



















- (h) Schedule 6 – Price Submission Form;
- (i) Schedule 7 – Administrative Checklist;
- (j) Schedule 8 – Letter of Credit;
- (k) Schedule 9 – Project Agreement, including all related Schedules appendices and attachments as listed in the RFP Data Sheet; and
- (l) Addenda to the RFP Documents, if any.

(2) Subject to RFP Section 2.2(1), the RFP Documents shall be read as a whole. The Schedules and Addenda, if any, constitute an integral part of this RFP and are incorporated by reference. For greater clarity, Background Information documents are not RFP Documents.

## 2.2 Conflicts or Inconsistencies in Documents

(1) For the purpose of the RFP Process, if there are any conflicts or inconsistencies among the terms and conditions of the documents comprising RFP Documents the following shall apply:

- (a) in respect of matters of interpretation related to the RFP Process and all competitive procurement process matters, this RFP shall prevail over the Schedules to this RFP during the RFP Process;
- (b) in respect of all matters of interpretation of the Project and the Project Agreement during the RFP Process, the Project Agreement shall prevail over this RFP and all other Schedules to this RFP; and
- (c) for the purpose of resolving conflicts or inconsistencies among the documents that constitute the Project Agreement, the provisions of the Project Agreement dealing with conflicts or inconsistencies shall govern.

(2) Despite RFP Section 2.2(1), if the Proponent believes that there is any term or condition in any RFP Document that is ambiguous, or that conflicts or is inconsistent with any other term or condition in the RFP Documents, the Proponent shall notify the Sponsors of that ambiguity, conflict or inconsistency in accordance with RFP Section 3.2.2 and, for greater clarity, by the deadline set out in the RFP Data Sheet for the submission of RFIs.

(3) If there is a conflict or inconsistency between:

- (a) the Sponsors' electronic version of an RFP Document as contained in the Data Room; and
- (b) any other version of the same RFP Document (whether in electronic or hard copy),

the Sponsors' electronic version as contained in the Data Room shall govern.

(4) If there is any conflict or inconsistency between documents, including RFP Documents, contained in the Data Room and documents that are downloaded by the Proponent, the documents contained in the Data Room shall govern.

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

### 2.3 Distribution of Documents to Proponents

(1) Except as provided in RFP Section 2.3(2), Infrastructure Ontario will circulate this RFP and all other RFP Documents, including Addenda, by placing them in the Data Room and notifying the Proponent Representatives by e-mail that RFP Documents or Addenda, as applicable, have been added to the Data Room. Notification to Proponents by Infrastructure Ontario that documents have been added to the Data Room is a courtesy only and Proponents are solely responsible to ensure that they reviewed all documents in the Data Room in accordance with RFP Section 2.4(3) and, in particular, have reviewed all documents in the Data Room immediately prior to submitting Proposals.

(2) The Sponsors may circulate some RFP Documents in paper copy. If the Sponsors circulate any RFP Documents in paper copy, Proponents will be notified of a paper copy circulation by way of a notice in the Data Room.

### 2.4 Data Room

(1) The Sponsors have established an electronic data room (the “**Data Room**”) at a secure website address for:

- (a) the distribution of RFP Documents and Addenda (including “black-lined” RFP Documents revised by Addenda);
- (b) the provision of various types of background information for the Proponents’ review (“**Background Information**”); and
- (c) the receipt of RFIs from Proponents and the posting of responses to RFIs.

(2) The Data Room will be accessible on approximately the date set out in the Timetable. The Sponsors may add, delete or amend documents in the Data Room at any time.

(3) Each Proponent is solely responsible to ensure that it:

- (a) contacts the Contact Person at the coordinates set out in the RFP Data Sheet to arrange access to the Data Room and receipt of a Data Room password;
- (b) has the appropriate software which allows the Proponent to access and download RFP Documents and Background Information from the Data Room; and

- (c) checks the Data Room frequently for the addition, deletion or amendment of RFP Documents, Background Information and the posting of responses to RFIs and, at all times during the RFP Process, keeps itself informed of and takes into account the most current RFP Documents, Background Information and responses to RFIs.

## 2.5 Proponent Investigations

(1) Each Proponent and each of its Proponent Team Members is solely responsible, at its own cost and expense, to carry out its own independent research and due diligence and to perform any other investigations, including seeking independent advice, considered necessary by the Proponent to satisfy itself as to all existing conditions affecting the Project or the Project Agreement. The Proponents' and Proponent Team Members' obligations set out in this RFP Section 2.5 apply irrespective of any Background Information in the Data Room or information contained in the RFP Documents or in responses to RFIs. The Proponents' and Proponent Team Members' obligation to carry out independent research, investigations, due diligence or to seek independent advice or, if applicable, their ability to rely on information provided by the Sponsors is more particularly set out in the Project Agreement.

(2) Except as explicitly provided in the Project Agreement, the Sponsors do not represent or warrant the accuracy or completeness of any information set out in the RFP Documents or made available to Proponents or Proponent Team Members in the Data Room as Background Information or of any other background or reference information or documents prepared by the Government of Ontario or by third parties and which may be made available to Proponents or Proponent Team Members by or through the Sponsors. Proponents and Proponent Team Members shall make such independent assessments as they consider necessary to verify and confirm the accuracy and completeness of all such information as any use of or reliance by Proponents or Proponent Team Members on any and all such information shall be at the Proponents' and Proponent Team Members' sole risk and without recourse against the Sponsors or the Government of Ontario.

## SECTION 3 - THE RFP PROCESS

### 3.1 RFP Process Timetable

(1) The deadline for the submission of the Technical Submission (the "**Technical Submission Deadline**") and the Financial Submission (the "**Financial Submission Deadline**") and the general timetable for the RFP Process (the "**Timetable**") are set out in the RFP Data Sheet.

- (2) The Sponsors may amend the Timetable in their sole discretion:
- (a) at any time prior to the Financial Submission Deadline for events that are to occur prior to or on the Financial Submission Deadline, including the Technical Submission Deadline and the Financial Submission Deadlines themselves; and
  - (b) at any time in the RFP Process for events that are to occur after the Financial Submission Deadline.

### 3.2 Questions and RFP Documents Comments

#### 3.2.1 Contact Person

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

### 3.2.2 Clarification/RFI Submission Process

(1) In addition to the requirement set out in RFP Section 3.2.1, the following rules shall apply to Proponents when submitting questions or requests for information (“**RFIs**”) to the Sponsors during the RFP Process:

- (a) Proponents are permitted to submit RFIs categorized as follows:
  - (i) RFIs that are of general application and that would apply to other Proponents (“**General RFIs**”); and
  - (ii) RFIs that the Proponent considers to be commercially sensitive or confidential to that particular Proponent (“**Commercially Confidential RFIs**”);
- (b) If the Sponsors disagree with the Proponent’s categorization of an RFI as a Commercially Confidential RFI, the Sponsors will give the Proponent an opportunity to either categorize the RFI as a General RFI or to withdraw the RFI;
- (c) If the Sponsors determine, in their sole discretion, that a Commercially Confidential RFI, even if it is withdrawn by a Proponent, is of general application or would provide a significant clarification of the RFP Documents or RFP Process to Proponents, the Sponsors may issue a clarification to Proponents that deals with the same subject matter as the withdrawn Commercially Confidential RFI; and
- (d) If the Sponsors agree with the Proponent’s categorization of a Commercially Confidential RFI, then the Sponsors will provide a response to that RFI to only the Proponent that submitted the RFI.

(2) Responses to RFIs prepared and circulated by the Sponsors are not RFP Documents and do not amend the RFP Documents. If, in the Sponsors’ sole discretion, responses to RFIs require an amendment to the RFP Documents, such amendment will be prepared and circulated by Addendum in accordance with RFP Section 3.7. Only a response to an RFI that has been incorporated into or issued as an Addendum will modify or amend the RFP Documents and, otherwise, RFIs will have no force or effect whatsoever and shall not be relied upon by any Proponent.

(3) Proponents shall submit RFIs in accordance with the deadlines set out in the Timetable.

(4) Proponents shall submit all RFIs to the Contact Person electronically in accordance with the instructions set out in the RFP Data Sheet.

(5) The Sponsors will respond to RFIs in written responses circulated to Proponents in accordance with the schedule set out in the Timetable. The Sponsors may, in their sole discretion, distribute responses to RFIs of a minor or administrative nature to only the Proponent who submitted the minor or administrative RFI.

(6) It is the Proponent's obligation to seek clarification from the Sponsors of any matter it considers to be unclear in accordance with RFP Section 3.2.2 and, for greater clarity, by the deadline set out in the Timetable for the submission of RFIs. Neither the Sponsors nor the Government of Ontario are responsible in any way whatsoever for any misunderstanding by the Proponent or any of its Proponent Team Members of the RFP Documents, Background Information, responses to RFIs, any documents placed in the Data Room or any other type of information provided by or communication made by the Sponsors or the Government of Ontario.

### 3.2.3 RFP Documents Comments

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

(2) The Sponsors may, in their sole discretion, request Proponents to submit comments on particular technical or financial issues arising out of the Project and reflected in the RFP Documents. Whether the Sponsors intend to permit or require the submission of such comments and the schedule and format for the submission of those comments is set out in the RFP Data Sheet. The Sponsors are not obliged to respond to such submissions made by Proponents under this RFP Section 3.2.3(2).

## 3.3 **Communications Restrictions**

### 3.3.1 Communications with Municipalities, Other Government Authorities and Utilities

(1) Subject to the restrictions in RFP Section 3.3.2 and any special rules set out in the RFP Data Sheet, Proponents, Proponent Team Members and their respective Advisors are permitted to communicate directly with any municipality, government authority or utility with respect to municipal, utility or other types of governmental requirements related to the Project. Under no circumstances will any special rules set out in the RFP Data Sheet in accordance with this RFP Section 3.3.1(1) override the provisions of RFP Section 3.3.2.

(2) Neither the Sponsors nor the Government of Ontario are, in any way whatsoever, responsible for any representations, statements, assurances, commitments or agreements which Proponents, Proponent Team Members or their respective Advisors receive or believe they may have received from a municipality, a government authority, or a utility. Proponents, Proponent Team Members and their respective Advisors rely on any such representations, assurances, commitments or agreements at their sole risk without recourse against the Sponsors or the Government of Ontario.

### 3.3.2 Prohibited Contacts and Lobbying Prohibition

(1) Proponents and Proponent Team Members and all of their respective Advisors, employees and representatives are prohibited from engaging in any form of political or other lobbying, of any kind whatsoever, to influence the outcome of the RFP Process.

(2) Without limiting the generality of RFP Section 3.3.2(1), neither Proponents or Proponent Team Members or any of their respective Advisors, employees or representatives shall contact or attempt to contact, either directly or indirectly, at any time during the RFP Process, any of the following persons or organizations on matters related to the RFP Process, the RFP Documents, or the Proposals:

- (a) any member of the Evaluation Committee;
- (b) any Advisor to the Sponsors or the Evaluation Committee;
- (c) any employee or representative of:
  - (i) the Sponsors;
  - (ii) MOI or any other Ministry, agency or entity listed in the RFP Data Sheet; or
  - (iii) the Premier of Ontario's office or the Ontario Cabinet office;
- (d) any Member of the Provincial Parliament (including the Premier) or his or her staff or representatives; or
- (e) any directors, officers or consultants of any entity listed in RFP Sections 3.3.2(2)(a) to 3.3.2(2)(d).

(3) If a Proponent or a Proponent Team Member or any of their respective Advisors, employees or representatives, in the opinion of the Sponsors, contravenes RFP Section 3.3.2(1) or 3.3.2(2), the Sponsors may, in their sole discretion:

- (a) take any action in accordance with RFP Section 7.1.2; or
- (b) impose conditions on the Proponent's or Proponent Team Member's continued participation in the RFP Process that the Sponsors consider, in their sole discretion, to be appropriate.

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

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

(1) A Proponent shall not, and shall ensure that its Advisors, employees, representatives and Proponent Team Members, and their respective Advisors, employees and representatives do not, issue or disseminate any media release, public announcement or public disclosure (whether for publication in the press, on the radio, television, internet or any other medium) that relates to the RFP Process, the RFP Documents or the Project or any matters related thereto, without the prior written consent of the Sponsors.

(2) Neither the Proponents or the Proponent Team Members or any of their respective Advisors, employees or representatives shall make any public comment, respond to questions in a public forum, or carry out any activities to either criticize another Proponent or Proposal or to publicly promote or advertise their own qualifications, interest in or participation in the RFP Process without the Sponsors' prior written consent, which consent may be withheld in the Sponsors' sole discretion. Notwithstanding this RFP Section 3.3.3(2), Proponents, Proponent Team Members and their respective Advisors, employees and representatives are permitted to state publicly that they are participating in the RFP Process.

(3) For the purpose of greater clarity, RFP Section 3.3.3(2) does not prohibit disclosures necessary to permit the Proponent to discuss the Project with prospective subcontractors but such disclosure is permitted only to the extent necessary to solicit those subcontractors' participation in the Project.

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

(1) A Proponent shall not discuss or communicate, directly or indirectly, with any other Proponent, any information whatsoever regarding the preparation of its own Proposal or the Proposal of the other Proponent in a fashion that would contravene Applicable Law. Proponents shall prepare and submit Proposals independently and without any connection, knowledge, comparison of information or arrangement, direct or indirect, with any other Proponent.

(2) For greater clarity, RFP Section 3.4.1(1) applies to Proponents and Proponent Team Members and their respective Advisors, employees and representatives.

## 3.4 **Meetings with Proponents**

### 3.4.1 General Proponents Meeting(s)

(1) The Sponsors may, in their sole discretion, convene general Proponents meetings (each, a "**Proponents Meeting**") on the dates and at the times set out in the Timetable and at the location and for the purposes set out in the RFP Data Sheet. While attendance at a Proponents Meeting is not mandatory, Proponents are strongly encouraged to attend. A Proponent's failure to attend a Proponents Meeting is at the Proponent's sole risk and responsibility.

(2) Proponents may ask questions and seek clarifications at a Proponents Meeting. Notwithstanding that the Sponsors may give oral answers at a Proponents Meeting, those answers shall not be considered final unless issued in writing. Therefore, Proponents are strongly encouraged to submit these questions in accordance with RFP Section 3.2.2 for response in accordance with RFP Section 3.2.2.

(3) No statement, consent, waiver, acceptance, approval or anything else said or done in any Proponents Meeting by the Sponsors or any of their respective Advisors, employees or representatives shall amend or waive any provision of the RFP Documents, or be binding on the Sponsors or be relied upon in any way by Proponents, Proponent Team Members or their Advisors, except when and only to the extent expressly confirmed in an Addendum to the RFP Documents issued in accordance with RFP Section 3.7.

### 3.4.2 Commercially Confidential Proponent Meetings







(1) The Proponent acknowledges and agrees that, as of the date of the issuance of this RFP, the Client owns or has access to some, but not all, of the Metrolinx Lands that will ultimately be owned by it or to which it will ultimately have access for the Project. The Client's acquisition of and access to all of the Metrolinx Lands will not be completed until after Financial Close. The Sponsors will only be able to provide the Proponents with access to those Lands that have been acquired by the Client or to which the Client has access.

### 3.5.3 Additional Visits to the Lands, Eglinton Crosstown Tunnels and the Existing Third Party Infrastructure

(1) Except for Scheduled Visits, Proponents are not permitted to access any of the Lands or any part of the Lands, Eglinton Crosstown Tunnels, or Existing Third Party Infrastructure which are not accessible by the general public, except by prior written arrangement with the Contact Person.

(2) A Proponent that wishes to arrange a visit to access the Lands, Eglinton Crosstown Tunnels, or Existing Third Party Infrastructure which are not accessible by the general public, other than a Scheduled Visit (an "**Additional Visit**"), shall submit a request to the Contact Person at least two Business Days prior (or such other time as is set out in the RFP Data Sheet) to the Proponent's proposed date and time for an Additional Visit. The request shall set out the:

- (a) proposed date and time, and alternate date and time, of the proposed Additional Visit;
- (b) purpose of the Additional Visit;
- (c) areas of the Lands which are not accessible by the general public for which access is requested; and
- (d) names, titles and contact information of the Proponent's representatives who will be attending the Additional Visit.

(3) If the Proponent has received approval for and written confirmation of an Additional Visit, from the Contact Person, unless otherwise set out in the Contact Person's confirmation the following shall apply to the Additional Visit:

- (a) all Proponent and Proponent Team Member representatives shall strictly obey all instructions from the Sponsors' representatives during the visit and shall comply with all site-specific security, safety or other types of requirements;
- (b) all Proponent and Proponent Team Member representatives shall, at all times, make reasonable efforts to avoid disturbing or infringing upon the privacy of any persons occupying, residing or working in close proximity to any part of the Lands which are not accessible by the general public, as applicable;
- (c) the Proponent and Proponent Team Member representatives shall visit only those specific areas of the Lands which are not accessible by the general public, as applicable, to which the Proponent has been granted access in the Contact Person's confirmation;

- (d) the Proponent and Proponent Team Member representatives shall not take photographs without the prior written consent of the Contact Person. If photographs are permitted by the Contact Person, they may be taken by the Proponent and Proponent Team Member representatives only in the specific areas of the Lands which are not accessible by the general public, for which consent to photograph has been given; and
- (e) the Proponent shall comply with any supplementary rules set out in the RFP Data Sheet for Additional Visits.

(4) Each Proponent acknowledges that because the Lands which are not accessible by the general public, or portions thereof, may be in use, unforeseen circumstances can arise and the Sponsors may, in their sole discretion, cancel or reschedule any Additional Visit, change the areas of access of any Additional Visit or otherwise change any Additional Visit on short notice or no notice to the Proponent and Proponent Team Members or their representatives.

#### 3.5.4 Additional Geotechnical, Environmental and Subsurface Utility Investigations

(1) If the Sponsors have decided to commission and provide to the Proponents further reports or results of geotechnical, environmental and subsurface utility investigations in respect of the Lands, details of this are set out in the RFP Data Sheet.

(2) If Proponents are permitted to request changes or additions to the investigations described pursuant to RFP Section 3.5.4(1), the process for submitting such requests for changes or additions is set out in the RFP Data Sheet.

### 3.6 **Changes to Proponents and Proponent Team Members**

(1) A Proponent shall not change its shareholders (unless the Proponent is a company whose equity securities are listed on a recognized stock exchange), Proponent Team Members, proposed subcontractors, Key Personnel, or other parties identified in the Proponent's Prequalification Submission (the "**Identified Proponent Parties**") without the prior written consent of the Sponsors.

If, at any time prior to Commercial Close, and notwithstanding any other provision in this RFP, there is a Change in Control of a Proponent or of one of its Proponent Team Members (the "**Acquiree**") by one of the other Proponents or one of the other Proponents' Proponent Team Members (the "**Acquirer**"):

- (i) The Acquiree shall be immediately disqualified from further participation in this RFP Process. In the event that a Proponent Team Member is the Acquiree, the affected Proponent may request a change of the Acquiree and the Sponsors shall consider such request, in their sole discretion, in accordance with this RFP Section 3.6. In the event that such request to change the Proponent Team Member is rejected by the Sponsors, the Sponsors shall disqualify the Proponent from continuing in the RFP Process; and
- (ii) The Sponsors, in their sole discretion, may allow the Acquirer to continue in the RFP Process; however, the Sponsors' consent to continue

may be subject to such terms and conditions as the Sponsors may require.

(2) Despite RFP Section 3.6(1), Proponents are permitted to request a change in their Identified Proponent Parties in accordance with this RFP Section 3.6.

(3) If, prior to the Financial Submission Deadline, a Proponent wishes to request a change in its Identified Proponent Parties, the Proponent shall notify the Contact Person as soon as possible and, in any event, no later than seven (7) days prior to the Financial Submission Deadline. That notification shall clearly identify the proposed change in the Identified Proponent Party including a proposed substitute and including sufficient documentation to demonstrate that the proposed substitute would have met or exceeded any applicable criteria applied during the Prequalification Stage.

(4) In response to a request in accordance with RFP Section 3.6(3), the Sponsors may, in their sole discretion, provide the Proponent with instructions as to the type of information required by the Sponsors to consider the proposed change to the Identified Proponent Party (or Parties) as well as the deadlines for submission of information that the Proponent must meet in order to have its request considered by the Sponsors.

(5) The Proponent shall provide any further documentation as may be reasonably requested by the Sponsors to assess any proposed substitute. If the Sponsors, in their sole discretion, consider the proposed substitute to be acceptable the Sponsors may consent to the substitution. The Sponsors' consent to such substitution, however, may be subject to such terms and conditions as the Sponsors may require. If the proposed substitute is not acceptable to the Sponsors, the Proponent shall propose an alternate substitute for review by the Sponsors in the same manner as the first proposed substitute. The Sponsors may, in their sole discretion, disallow any actual or proposed change.

(6) In the case of an actual change in the Identified Proponent Parties previously made by the Proponent without consent by the Sponsors or a change proposed after the Financial Submission Deadline, the Sponsors may, in their sole discretion, disqualify the Proponent and terminate the Proponent's continued involvement in the RFP Process or allow the Proponent to continue under such terms and conditions as the Sponsors, in their sole discretion, may require.

(7) If, on or after the Financial Submission Deadline and prior to Commercial Close, there is an actual or proposed addition, deletion, substitution or other change in the membership or effective control of an Identified Proponent Party or if there is a change in circumstances that may materially adversely affect an Identified Proponent Party in a way which could impair the Proponent's or the Identified Proponent Party's ability to perform their respective obligations under the Project Agreement, then the Proponent shall promptly notify the Sponsors in writing by delivery or facsimile to the Contact Person. The Sponsors may, in their sole discretion, refuse to accept a change in an Identified Proponent Party that occurs or is requested by the Proponent after the Financial Submission Deadline and may, in their sole discretion, disqualify the Proponent from continuing in the RFP Process.

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

(1) The Sponsors may, in their sole discretion, amend or supplement the RFP Documents prior to the Technical Submission Deadline (for matters relating to the Technical Submission) and prior to the Financial Submission Deadline (for all other matters). The Sponsors shall issue changes to the RFP Documents by Addenda only. No other statement, whether oral or written, made by the Sponsors or the

Sponsors' Advisors, employees or representatives, including, for clarity, the Contact Person, or any other person, shall amend the RFP Documents. The approximate final date that the Sponsors will issue an Addendum in respect of the Project Agreement is set out in the Timetable. The Sponsors may issue other Addenda at any time.

(2) The Proponent is solely responsible to ensure that it has received all Addenda issued by the Sponsors. Proponents may, in writing, seek confirmation of the number of Addenda issued under this RFP from the Contact Person.

(3) The Sponsors shall issue Addenda by placing them in the Data Room and notifying the Proponents' Representatives by e-mail that an Addendum has been placed in the Data Room.

(4) Any reference to any one or all of the RFP Documents in the RFP Documents includes any amendments to the RFP Documents made in accordance with this RFP Section 3.7.

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

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

(1) Proponents are advised that the Sponsors may be required to disclose the RFP Documents and a part or parts of any Proposal pursuant to the *Freedom of Information and Protection of Privacy Act* (Ontario) ("**FIPPA**").

(2) Proponents are also advised that FIPPA does provide protection for confidential and proprietary business information. Proponents are strongly advised to consult their own legal Advisors as to the appropriate way in which confidential or proprietary business information should be marked as such in their Proposals.

(3) Subject to the provisions of FIPPA, the Sponsors will use reasonable commercial efforts to safeguard the confidentiality of any information identified by the Proponent as confidential but shall not be liable in any way whatsoever to any Proponent or Proponent Team Member if such information is disclosed based on an order or decision of the Information and Privacy Commissioner or otherwise as required under Applicable Law.

#### **3.8.2 Confidentiality Agreements**

(1) No later than five (5) days after a request by the Sponsors, the Proponent shall cause each of its employees, representatives and Advisors and its Proponent Team Members and each of their employees, representatives and Advisors who are in receipt of Confidential Information, to execute and deliver to the Sponsors a confidentiality agreement in a form prescribed by and with terms and conditions acceptable to the Sponsors, in their sole discretion.

#### **3.8.3 Confidential Information**

(1) For the purpose of this RFP Process, "**Confidential Information**" means all material, data, information or any item in any form, whether oral or written, including in electronic or hard-copy format, supplied by, obtained from or otherwise provided by the Sponsors or the Government of Ontario in connection with the RFP Process, the RFP Documents or the Project, whether supplied, obtained from or provided before or after the RFP Process.

- (2) The Proponent agrees that all Confidential Information:
- (a) shall remain the sole property of the Government of Ontario or the Sponsors, as applicable, and the Proponent shall treat it as confidential;
  - (b) shall not be used by the Proponent for any purpose other than developing and submitting a Proposal in response to this RFP Process or the performance of any subsequent agreement relating to the Project with the Signing Parties;
  - (c) shall not be disclosed by the Proponent to any person who is not involved in the Proponent's preparation of its Proposal or the performance of any subsequent agreement relating to the Project with the Signing Parties, without prior written consent of the Sponsors or the Government of Ontario, as applicable;
  - (d) shall not be used in any way detrimental to the Sponsors or the Government of Ontario; and
  - (e) if requested by the Sponsors, all Confidential Information shall be returned by the Proponents to the Sponsors no later than ten (10) days after that request.

(3) Each Proponent shall be responsible for any breach of the provisions of this RFP Section 3.8.3 by any person to whom it discloses the Confidential Information including, for greater clarity, the Proponent's employees, representatives and Advisors and the Proponent Team Members and their employees, representatives and Advisors. Each Proponent shall indemnify each of the Sponsors, the Government of Ontario and each of their related entities and each of their respective directors, officers, consultants, employees, agents and representatives and save each of them fully harmless from and against any and all loss, cost, damage, expense, fine, suit, claim, penalty, demand, action, obligation and liability of any kind or nature (including, without limitation, professional fees on a full indemnity basis) suffered or incurred by any of them arising as a result of or in connection with any breach of any of the provisions of this RFP Section 3.8.3 by the Proponent or by any person to whom the Proponent has disclosed the Confidential Information. Each Proponent agrees that the Sponsors act as trustee for each of their related entities and the Government of Ontario and each of their respective directors, officers, consultants, employees, agents and representatives with respect to all rights contemplated hereunder arising in favour of a related entity or the Government of Ontario or any of their respective directors, officers, consultants, employees, agents or representatives and that the Sponsors have agreed to accept such trust and hold and enforce such rights on behalf of each related entity or the Government of Ontario and each of their respective directors, officers, consultants, employees, agents and representatives.

(4) Each Proponent acknowledges and agrees that a breach of the provisions of this RFP Section 3.8.3 would cause the Sponsors, the Government of Ontario and their related entities to suffer loss that could not be adequately compensated by damages, and that the Sponsors, the Government of Ontario and any of their related entities may, in addition to any other remedy or relief, enforce any of the provisions of this RFP Section 3.8.3 upon application to a court of competent jurisdiction without proof of actual damage to the Sponsors, the Government of Ontario or any of their related entities.

(5) Notwithstanding anything else to the contrary in this RFP, the provisions of this RFP Section 3.8.3 shall survive any cancellation of this RFP Process and the conclusion of the RFP Process and, for greater clarity, shall be legally binding on all Prequalified Parties, whether or not they submit a Proposal.

(6) The confidentiality obligations of the Proponent shall not apply to any information which falls within the following exceptions:

- (a) information that is lawfully in the public domain at the time of first disclosure to the Proponent, or which, after disclosure to the Proponent, becomes part of the public domain other than by a breach of the Proponent's confidentiality obligations or by any act or fault of the Proponent;
- (b) information which was in the Proponent's possession prior to its disclosure to the Proponent by the Sponsors, and provided that it was not acquired by the Proponent under an obligation of confidence; or
- (c) information which was lawfully obtained by the Proponent from a third party without restriction of disclosure, provided such third party was at the time of disclosure under no obligation of secrecy with respect to such information.

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

(1) The Sponsors' rights, as set out in this RFP Section 3.8.4, to the Proposal and all Proposal Information submitted by the Proponent during the RFP Process shall be granted to the Sponsors as follows:

- (a) if a Design and Bid Fee is offered in accordance with RFP Section 10.3.2:
  - (i) for unsuccessful Proponents, upon payment of the Design and Bid Fee; and
  - (ii) for the Preferred Proponent, upon Commercial Close;
- (b) if the Project is cancelled and a Break Fee is offered in accordance with RFP Section 10.3.3, upon payment of the Break Fee; or
- (c) if RFP Sections 3.8.4(1)(a) and 3.8.4(1)(b) do not apply, upon submission of the Proposal.

(2) Proponents shall not use or incorporate into their Proposals any concepts, products or processes which are subject to copyright, patents, trademarks or other intellectual property rights of third parties unless Proponents have, or will procure through licensing without cost to the Sponsors, the right to use and employ such concepts, products and processes in and for the Project.

(3) All requirements, designs, documents, plans and information supplied by the Sponsors to the Proponents in connection with this RFP are and shall remain the property of the Sponsors. Upon request of the Sponsors, all such designs, documents, plans and information (and any copies thereof in any format or medium created by or on behalf of the Proponent) must be returned to the Sponsors.

(4) The Proponent shall grant to the Sponsors and Her Majesty the Queen in Right of Ontario a non-exclusive, perpetual, irrevocable, world-wide, fully paid and royalty free license (fully assignable without the consent of the Proponent and with the right to sub-license without the consent of the Proponent) to use the Proposal Information (the "**Proposal Information Licence**"). Without limiting the

foregoing, the Proposal Information Licence shall include the right to modify the Proposal Information, and, where applicable, to use it, or any modified form of it, anywhere in the world. Under no circumstances shall the Proponent, except Project Co (as defined in the Project Agreement) in relation to this Project, be liable to the Sponsors, Her Majesty the Queen in Right of Ontario or to any other person or entity for any damages, losses, costs, expenses, claims or actions whatsoever arising directly or indirectly from the use of the Proposal Information pursuant to the Proposal Information Licence.

- (5) For the purpose of this RFP Section 3.8.4, “**Proposal Information**” includes:
- (a) all information contained in a Proposal or which is disclosed by or through a Proponent to the Sponsors during the evaluation of Proposals or during the process of executing any Project Agreement; and
  - (b) any and all ideas, concepts, products, alternatives, processes, recommendations and suggestions developed by or through a Proponent and revealed to or discovered by the Sponsors, including any and all those which may be connected in any way to the preparation, submission, review or negotiation of any Proposal or the Project Agreement.

(6) Proponents shall ensure that all intellectual property rights associated with any and all of the Proposal Information (including copyright and moral rights but excluding patent rights) provide for and give Infrastructure Ontario, the Client and Her Majesty the Queen in Right of Ontario the rights set out in this RFP Section 3.8.4. It is expressly understood and agreed that any actual or purported restriction in the future on the ability of Infrastructure Ontario, the Client or Her Majesty the Queen in Right of Ontario to use any of the Proposal Information, or anything else obtained by or through Proponents, shall be absolutely null and void and unenforceable as against Infrastructure Ontario, the Client, Her Majesty the Queen in Right of Ontario and each of their respective Advisors, and that the provisions of this RFP Section 3.8.4 shall take precedence and govern.

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

#### **3.9.1 Conflict of Interest**

(1) Proponents and Proponent Team Members and each of their Advisors shall disclose, in their Proposal Submission Form and the Proponent Team Member Declaration (in respect of Proponent Team Members), all perceived, potential and actual Conflicts of Interest. Proponents are advised to review the “Metrolinx Consultant Conflict of Interest and Unfair Advantage Guidance Document” posted in the Data Room and ensure that all Proponent Advisors, as applicable, have complied with these guidelines requirements of the Metrolinx Conflict of Interest Guidelines and with any instructions from the Sponsors arising from the application of these guidelines. For clarity, Proponents have an ongoing obligation to comply with this RFP Section 3.9.1 in addition to complying with the Metrolinx Consultant Conflict of Interest and Unfair Advantage Guidance Document. The Proponent, Proponent Team Members and their respective advisors shall,

- (a) no later than the date set out in the Timetable, disclose all information in respect of the Project which the Proponent, Proponent Team Members, or their respective advisors have generated or have available to them as a result of work carried out by the Proponent, Proponent Team Members or their respective



advisors, for the Sponsors, City or TTC in respect of, or in anticipation of, the Project;

- (b) provide a briefing to other Proponents in respect of the information provided pursuant to RFP Section 3.9.1(1)(a); and
- (c) at the request of the Sponsors, provide a director's or officer's certificate confirming that the requirements of RFP Section 3.9.1(1)(a) and 3.9.1(1)(b) have been complied with by the Proponent and, as applicable, the Proponent Team Members.

For clarity, the Sponsors may, in their sole discretion, circulate the information provided pursuant to RFP Section 3.9.1(1)(a) to other Proponents, Proponent Team Members, and their respective advisors. If any Proponent or Proponent Team Member becomes aware of relevant information of the type set out in RFP Section 3.9.1(1)(a) that has not been made available to all Proponents, that Proponent shall disclose such information promptly to the Contact Person.

(2) If a Proponent, a Proponent Team Member or any of their respective Advisors, prior to or following submission of its Proposal, discovers any perceived, potential or actual Conflict of Interest, the Proponent shall promptly disclose the perceived, potential or actual Conflict of Interest to the Sponsors in a written statement to the Contact Person.

(3) At the request of the Sponsors, the Proponent shall provide the Sponsors with the Proponent's proposed means to mitigate and minimize to the greatest extent practicable any perceived, potential or actual Conflict of Interest. The Proponent shall submit any additional information to the Sponsors that the Sponsors consider necessary to properly assess the perceived, potential or actual Conflict of Interest.

(4) The Sponsors may, in their sole discretion, exclude any Proponent Team Member or Proponent Advisor on the grounds of Conflict of Interest.

(5) Without limiting the generality of RFP Sections 3.9.1(4) or 3.9.1(6), the Sponsors may, in their sole discretion, require the Proponent, Proponent Team Member or a Proponent's Advisor to substitute a new person or entity for the person or entity giving rise to the Conflict of Interest.

(6) The Sponsors may, in their sole discretion, waive any and all perceived, potential or actual Conflicts of Interest of Proponents or Proponent Team Members, or any of their respective Advisors. A waiver may be upon such terms and conditions as the Sponsors, in their sole discretion, require to satisfy themselves that the Conflict of Interest has been appropriately managed, mitigated and minimized, including requiring the Proponent to put into place such policies, procedures, measures and other safeguards as may be required by and be acceptable to the Sponsors, in their sole discretion, to manage, mitigate and minimize the impact of such Conflict of Interest.

(7) For the purposes of this RFP Process "**Conflict of Interest**" includes any situation or circumstance where, in relation to the Project, a Proponent or any Proponent Team Member or Proponent Advisor:

- (a) has other commitments, relationships or financial interests that:

- (i) could or could be seen to exercise an improper influence over the objective, unbiased and impartial exercise of independent judgment by any personnel of the Sponsors or their Advisors; or
  - (ii) could or could be seen to compromise, impair or be incompatible with the effective performance of a Proponent's obligations under the Project Agreement if that Proponent was determined to be the Preferred Proponent under the RFP Process; or
- (b) has contractual or other obligations to Infrastructure Ontario or the Client that could or could be seen to have been compromised or otherwise impaired as a result of its participation in the RFP Process or the Project.

### 3.9.2 Ineligible Persons

(1) As a result of their involvement in the Project, the persons named in the RFP Data Sheet as "**Ineligible Persons**", their employees, and any of their subcontractors, advisors, consultants or representatives engaged in respect of this Project and, subject to RFP Sections 3.9.2(3) and 3.9.2(4) any person controlled by, that controls or that is under common control with the Ineligible Persons (each an "**Ineligible Person's Affiliate**") are not eligible to participate as a Proponent Team Member, Advisor to the Proponent, Financial Services Provider or Advisor to a Financial Services Provider.

(2) The Sponsors may amend the Ineligible Persons list in the RFP Data Sheet from time to time during the RFP Process.

(3) An Ineligible Person's Affiliate may be eligible to participate as a Proponent Team Member, Advisor to the Proponent, Financial Services Provider or Advisor to a Financial Services Provider only after it has obtained a written consent from the Sponsors permitting it to participate as a Proponent Team Member, Advisor to the Proponent, Financial Services Provider or Advisor to a Financial Services Provider. To obtain consent for an Ineligible Person's Affiliate to participate as a Proponent Team Member, Advisor to the Proponent, Financial Services Provider or Advisor to a Financial Services Provider, the Proponent must submit a request for consent to the Contact Person that includes the following information:

- (a) the full legal name of the Ineligible Person's Affiliate that the Proponent wishes to include on its team or as a Proponent Team Member, Advisor to the Proponent, Financial Services Provider or Advisor to a Financial Services Provider;
- (b) information regarding the Ineligible Person's Affiliate's relationship to the Ineligible Person listed in the RFP Data Sheet; and
- (c) a description of the policies and procedures that will be put in place to manage, mitigate or minimize the impact of any potential Conflict of Interest.

(4) Upon the Contact Person's receipt of a Proponent's properly completed request for consent in accordance with RFP Section 3.9.2(3), the Sponsors shall, in their sole discretion, make a determination as to whether they consider there to be a real, perceived or potential Conflict of Interest and whether the impact of such real perceived or potential Conflict of Interest can be appropriately managed,











































Evaluation Committee or sub-committee member, in these circumstances, is replaced in the sole discretion of the Sponsors.

## 6.2 Sponsors' Clarification and Verification of Proposals

- (1) The Sponsors may:
  - (a) require the Proponent to clarify or verify the contents of its Proposal or any statement made by the Proponent;
  - (b) require the Proponent to submit supplementary documentation clarifying or verifying any matters contained in its Proposal; and
  - (c) seek a Proponent's acknowledgement of a Sponsors' interpretation of the Proposal or any part of the Proposal.

(2) The Sponsors are not obliged to seek clarification or verification of any aspect of a Proposal or any statement by a Proponent, including an ambiguity in a Proposal or in a statement made by a Proponent.

(3) Any written information received by the Sponsors from a Proponent pursuant to a request for clarification or verification from the Sponsors as part of the RFP Process may, in the Sponsors' sole discretion, be considered as an integral part of the applicable Proposal.

## 6.3 Steps in the Evaluation Process

### 6.3.1 Step 1 – Compliance of Proposals

(1) In Step 1, the Sponsors will open each Proposal and will review the contents of the Proposal to assess whether it is in compliance with the terms and conditions of the RFP Documents, including whether all documents required to be submitted have been appropriately submitted.

(2) If, in the sole discretion of the Sponsors, a Proposal does not comply with the requirements set out in the RFP Documents, the Sponsors may, in their sole discretion, without liability, cost or penalty, eliminate the Proposal and the Proposal shall not be given any further consideration.

(3) For purposes of this RFP, "comply" and "compliance" mean that the Proposal conforms to the requirements of the RFP Documents without material deviation. A "material deviation" in a Proposal is any failure to comply with an RFP Document requirement that, in the sole discretion of the Sponsors:

- (a) impedes, in any material way, the ability of the Sponsors to evaluate the Proposal;
- (b) affects the Sponsors' ability to enforce the Proponent's obligations pursuant to the RFP Documents; or







(2) The Sponsors' discretion in determining compliance, scores, ranking and disqualification of the Proponents and their Proposal is not limited or restricted in any way by the fact that a prequalification process preceded this RFP Process.

(3) The Sponsors have the right, at any time and in their sole discretion, to consider in the evaluation of the Proposals or in the exercise of any of the Sponsors' rights under this RFP:

- (a) any instances of poor performance by a Proponent or a Proponent Team Member that the Sponsors have experienced; and/or
- (b) any publicly available information about a Proponent or a Proponent Team Member that is, in the Sponsors' sole discretion, credible information.

#### 7.1.2 Disqualification

(1) The Sponsors may, in their sole discretion, disqualify a Proponent, a Proponent Team Member, or a Proposal or reverse their decision to make an award (even if the award has already been made to a Preferred Proponent under this RFP) at any time prior to Commercial Close with respect to the Preferred Proponent and at any time prior to Financial Close with respect to the remaining Proponents, if,

- (a) the Proposal is determined to be non-compliant pursuant to RFP Section 6.3.1;
- (b) the Proponent fails to cooperate in any attempt by the Sponsors to verify any information provided by the Proponent in its Proposal or interview;
- (c) the Proponent contravenes RFP Sections 3.3.2 or 3.3.3;
- (d) the Proponent fails to comply with Applicable Law;
- (e) the Proposal contains false or misleading information or a misrepresentation;
- (f) the Proposal, in the opinion of the Sponsors, reveals a material Conflict of Interest as described in RFP Section 3.9 and the Proponent,
  - (i) does not receive a waiver from the Sponsors in accordance with RFP Section 3.9.1(6) or does not receive a consent in accordance with RFP Section 3.9.2(4), as applicable; or
  - (ii) fails to substitute the person or entity giving rise to the Conflict of Interest in accordance with RFP Section 3.9.1(5);
- (g) if, in the opinion of the Sponsors, acting reasonably, the Proponent or a Proponent Team Member or any of their respective Advisors, employees or representatives directly or indirectly colluded with one or more other Proponents or its Proponent Team Members or any of their respective Advisors, employees or representatives in the preparation or submission of a Proponent's Proposal or otherwise contravened RFP Section 3.3.4;























**SECTION 11 - NOTIFICATION AND DEBRIEFING**

(1) Any time after the Preferred Proponent has been identified, the Sponsors will formally notify all Proponents who were not successful in the RFP Process that they have not been selected. Notwithstanding such notification, the Proponents' Proposals shall be irrevocable until the expiration of the Proposal Validity Period (or extended Proposal Validity Period, if applicable) or Financial Close, in accordance with RFP Section 5.4.

(2) Any time after Financial Close, the Sponsors, and a member or members of the Evaluation Committee will meet with any unsuccessful Proponents, at the request of the unsuccessful Proponent, to provide a de-briefing.

**SECTION 12 - DEFINITIONS****12.1 General**

(1) Unless otherwise defined in this RFP, Section 12 -, capitalized terms and expressions used in this RFP have the meaning given to them in the Project Agreement. In this RFP, the singular shall include the plural and the plural shall include the singular, except where the context otherwise requires.

(2) All references in this RFP to the Sponsors' or Infrastructure Ontario's "discretion" or "sole discretion" means in the sole and absolute discretion of the party exercising the discretion.

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

**12.2 RFP Definitions**

Whenever used in the RFP:

(1) "Acquiree" is defined in RFP Section 3.6(1);

(2) "Acquirer" is defined in RFP Section 3.6(1);

(3) "Additional City Infrastructure" means City of Toronto proposed infrastructure, as set out in Part 2 of Schedule 3, which, in the sole discretion of the City of Toronto, the Successful Proponent may be required to include as New City Infrastructure in accordance with the Project Agreement and in accordance with prices submitted by the Proponent in its Financial Submission;

(4) "Addendum" means a written addendum to the RFP Documents issued by the Sponsors as set out in RFP Section 3.7;

(5) "Additional Visit" is defined in RFP Section 3.5.3(2);

(6) "Advisors" means any person or firm retained to provide professional advice to any one of the Sponsors, a Proponent, a Proponent Team Member or a Financial Services Provider, as applicable;

(7) "Assumption" is defined in Section 6.10 of Part B of Part 1 of Schedule 3 to the RFP;













- (114) “Sponsors” is defined in RFP Section 1.1(1) and means Infrastructure Ontario and the Client;
- (115) “Spread Decrease” is defined in Section 2.1 of Part C of Part 2 of Schedule 3 to this RFP;
- (116) “Submission Deadline” is defined in RFP Section 3.1(1);
- (117) “Submission Requirements” means all of the submission requirements set out in this RFP;
- (118) “Substantial Completion Payment” is defined in Section 2.20 of Part E of Part 2 Schedule 3 to this RFP;
- (119) “Technical Submission” means the component of the Proposal submitted in response to the requirements set out in Part 1 of Schedule 3 to this RFP;
- (120) “Technical Submission Deadline” is defined in RFP Section 3.1(1);
- (121) “Technical Submission Information” means the information contained in the Proponent’s Technical Submission;
- (122) “Termination Notice” is defined in RFP Section 5.5(6)(b);
- (123) “Timetable” is defined in RFP Section 3.1(1);
- (124) “Utility Subcontractor” means any subcontractor of Project Co or a Utility Company engaged by or that will be engaged by or through Project Co or a Utility Company to perform any of the Utility Work.
- (125) “Vehicle Maintenance Provider” means the Proponent Team Member identified by the Proponent as responsible for the maintenance of the Vehicles under the Project Agreement.

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