

**APPENDIX 4B**

**MARKET TESTING PROCEDURE**

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## APPENDIX 4B

### MARKET TESTING PROCEDURE

#### 1. DEFINITIONS

In this Appendix, in addition to the definitions set out in Schedule 1 of this Agreement:

**“Affiliated Person”** means:

- (a) an Affiliate of any of Project Co, a Partner, a Project Contractor, a Sub-Contractor or other Project Co Person;
- (b) any partner in any partnership or any Person who participates in any profit sharing, cost-sharing or joint venture arrangement, in each case to which any of Project Co, a Partner, a Project Contractor, a Sub-Contractor or other Project Co Person (other than an invitee of Project Co or of any Project Co Person) or any Person mentioned in Section (a) above is also a party;
- (c) any shareholder, director, officer or employee of any of the Persons referred to in Sections (a) and (b) above or any of those Persons’ spouses, children, step-children or partners; or
- (d) any body corporate of which any Person referred to in Section (c) above is a shareholder, director, officer or employee;

**“Benchmarking Exercise”** has the meaning set out in Section 3.1 of this Appendix;

**“Benchmark Price Range”** means the range of prices that is within 5% less than and 5% greater than the simple average of prices for relevant Market Tested Services obtained from the suitable comparators as part of a Benchmarking Exercise conducted hereunder, once adjustments have been made to make such comparators comparable, including adjusting for standards, as agreed by the parties, provided however that the higher limit of such range will not exceed the highest of the suitable comparators;

**“Benchmark Price Range (Plant Services)”** means the range of Proposed Labour Costs that are within 5% less than and 5% greater than the simple average of labour costs for the Plant Services obtained from the suitable comparators as part of a Benchmarking Exercise conducted pursuant to Section 4 of this Appendix, once adjustments have been made to make such comparators comparable, including adjusting for standards, as agreed by the parties, provided however that the higher limit of such range will not exceed the highest of the suitable comparators;

**“Benchmarking Proposal”** has the meaning set out in Section 3.4 of this Appendix;

**“Draft Proposal”** has the meaning set out in Section 5.4(a) of this Appendix;

**“Excluded Person”** means Project Co, any Affiliated Person, any subcontractor of an Affiliated Person or any Affiliate of their respective subcontractors;

**“Market Tested Services”** means the Housekeeping and Waste Management Services and Help Desk Services, grouped and market tested together;

**“Market Testing”** means the process described in this Appendix, including the Benchmarking Exercise if applicable;

**“Market Testing Dates”** means 4 years after Service Commencement and thereafter every sixth anniversary of that date;

**“Market Testing Meetings”** has the meaning set out in Section 5.1 of this Appendix;

**“Market Testing Proposal”** has the meaning set out in Section 5.4(e) of this Appendix;

**“Plant Services Benchmarking Exercise”** means a benchmarking exercise in respect of the Plant Services;

**“Plant Services Benchmarking Proposal”** has the meaning set out in Section 4.3 of this Appendix;

**“Preferred Service Tenderer”** has the meaning set out in Section 5.8 of this Appendix;

**“Proposed Labour Costs”** has the meaning set out in Section 4.3 of this Appendix;

**“Prospective Service Tenderers”** means those Persons identified by the parties pursuant to Section 5.5 of this Appendix;

**“Qualifying Service Tender”** means a tender received from a Service Tenderer which complies with the Service Tender Requirements;

**“Service Tender Requirements”** has the meaning set out in Section 5.1(d) of this Appendix;

**“Service Tenderers”** means those of the Prospective Service Tenderers selected to submit tenders in accordance with Section 5.6 of this Appendix; and

**“Service Tender Validity Period”** means the period within which tenders from Service Tenderers must be received if they are to be valid.

## **2. TIMING OF MARKET TESTING**

### **2.1 Project Co’s Responsibility to Conduct**

Notwithstanding any other provision of this Appendix (including the participation of the Authority described in Section 5.1 of this Appendix), Project Co will carry out the Market Testing of Market Tested Services in accordance with this Appendix so that the Preferred Service Tenderer(s) will, if appointed to act as Service Provider(s), commence provision of the relevant Market Tested Services on the relevant Market Testing Date.

### **2.2 Consequences of Delay in Market Testing**

If for any reason the applicable Market Testing for the Market Tested Services will not be complete on the relevant Market Testing Date, including for failure of the Market Testing, then Project Co will remain

responsible to ensure the continued provision of the relevant Market Tested Services, and the Authority will be responsible to continue to pay Project Co as provided in this Agreement for the continued provision of the Market Tested Services, pending completion of the applicable Market Testing or the determination of how to proceed if Market Testing has failed. The pricing of such continued Market Tested Services will, pending the establishment of new pricing as contemplated under this Appendix, be at the same pricing as prevailed before the relevant Market Testing and will be Index Linked (with the base date for such purposes deemed to be the relevant Market Testing Date).

### **3. BENCHMARKING OF MARKET TESTED SERVICES**

#### **3.1 Project Co Notice May Initiate Benchmarking**

Project Co may, not later than 8 months before a Market Testing Date, give notice to the Authority that Project Co wishes to carry out a benchmarking exercise (the “**Benchmarking Exercise**”) of the Market Tested Services, rather than Market Testing as otherwise provided in this Appendix.

#### **3.2 Initial Meeting**

Within 7 days after receipt of the notice referred to in Section 3.1 of this Appendix, the parties will meet to:

- (a) discuss and agree to the procedure for, and factors to be taken into account, in the Benchmarking Exercise to ensure that the Market Tested Services are compared on a like to like basis with suitable comparators and reliable information, which will include comparing the standards and prices of such Market Tested Services and the costs of providing them with the standards and prices of equivalent services and the costs of providing them in similar circumstances by reputable organizations possessing an appropriate degree of skill, resources, reputation and financial standing relative to the provision of such Market Tested Services; and
- (b) review the Services Protocols and Specifications for the Market Tested Services that will be subject to the Benchmarking Exercise and, if required by the Authority, amend the relevant Services Protocols and Specifications to be applicable to the Market Tested Service after the Market Testing Date, as appropriate, provided that Project Co may only object to any change in the requirements of the Authority on the grounds referred to in Section 2.3 (Restrictions on Changes) of Schedule 6 [Changes, Minor Works and Innovation Proposals] and any such objection must be made in writing to the Authority within 15 days of the relevant meeting at which the change was contemplated.

#### **3.3 No Suitable Comparators**

If Project Co cannot establish to the Authority’s satisfaction, acting reasonably, that for a Market Tested Service there are suitable comparators and reliable information as described in Section 3.2(a) of this Appendix, then the Benchmarking Exercise for that Market Tested Service will not proceed and Market Testing of such Market Tested Service will be as otherwise provided in this Appendix.

### **3.4 Benchmarking Proposal**

Project Co will, prior to the start of the Benchmarking Exercise, submit to the Authority a proposal (the “**Benchmarking Proposal**”) for the pricing of the Market Tested Services that is the subject of the Benchmarking Exercise. The pricing will not exceed any amount contractually agreed between Project Co and the relevant Service Provider that is applicable for the period after the Market Testing Date. After Project Co submits the Benchmarking Proposal, Project Co will carry out the Benchmarking Exercise for the relevant Market Tested Services.

### **3.5 Records and Information**

Project Co will maintain complete and accurate records of each Benchmarking Exercise and will present the results of the Benchmarking Exercise to the Authority, together with all necessary supporting documentation and such other information for full transparency of relevant cost and other information relating to the Benchmarking Exercise and as the Authority may reasonably require in order to evaluate properly the results of the Benchmarking Exercise. The parties will use all reasonable efforts to agree upon the Benchmark Price Range, but if each party acts reasonably and no agreement is reached Section 4 below will apply.

### **3.6 Pricing Less Than Benchmark Price Range**

If the pricing of the Market Tested Services in the Benchmarking Proposal is less than the Benchmark Price Range, then Project Co will confirm the appointment of the relevant Service Provider then providing the Market Tested Services to continue providing the Market Tested Services for the next six year term and the re-pricing of the Market Tested Services will be at the pricing set out in the Benchmarking Proposal and the Periodic Payments will be adjusted pursuant to Section 2.3 of Schedule 8 [Payments]. .

### **3.7 Pricing Within Benchmark Price Range**

If the pricing of a Market Tested Service in the Benchmarking Proposal is within the Benchmark Price Range then, Project Co will have the option to confirm, by notice to the Authority, the appointment of the relevant Service Provider then providing such Market Tested Service to continue providing such Market Tested Service for a further six year term at the pricing set out in the Benchmarking Proposal and the Periodic Payments will be adjusted pursuant to Section 2.3 of Schedule 8 [Payments]. If Project Co does not exercise such option, then Market Testing of the Market Tested Services will be as otherwise provided in this Appendix.

### **3.8 Pricing Greater Than Benchmark Price Range**

If the pricing of a Market Tested Service in the Benchmarking Proposal is greater than the Benchmark Price Range then, unless the Authority otherwise agrees, Market Testing of such Market Tested Service will be conducted as otherwise provided in this Appendix.

### **3.9 Costs**

Project Co will bear all costs, fees and expenses associated with the Benchmarking Exercise other than any costs, fees or and expenses incurred by the Authority.

### **3.10 Process Meetings**

The Benchmarking Exercise is intended to be an expedited process that is completed at least 6 months prior to the relevant Market Testing Date to allow time for Market Testing to proceed as otherwise provided in this Appendix and accordingly either party may, at any time after the date that is 10 months prior to the relevant Market Testing Date, request a meeting with the other party to discuss the likelihood and scope of a Benchmarking Exercise, as it is then known to the parties, and to review the proposed timeline, details and issues concerning a Benchmarking Exercise. The other party will meet with the requesting party and both parties, acting reasonably, will consider the timelines set out in this Section 3 and, if agreed, the timelines set out in this Section 3 will be modified for the Benchmarking Exercise.

## **4. BENCHMARKING OF PLANT SERVICES**

### **4.1 Frequency**

At least six months before each Market Testing Date, Project Co will carry out a Plant Services Benchmarking Exercise in respect of the Plant Services separately from any Benchmarking of the Market Tested Services. Unless otherwise provided in this Section 4 of Appendix 4B, the provisions of Section 3 will apply to a Plant Services Benchmarking Exercise in respect of the Plant Services. For certainty, the second sentence of Section 3.4 will not apply to a Plant Services Benchmarking Exercise.

### **4.2 Plant Services Benchmarking Factors**

Any Plant Services Benchmarking Exercise for the Plant Services will only compare, and establish a Benchmark Price Range (Plant Services) for, the direct wage and labour costs of reputable organizations possessing an appropriate degree of skill, resources, reputation and financial standing delivering services in British Columbia comparable to the Plant Services.

### **4.3 Labour Cost Proposal**

Project Co will, prior to the start of any Plant Services Benchmarking Exercise, submit to the Authority a proposal (a "**Plant Services Benchmarking Proposal**") the proposed direct labour and wage costs which are to apply in respect of the Plant Services for the next six year term of the Services Contract pursuant to which the Plant Services are provided (the "**Proposed Labour Costs**").

### **4.4 Proposed Labour Costs Within the Benchmark Price Range (Plant Services)**

If the Proposed Labour Costs in a Plant Services Benchmarking Proposal are less than or within the Benchmark Price Range (Plant Services), then the Plant Services will be re-priced for the ensuing six year term at the pricing set out in the Plant Services Benchmarking Proposal and the Periodic Payments for the next six year term of the relevant Services Contract will be adjusted to include the Proposed Labour Costs pursuant to Section 2.3 of Schedule 8 [Payments].

### **4.5 Proposed Labour Costs Greater than Benchmark Price Range (Plant Services)**

If the Proposed Labour Costs in a Plant Services Benchmarking Proposal are greater than the Benchmark Price Range (Plant Services), no adjustments for increased wage or labour costs will be

made to Periodic Payments for the next six year term of the relevant Services Contract other than as provided elsewhere in the Agreement.

#### **4.6 No Market Testing**

Plant Services will not be subject to the Market Testing procedure set out in Section 5 of this Appendix.

### **5. MARKET TESTING**

#### **5.1 Market Testing Meetings**

Unless a Benchmarking Exercise has been completed as provided in Section 3 of this Appendix or unless otherwise agreed by the parties, at least 6 months before each Market Testing Date the parties will hold meetings (“**Market Testing Meetings**”) in respect of the Market Tested Services:

- (a) to review the Services Protocols and Specifications for the Market Tested Services and if required by the Authority, to amend the relevant Services Protocols and Specifications as appropriate, provided that Project Co may only object to any change in the requirements of the Authority on the grounds referred to in Section 2.3 (Restrictions on Changes) of Schedule 6 [Changes, Minor Works and Innovation Proposals] and any such objection must be made in writing to the Authority within 15 days of the relevant Market Testing Meetings at which the change was contemplated;
- (b) to discuss and seek to agree upon the appropriate media for advertising the Market Tested Services and identifying the Prospective Service Tenderers;
- (c) to discuss and seek to agree upon the basis on which the Service Tenderers will be selected by Project Co from among the Prospective Service Tenderers; and
- (d) to discuss and seek to agree upon the form and requirements of the tender documents to be sent to Service Tenderers (the “**Service Tender Requirements**”) which will satisfy the requirements of this Appendix and be in sufficient detail to allow the Preferred Service Tenderer to be determined in accordance with this Appendix, and which will include:
  - (1) a statement of the Service Tender Validity Period;
  - (2) requirements in respect of the possible grouping or groupings of Market Tested Services and any division of any Market Tested Service into separate parts;
  - (3) details of the tender evaluation criteria;
  - (4) the information Service Tenderers are required to provide; and
  - (5) details of the required financial capacity and performance security/guarantees to be provided to support the Preferred Service Tenderer’s obligations.

## 5.2 Notice of Meetings

Project Co will provide at least one month's notice to the Authority of the time, place and agenda for the first Market Testing Meeting. Thereafter, each subsequent Market Testing Meetings will be convened on not less than 7 days notice, with such notice identifying the agenda items to be discussed at the Market Testing Meeting, provided that in emergencies a Market Testing Meetings may be called at any time on such notice as may be reasonable in the circumstances. The parties will hold Market Testing Meetings as often as necessary.

## 5.3 Tender Evaluation Material

Any tender evaluation criteria agreed between Project Co and the Authority and made available to the Service Tenderers as part of the Service Tender Requirements must be objective and impartial.

## 5.4 Market Testing Proposal

Notwithstanding any failure of the parties to agree upon any matter referred to in Section 5.1:

- (a) Project Co will prepare and deliver to the Authority no later than 4 months before the relevant Market Testing Date a draft market testing proposal (the "**Draft Proposal**") describing in detail Project Co's proposals for the Market Testing of the Market Tested Services. The Draft Proposal will describe all of the matters referred to in, and agreed pursuant to, Section 5.1 and the form of contract which the Preferred Service Tenderer will be required to accept;
- (b) it will be a principle of the Market Testing Proposal that, unless otherwise agreed by the parties, the allocation of risk to the Preferred Service Tenderer, if appointed to act as a Service Provider, will not be materially greater or less than such allocation to the Service Provider whom the Preferred Service Tenderer is to replace;
- (c) the Authority may, within 30 days of the Authority's receipt of the Draft Proposal, provide comments and request amendments to the Draft Proposal to the extent required to comply with the requirements of this Section 4 and Project Co will revise the Draft Proposal as reasonably required by the Authority;
- (d) if Project Co and the Authority are unable to agree on any matter relating to the Draft Proposal within 60 days of the Authority's receipt of the Draft Proposal, either party may refer the matter for resolution in accordance with the Dispute Resolution Procedure;
- (e) the Draft Proposal, amended as agreed by the parties or as determined by the Dispute Resolution Procedure, will be the "**Market Testing Proposal**"; and
- (f) the Services Protocols and Specifications, Service Tender Requirements and form of contracts set out in the Market Testing Proposal will be used for the Market Testing.

## 5.5 Selection of Prospective Service Tenderers

Prospective Service Tenderers will be selected as follows:

- (a) Project Co will be responsible for compiling the list of Prospective Service Tenderers;
- (b) if the Authority recommends any Prospective Service Tenderers, then Project Co will include any such recommended Person in the list of Prospective Service Tenderers provided such Person complies with and meets the criteria referred to in Section 5.6(a); and
- (c) unless otherwise consented to by the Authority, the Authority will have the right to object to the selection of, and Project Co will not select, any Person as a Prospective Service Tenderer:
  - (1) if such Person does not, or could not reasonably be considered to, comply with and meet any of the criteria referred to in Section 5.6(a) of this Appendix;
  - (2) if such Person is an Excluded Person provided that for the purposes of this Section 5.5 the existing Service Provider will not be an Excluded Person if such person is not in default of the performance of its obligations under its contract to provide the Market Tested Services; or
  - (3) if such Person is a Restricted Person or any other Person who is not permitted to be a Sub-Contractor pursuant to this Agreement.

## **5.6 Selection Of Service Tenderers**

Service Tenderers will be selected as follows:

- (a) Project Co, in consultation with the Authority, will be responsible for selecting the Service Tenderers from the list of Prospective Service Tenderers on the basis of the following criteria:
  - (1) the financial standing of the Prospective Service Tenderers;
  - (2) the technical, managerial and other relevant experience and ability of the Prospective Service Tenderers, taking into account any relevant customer references; and
  - (3) any other basis identified pursuant to Section 5.1(c) of this Appendix or the Service Tender Requirements;
- (b) the Authority will have the right to object to the selection of, and Project Co will not select, any Person as a Service Tenderer if pursuant to Section 5.5(c) of this Appendix the Authority consented to such Person being a Prospective Services Tenderer and Project Co or such Person failed to comply with any condition of such consent, including with respect to any conflict of interest for an Excluded Person; and
- (c) Project Co will, after consultation with the Authority, provide any Prospective Service Tenderer which is unsuccessful in being selected as a Service Tenderer with an appropriate explanation of the reasons behind its non-selection, if so requested by the Person in question.

## 5.7 Service Tendering Process

Project Co will be responsible for managing and co-ordinating the Market Testing in an efficient and fair manner in accordance with the Market Testing Proposal (including the Service Tender Requirements) and:

- (a) Project Co will ensure that only Service Tenderers selected in accordance with this Appendix are invited to submit tenders and that the principle of equality of information to, and treatment of, Service Tenderers will apply at all times;
- (b) the Market Testing will be by way of competitive tenders unless the Authority consents in writing to another competitive process (including requests for proposals, requests for qualifications or requests for quotations). If the Authority consents to another such process, the terms “tender”, “tenderer” and “tendering” will be deemed modified as necessary to reflect the terminology of such other process;
- (c) Project Co will send all necessary documents and information to Service Tenderers (including the Service Tender Requirements) in a timely manner;
- (d) tenders must be assessed on the basis of relevant criteria, including:
  - (1) their compliance with the Service Tender Requirements; and
  - (2) the value for money that the tenders represent for the Authority;
- (e) Project Co will bear all costs, fees and expenses associated with Market Testing;
- (f) the Authority may, at its own cost, appoint a monitor for the purpose of monitoring and reporting to the Authority on Project Co’s compliance with all requirements for Market Testing. Such monitors will be entitled to attend all meetings and processes relating to Market Testing, including evaluation meetings and processes, inspect copies of all the tender documentation, bids and evaluation documentation and comment (on behalf of the Authority) to Project Co as to compliance with the requirements for Market Testing provided that the Authority will cause such monitor to comply with the confidentiality provisions set out in Section 17.1 of this Agreement. The monitor may or may not be employees of the Authority; and
- (g) if, in respect of the Market Tested Services there is only one Prospective Service Tenderer, or Project Co intends to select only one of the Prospective Service Tenderers as the Service Tenderer, then Project Co will provide notice thereof to the Authority and:
  - (1) Project Co and the Authority will discuss and consider whether the Market Testing conducted for the Market Tested Services was adequate or whether such Market Testing should be re-performed on a different basis; and
  - (2) if Project Co and the Authority agree that such Market Testing was adequate, or if such Market Testing is re-performed and there is still only one Prospective Service Tenderer or Project Co intends to select only one of the Prospective

Service Tenderers as the Service Tenderer, then Project Co will confirm the appointment of such Service Tenderer to provide the Market Tested Services. The pricing for such Market Tested Service will be based on the pricing of such Market Tested Service then in effect subject to adjustments for the period such pricing was in effect equal to the greater of any increase in:

- (A) the Consumer Price Index, All-Items in British Columbia as published by statistics Canada for the period; and
- (B) the British Columbia Average Weekly Wage Rates as published by BC stats in the monthly report entitled "Earnings and Employment Trends",

to the extent such increases have not already been taken into account in the price for such Market Test Services then in effect.

- (h) if Project Co does not comply with all requirements for Market Testing, then, without limiting any other remedies of the Authority under this Agreement or otherwise, Project Co will if required by the Authority re-perform the relevant Market Testing in accordance with such requirements.

## 5.8 Preferred Service Tenderers

Following expiry of the Service Tender Validity Period, Project Co will, subject to the provisions of this Section 5.8, determine which Service Tenderer (the "**Preferred Service Tenderer**") offers the Qualifying Service Tender in respect of the Market Tested Services that represents, as the case may be, the best value for money for the Authority, and:

- (a) promptly upon making such determination of the Preferred Service Tenderer, Project Co will supply to the Authority a copy of its tender evaluation, together with sufficient supporting information concerning the tender evaluation to enable the Authority to analyse and understand the basis for Project Co's determination; and
- (b) if the Authority does not agree with Project Co's determination in the case of any Qualifying Service Tender, the Authority may, within 30 days of being provided with the tender evaluation, dispute such determination and, if the parties do not resolve such Dispute within a further 30 days, the Dispute will be resolved in accordance with the Dispute Resolution Procedure; and
- (c) Project Co will, after consultation with the Authority, provide any Service Tenderer which is unsuccessful in being selected as a Preferred Service Tenderer with an appropriate explanation of the reasons behind its non selection, if so requested by the party in question.

## 5.9 Appointment

On or about each Market Testing Date, Project Co will ensure that all Preferred Service Tenderers, as agreed or determined in accordance with Section 5.8 of this Appendix, are appointed to provide and enter into contracts to provide the Market Tested Services for 6 year terms and on the basis set out in their Qualifying Service Tender.

## **6. SERVICE PAYMENT ADJUSTMENTS**

### **6.1 Adjustment**

Following Market Testing, the Periodic Payments will be adjusted in accordance with Section 2.3 of Schedule 8 [Payments].

## **7. INFORMATION REQUIREMENTS**

Without prejudice to any of Project Co's general obligations under this Agreement, including pursuant to Section 4.2 (Records and Reports) of this Agreement, Schedule 14 [Records and Reports] and the other provisions of this Appendix, Project Co will:

- (a) maintain a full record and audit trail of each Market Testing and make all such records, including details of all tenders received, available for inspection by the Authority and other authorized representatives on reasonable notice from the Authority;
- (b) provide to the Authority, in a comprehensive and accurate manner, all information necessary to enable the Authority to review and assess all matters relating to the Market Testing; and
- (c) certify to the Authority within 30 days after expiry of the Service Tender Validity Period that:
  - (1) to the best of Project Co's knowledge after due enquiry, no Excluded Person intends to or will obtain any direct or indirect financial or other benefit from such appointment, other than the benefit of the contract itself;
  - (2) to the best of Project Co's knowledge after due enquiry, no Excluded Person has colluded in connection with the Market Testing; and
  - (3) there has been full material compliance with all requirements relating to ensuring equality of information provided to, and treatment of, Service Tenderers.

## **8. INDEMNITY**

Project Co will indemnify and keep the Authority and each Authority Person indemnified at all times from and against all Direct Losses (including those arising from any third party claims) that any such Person may sustain in connection with:

- (a) the implementation of this Appendix;
- (b) any breach of the provisions of this Appendix; and
- (c) any claim made by any Person, including any Prospective Service Tenderer, Service Tenderer or Preferred Service Tenderer, that is not awarded a contract,

except to the extent that any such breach or claim results from any failure of the Authority to comply with the provisions of this Appendix.