
 Edmonton, Alberta  
 T6H 5V7  
 attention: Ray Gilmour, Deputy Minister  
 fax: (780) 422-6565  
 e-mail: ray.gilmour@gov.ab.ca

With a copy to:

Alberta Education  
 7<sup>th</sup> Floor, Commerce Place  
 10155 – 102 Street  
 Edmonton, Alberta  
 T5L 4L5  
 attention: Tim Wiles, Deputy Minister  
 fax: (780) 427-7733  
 e-mail: tim.wiles@gov.ab.ca

(b) if to the Contractor:

ABC Schools Partnership  
 c/o HOCHTIEF PPP Solutions North America, Inc.  
 2 Bloor Street East, Suite 701  
 Toronto, Ontario  
 M4W 1A8  
 attention: Steve Perfect  
 fax: (647) 259-3741  
 e-mail: sperfect@hochtief-p3.com

With a copy to:

3ASAP Investment LP  
 9<sup>th</sup> Floor, 1190 Hornby Street  
 Vancouver, British Columbia  
 V6Z 2K5  
 attention: Derron Bain, Vice President, Concert Infrastructure Ltd.  
 fax: (604) 688-6882  
 e-mail: dbain@concertinfrastructure.com

Either party may change its address information by giving notice to the other in the above manner.

## **19.2 Authority to Give Notices**

The parties designate for the time being the following individuals as having authority to communicate to the other any notice, approval, consent, waiver or other communication under this Agreement:

(a) in the case of the Province:

Director, Alternative Procurement Office, Alberta Infrastructure

(b) in the case of the Contractor:

Steve Perfect, ABC Schools Partnership

In the absence of any further designation or limitation communicated with reference to this Section 19.2, each party may assume that any notice, approval, consent, waiver or other communication under this Agreement given by the above individual has been duly authorized and is binding upon the other party.

### **19.3 Public Announcements**

The Contractor shall not make, and shall not cause or permit any entity not at arm's length with the Contractor to make, any public announcement relating to this Agreement except as approved in advance by the Province, acting reasonably.

### **19.4 Confidential Information**

Each party shall, upon delivering any information to the other that includes information delivered in confidence, identify the information delivered in confidence (the "**Confidential Information**"). The receiving party shall maintain (and shall ensure that its officers, employees, consultants, advisors and contractors maintain) the confidentiality of the Confidential Information, with the exception of information that:

- (a) at the time of the disclosure to the receiving party, was in the public domain;
- (b) after disclosure to the receiving party became part of the public domain through no fault of the receiving party or those for whom it is responsible at law;
- (c) was in the possession of the receiving party at the time of disclosure to it, as demonstrated by written records; or
- (d) was received by the receiving party from a third party who had a lawful right to disclose the information.

### **19.5 Disclosure of Confidential Information**

Neither party shall disclose Confidential Information delivered by the other except:

- (a) to such of its affiliates, officers, employees, consultants, advisors and contractors (including, in the case of the Province, each School Board, and including, in the case of the Contractor, its lenders and potential lenders, investors and potential investors, and rating agencies, surety companies and prospective guarantors) who reasonably require access to the Confidential Information for the due performance of this Agreement or to further the purposes of this Agreement;
- (b) as required by FOIP or any other applicable law; or

(c) where the disclosure is consented to by the other.

## **19.6 Public Disclosure of Agreement**

Notwithstanding the above Sections 19.4 and 19.5, the Contractor agrees that the Province will be at liberty to disclose all information contained in this Agreement, excepting only any Schedules or portions thereof that the Contractor has, prior to signing of this Agreement, established to the satisfaction of the Province, acting reasonably, contain information that:

- (a) would reveal trade secrets, or commercial, financial, labour relations, scientific or technical information of the Contractor;
- (b) is being supplied in confidence to the Province; and
- (c) if disclosed, could reasonably be expected to harm significantly the competitive position or interfere significantly with the negotiating position of the Contractor,

(the “**Sensitive Information**”). In the event of a request under FOIP for access to any of the Sensitive Information, the Contractor will be given notice of the request pursuant to FOIP and will be given an opportunity to make representations as to why the information should not be disclosed.

Notwithstanding the foregoing, the Contractor consents to the Province disclosing the Sensitive Information to the Schools Boards, except Appendix 1 to Schedule 14 (Payment Schedule).

The Province acknowledges that the financial, commercial and technical information contained in the Contractor’s Proposal (including but not limited to the financial model contained therein) has been submitted to the Province in confidence.

## **19.7 Collection, Use and Disclosure of Personal Information**

For the purposes of this Section, “**personal information**” has the same definition as that which is found in FOIP.

The Contractor acknowledges that FOIP applies to information obtained, related, generated, collected or provided for the Province or the School Boards under this Agreement and agrees to adhere to FOIP.

The Contractor shall not collect, use or disclose any personal information under this Agreement except that which is reasonably required to fulfil its obligations under this Agreement, or as otherwise authorized by the Province.

The Contractor shall protect the personal information it collects under this Agreement and shall make reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or destruction.

Upon request, the Contractor shall provide to the Province, within seven days, any records that are requested under the access provisions of FOIP that are in the custody or under the control of the Contractor. Should the Contractor receive an access request under FOIP, the Contractor shall not respond to it, but shall immediately forward the access request to the Province for further handling.

The Contractor shall ensure that its employees, agents, and subcontractors comply with this Section 19.7.

### **19.8 Naming Rights**

The Contractor acknowledges that each School Board has the exclusive right to name its respective Schools and all related improvements. The Contractor shall not name nor purport to name the Project, the Schools, or any portions thereof. Where the School Boards have named the Schools, the Contractor shall not publicly refer to the Schools except as so named by the School Boards.

## **20. CONTRACT ADMINISTRATION**

### **20.1 Contract Administration Representatives**

Immediately following Execution of this Agreement, the Province and the Contractor will each designate a representative or representatives to establish protocols and procedures, including but not limited to lines of communication additional to those expressly contemplated by this Agreement, designed to facilitate the effective, efficient and cooperative administration of this Agreement and avoidance of disputes.

### **20.2 Mutual Cooperation**

In administering, interpreting and carrying out their respective obligations under this Agreement, the parties mutually undertake to deal fairly and in good faith, and to act at all times in a spirit of mutual cooperation.

### **20.3 Conduct of Indemnified Claims**

Where either party to this Agreement is entitled to indemnification under this Agreement (“**Indemnified Party**”) and determines that an event has occurred giving rise or that may give rise to a right of indemnification in favor of the Indemnified Party (an “**Indemnity Claim**”), the Indemnified Party shall promptly notify the party obligated to provide indemnification (the “**Indemnifying Party**”) of such Indemnity Claim (a “**Claim Notice**”) describing in reasonable detail the facts giving rise to the claim for

indemnification, and shall include in such Claim Notice (if then known) the amount or the method of computation of the amount of such Indemnity Claim; provided that the failure of an Indemnified Party to give timely notice thereof shall not affect any of its rights to indemnification nor relieve the Indemnifying Party from any of its indemnification obligations except to the extent the Indemnifying Party is materially prejudiced by such failure. For clarity, the Contractor acknowledges and agrees that the Province may advance as the Indemnified Party any rights of the School Boards or the Municipalities or their respective officials or employees to be indemnified by the Contractor.

Any obligation to provide indemnification under this Agreement shall be subject to the following terms and conditions:

(a) upon receipt of a Claim Notice the Indemnifying Party shall, at its cost and expense and upon notice to the Indemnified Party within 30 days of its receipt of such Claim Notice (or such shorter time period as the circumstances warrant), assume and control the defence, investigation, compromise and settlement of such Indemnity Claim, including the management of any proceeding relating thereto, and shall employ and engage legal counsel reasonably acceptable to the Indemnified Party; provided that if there exists a material conflict of interest (other than one of a monetary nature) or if the Indemnified Party has been advised by counsel that there may be one or more legal or equitable defences available to it that are different from or additional to those available to the Indemnifying Party that in either case, would make it inappropriate for the same counsel to represent both the Indemnifying Party and the Indemnified Party, then the Indemnified Party shall be entitled to retain its own counsel at the cost and expense of the Indemnifying Party (except that the Indemnifying Party shall not be obligated to pay the fees and expenses of more than one separate counsel, other than local counsel, for all Indemnified Parties, taken together);

(b) the Indemnified Party may, at its own cost and expense, participate in the defence of the Indemnity Claim, and shall cooperate with the Indemnifying Party in such efforts and make available to the Indemnifying Party all witnesses, records, materials and information in the Indemnified Party's possession, under its control or to which it may have access as may be reasonably required by the Indemnifying Party. The Indemnifying Party will keep the Indemnified Party reasonably informed of the progress of the defence of the Indemnity Claim. If the Indemnifying Party, contrary to clause (a), fails to assume the defence and investigation of the Indemnity Claim, then:

(i) the Indemnified Party shall have the right to undertake the defence, investigation, compromise and settlement of the Indemnity Claim on behalf of, and at the cost and expense of and for the account and risk of the Indemnifying Party;

(ii) the Indemnifying Party shall cooperate with the Indemnified Party in

such efforts; and

(iii) the Indemnified Party will keep the Indemnifying Party reasonably informed of the progress of the defence of the Indemnity Claim.

The Indemnifying Party shall not, without the written consent of the Indemnified Party:

(c) settle or compromise any Indemnity Claim or consent to any final judgment that does not include as an unconditional term thereof the delivery by the claimant or plaintiff of a written release or releases from all liability in respect of such Indemnity Claim of all Indemnified Parties affected by such Indemnity Claim; or

(d) settle or compromise any Indemnity Claim if the settlement imposes equitable remedies or material obligations on the Indemnified Party other than financial obligations for which such Indemnified Party will be indemnified hereunder. No Indemnity Claim that is being defended in good faith by the Indemnifying Party shall be settled or compromised by the Indemnified Party without the written consent of the Indemnifying Party.

## **21. DISPUTE RESOLUTION**

### **21.1 Dispute Resolution Procedure**

Unless otherwise agreed to in writing between the Province and the Contractor, all disputes in respect of the application or interpretation of any provision of this Agreement shall be determined in accordance with the Dispute Resolution Procedure. Either party may at any time by notice to the other refer any question in respect of the application or interpretation of any provision of this Agreement to the Dispute Resolution Procedure. The right to refer disagreements to the Dispute Resolution Procedure shall not be limited to provisions of this Agreement that expressly refer to the Dispute Resolution Procedure, and all such express provisions shall be construed as having been included only for greater certainty.

### **21.2 Exception**

Where under the provisions of this Agreement a party has an unfettered discretion to exercise a right or take an action, the decision of that party to exercise the right or take the action is not subject to review under the Dispute Resolution Procedure; but where any decision or discretion is expressly required to be made or exercised reasonably (or is otherwise qualified), then the reasonableness (or other qualification) of the decision made or the discretion exercised may be referred to the Dispute Resolution Procedure for determination.



### **21.3 Termination and Dispute Resolution Procedure**

A party may refer to the Dispute Resolution Procedure for advance determination the question of whether it has grounds for terminating this Agreement (including, without limitation, whether the circumstances described in Section 16.8(h) or (j) have occurred). However, the submission of that question to the Dispute Resolution Procedure shall not prevent either party from terminating this Agreement in accordance with its provisions prior to determination of that question by the Dispute Resolution Procedure. If either party has purported to terminate this Agreement in accordance with its provisions, the other party may submit to the Dispute Resolution Procedure the question of whether such termination was made in accordance with this Agreement, and request either:

- (a) a ruling that this Agreement has not been terminated; or
- (b) an award of damages for wrongful repudiation of this Agreement.

### **21.4 No Court Proceedings**

Neither party shall, except as may be otherwise expressly permitted by this Agreement or permitted by the *Arbitration Act* (Alberta) or with the prior approval of the other, initiate in any Court any proceedings against the other (including but not limited to any application for an injunction) in respect of the application or interpretation of any provision of this Agreement.

### **21.5 Payments Where Amount in Dispute**

Where the amount of any payment required to be made under this Agreement (including without limiting the generality of the foregoing the amount of any Termination Payment) is in dispute, the party required to make the payment shall pay such portion of the payment as it does not dispute in good faith.

## **22. GENERAL PROVISIONS**

### **22.1 Assignment by Contractor**

The Contractor may not, without the prior consent of the Province, which consent shall not be unreasonably withheld, assign this Agreement or any right or benefit under this Agreement, except that the Contractor may assign to a party to the Direct Lender Agreement the right to receive the Payment, the Progress Payments and any Termination Payment or other payment becoming due by the Province to the Contractor hereunder, in which case the Province will consent to the assignment as required by section 94 of the *Financial Administration Act* (Alberta). Nothing in this Agreement restricts the Contractor from granting security interests (including any security interest that is nominally structured as an “assignment” but is in essence a security agreement) in its assets as it sees fit. For greater certainty, the Province shall not withhold or delay its

consent where the Contractor has satisfied the Province, acting reasonably, that:

- (a) the proposed transferee is of good reputation and has suitable technical, commercial and financial resources; and
- (b) the proposed transferee is not involved in a business or activity incompatible with or inappropriate in relation to the Project or the M&R or the business relationship between the Province and the Contractor.

## **22.2 Subcontracting by Contractor**

The Contractor may subcontract its obligation to carry out the Project and its obligation to perform the M&R Requirements only to:

- (a) the respective subcontractors identified in Schedule 17 (Subcontractors); and
- (b) any additional subcontractors approved in advance by the Province.

The Contractor may replace a subcontractor or engage additional subcontractors only with the prior consent of the Province, such consent not to be unreasonably withheld (having regard to the reputation of and the technical, commercial and financial resources available to the proposed subcontractor). For greater certainty, in this Section 22.2, “**subcontractors**” means parties having a direct contractual relationship with the Contractor, and excludes subcontractors of such parties.

## **22.3 Change in Ownership**

The Contractor shall not, prior to one year after Total Availability, allow or suffer any material change in its ownership (direct or indirect) unless such change has been consented to in advance by the Province, such consent not to be unreasonably withheld or delayed. For greater certainty, the Province shall not withhold or delay its consent where the Contractor has satisfied the Province, acting reasonably, that:

- (a) the proposed owner is of good reputation and has suitable technical, commercial and financial resources; and
- (b) the proposed owner is not involved in a business or activity incompatible with or inappropriate in relation to the Project or the M&R or the business relationship between the Province and the Contractor.

For the purposes of this Section: (i) the issuance by the Contractor of non-voting preferred shares or any similar transaction entered into for tax-planning purposes that does not involve voting shares in the Contractor; (ii) internal reorganizations, which do not have the effect of changing the ultimate ownership of the Contractor; or (iii) the initial public offering or the issuance of or trading of publicly traded securities of an entity that directly or indirectly holds an interest in the Contractor, shall not be

considered to be a material change in the ownership of the Contractor.

#### **22.4 Assignment by Province**

The Province may assign and transfer all its rights and obligations under this Agreement only to a “**Provincial corporation**” (as that term is defined by the *Financial Administration Act* (Alberta)) that is a Crown agent such that the Province, as principal to that Crown agent, retains full legal responsibility for all obligations stated as obligations of the Province in this Agreement.

#### **22.5 Intellectual Property**

All intellectual property created by the Contractor or its subcontractors, including but not limited to copyright, patents and industrial designs, and including without limiting the generality of the foregoing the Contractor’s Designs and all other plans, drawings and designs created by the Contractor or its subcontractors in relation to the Project, arising from or in relation to the Contractor’s Proposal or the Contractor’s carrying out of the Project (collectively, the “**Assigned Intellectual Property**”), shall be owned by the Province, and the Province shall be granted a non-exclusive, irrevocable, perpetual, royalty-free license in and to all rights to use intellectual property belonging to third parties necessary for the use of the intellectual property created by the Contractor or its subcontractors, subject to and in accordance with the following:

- (a) the Province hereby grants to the Contractor an irrevocable, perpetual, royalty-free license to use any of the Assigned Intellectual Property (including a right to grant sub-licenses or otherwise commercialize the Assigned Intellectual Property). The Contractor shall as soon as reasonably practicable give the Province notice of each time the Contractor intends to grant sub-licenses or otherwise commercialize the Assigned Intellectual Property; and
- (b) the Contractor shall ensure that its employees, subcontractors and agents waive all moral rights in respect of the Assigned Intellectual Property.

Notwithstanding Section 22.5(a), the Contractor may without notice to the Province grant to its subcontractors such permissions and, if applicable, sub-licenses in respect of the Assigned Intellectual Property as are reasonably required for:

- (c) the carrying out of the Project and the M&R; or
- (d) the use by a third party, other than in furtherance of the Project or the M&R, of a design or invention or process developed by that third party in its capacity as a subcontractor to the Contractor in respect of the Project or the M&R.

#### **22.6 Applicable Law and Jurisdiction**

This Agreement shall be governed by the laws in force in Alberta, including the federal

laws of Canada applicable therein. Subject to Section 21.4, Alberta courts shall have exclusive jurisdiction over all matters arising in relation to this Agreement, and each party accepts the jurisdiction of Alberta courts.

### **22.7 Amendment and Waiver**

No amendment of this Agreement is effective unless made in writing and signed by a duly authorized representative of each of the Province and the Contractor. No waiver of any provision of this Agreement is effective unless made in writing, and any such waiver has effect only in respect of the particular provision or circumstance stated in the waiver. No representation by either of the parties with respect to the performance of any obligation under this Agreement is capable of giving rise to an estoppel unless the representation is made in writing.

### **22.8 Additional Assurances**

The Province and the Contractor each agree to from time to time do all such acts and provide such further assurances and instruments as may reasonably be required in order to carry out the provisions of this Agreement according to their spirit and intent; but this Section 22.8 shall not in any event be construed as obligating the Province to amend or enact any statute or regulation.

### **22.9 Counterparts**

This Agreement may be executed in counterparts, in which case (i) the counterparts together shall constitute one agreement, and (ii) communication of execution by fax transmission shall constitute good delivery.

**22.10 Joint and Several**

Where two or more persons execute this Agreement as the Contractor, the liability under this Agreement of such persons executing this Agreement shall be joint and several.

The parties have therefore signed this Agreement, by their respective duly authorized officers, on the respective dates shown below.

**HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA**, as represented by the Minister of Infrastructure and the Minister of Education

Date: September \_\_\_\_, 2012

Per: \_\_\_\_\_  
Ray Gilmour  
Deputy Minister, Alberta Infrastructure

Date: September \_\_\_\_, 2012

Per: \_\_\_\_\_  
Tim Wiles  
Deputy Minister, Alberta Education

**ABC SCHOOLS PARTNERSHIP**,  
by its general partners:

**HOCHTIEF ABC Schools Partner Inc.**

Date: September \_\_\_\_, 2012

Per: \_\_\_\_\_  
Cecil C. Kramer  
Secretary

**3ASAP Investment LP**,  
by its general partner 3ASAP General Partner Ltd.

Date: September \_\_\_\_, 2012

Per: \_\_\_\_\_  
Derron John Bain  
Secretary