

SOUTH FRASER PERIMETER ROAD PROJECT

SCHEDULE 16
DISPUTE RESOLUTION PROCEDURE

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**PART 1
GENERAL**

1.1 Resolution of Disputes

- (a) Each of the parties agrees that at all times, both during and after the Term, it shall make bona fide efforts to:
 - (i) resolve by amicable negotiations any and all disputes arising between the parties;
 - (ii) resolve all disputes at the lowest level of management possible; and
 - (iii) exhaust all reasonable efforts to resolve a dispute at all available levels of management before issuing a notice pursuant to Section 1.1(b) of this Schedule to refer the dispute to any of the escalated dispute resolution processes available pursuant to and in accordance with Part 3 [Referral to Expert], Part 4 [Referral to Arbitration] and Part 5 [Court Proceedings] of this Schedule.
- (b) If the parties are unable to resolve a dispute pursuant to Section 1.1(a) of this Schedule, then for any dispute described in Section 18.1 [Dispute Resolution Procedure] a party may deliver to the person designated by the Province to resolve the dispute (the “**Province Designate**”) or the person designated by the Concessionaire to resolve the dispute (the “**Concessionaire Designate**”), as applicable, a written notice of dispute which shall constitute, unless otherwise expressly agreed by the parties:
 - (i) when the dispute is a dispute in relation to a decision of the Independent Certifier, an Arbitration Dispute Notice issued pursuant to Part 4 [Referral to Arbitration] of this Schedule; or
 - (ii) for any other dispute, an Expert Dispute Notice issued pursuant to Part 3 [Referral to Expert] of this Schedule.

To be effective, any such notice must expressly state that it is an Arbitration Dispute Notice or Expert Dispute Notice, as the case may be, set out the particulars of the matter in dispute, describe the remedy or resolution sought by the party issuing such notice and be signed by the Province Designate, if given by the Province, or by the Concessionaire Designate, if given by the Concessionaire.

1.2 No Joinder

No proceedings to resolve any dispute arising out of or relating to this Agreement in accordance with this Schedule shall include, by consolidation or joinder or in any other manner, any additional person not a party to this Agreement, including any Principal Contractor or Subcontractor, except with the written consent of all of the parties to this Agreement and any other person sought to be so joined.

1.3 Survival

Notwithstanding any other provision of this Agreement, the provisions of this Schedule will survive the expiry or any earlier termination of this Agreement.

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**PART 2
INDEPENDENT CERTIFIER**

2.1 Decisions of Independent Certifier

Any decision of the Independent Certifier to issue or not to issue a Certificate of Substantial Completion or a Certificate of Total Completion shall be final and binding on the parties unless and until revised, cancelled, varied or overturned by an Arbitrator or Court in accordance with the provisions of this Schedule, and each of the parties expressly waives all rights of appeal in connection with the Independent Certifier's decisions except as expressly provided in this Schedule.

2.2 No Referral to Expert

Part 3 [Referral to Expert] of this Schedule shall not apply in respect of the resolution of any dispute regarding a decision of the Independent Certifier unless otherwise agreed by the parties.

**PART 3
REFERRAL TO EXPERT**

3.1 Referral to Expert

If the parties are unable to resolve a dispute in the manner contemplated in Section 1.1(a) of this Schedule then, subject to Section 2.2 [No Referral to Expert] of this Schedule, a party may at any time by written notice to another party (the "**Expert Dispute Notice**") require the dispute to be resolved on an expedited basis by a qualified and experienced expert (the "**Expert**") in accordance with this Part.

3.2 Expert Panels

Panels of Experts shall be appointed as follows:

- (a) there shall be three panels of experts (each, a "**Panel**", and collectively, the "**Panels**"), as follows:
 - (i) a panel to resolve disputes relating to design and construction matters in respect of the New Infrastructure (the "**Design and Construction Panel**");
 - (ii) a panel to resolve disputes relating to Operation, Maintenance and Rehabilitation matters (the "**OMR Panel**"); and
 - (iii) a panel to resolve all disputes relating to financial and other matters arising under the Agreement (the "**General Panel**");
- (b) each of the Design and Construction Panel and the OMR Panel shall consist of three experts, each of whom shall have experience:
 - (i) to serve on the Design and Construction Panel, with design or construction, or both; and

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- (ii) to serve on the OMR Panel, with any or all of operations, maintenance or rehabilitation,

and who shall be jointly appointed by the Province and the Concessionaire within 90 days following the Effective Date;

- (c) the General Panel shall consist of three experts (at least one of whom shall be a barrister and solicitor duly licensed to practice law in the Province of British Columbia and one of whom shall be a member in good standing of the Institute of Chartered Accountants of British Columbia) who shall be jointly appointed by the Province and the Concessionaire within 90 days following the Effective Date;
- (d) if any member of a Panel resigns, dies or otherwise withdraws from the Panel at any time during the Term, a replacement expert shall be appointed to the relevant Panel by the Province and the Concessionaire as soon as practicable thereafter; and
- (e) if the parties fail to agree on the identity of any expert to be appointed to any of the Panels within the 90 day period following the Effective Date or within a reasonable time pursuant to Section 3.2(d) of this Schedule, a party may apply to the BCICAC or to a judge of the Supreme Court of the Province of British Columbia for appointment of such expert, in which case the BCICAC or such Court shall appoint the expert at the earliest opportunity from the list of potential experts submitted by the parties or, if a party fails to submit its list of potential experts within seven Business Days, the BCICAC or such Court may appoint such person as expert who meets the requirements set out in this Schedule for qualifications and experience of the relevant expert.

3.3 Retention Payments to Expert Panel Members

The Concessionaire shall be responsible for the payment of retention payments to the members of the Panels, in such amounts and at such times as determined by the parties, each acting reasonably.

3.4 No Conflict for Expert

Unless the parties otherwise agree, no person shall be nominated or appointed to act as a member of any of the Panels who is or at any time has been involved or interested in the conduct of:

- (a) any of the Project Work on behalf of the Concessionaire or any of its Principal Contractors or Subcontractors; or
- (b) the Project on behalf of the Province,

including but without restricting the generality of the foregoing as a shareholder or any of its or their Affiliates.

3.5 Selection of Expert

An Expert shall be selected to resolve a particular dispute from the Panels established pursuant to Section 3.2 [Expert Panels] of this Schedule as follows:

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- (a) the party that issues the Expert Dispute Notice shall designate in such notice the relevant Panel from which the Expert is to be selected;
- (b) when the Design and Construction Panel or the OMR Panel is designated as the relevant Panel by the party that issues the Expert Dispute Notice, the Expert shall be selected by agreement of the parties from such Panel no later than five Business Days following delivery of the Expert Dispute Notice, provided that, if the parties cannot agree on the Expert, the Expert shall be selected on a rotational basis from such Panel;
- (c) when the General Panel is designated as the relevant Panel by the party that issues the Expert Dispute Notice, such party shall designate in the Expert Dispute Notice a member of the General Panel (having qualifications and experience relevant to the issues in the particular dispute for which the Expert is appointed) to serve as Expert; and
- (d) if a party that did not issue the Expert Dispute Notice does not agree with the choice of Panel, or with the choice of member of the General Panel pursuant to Section 3.5(c) of this Schedule, designated in the Expert Dispute Notice, it may, by notice in writing delivered to the other parties and to the members of the General Panel within five Business Days following delivery of the Expert Dispute Notice, refer the matter for resolution by an Expert drawn on a rotational basis from the General Panel (provided that in no circumstance shall the member of the General Panel designated as Expert in the Expert Dispute Notice resolve any disagreement regarding the choice of himself or herself as Expert), whose decision in relation to such disagreement must be delivered within three Business Days of delivery of such notice. Any such decision shall be final and binding on the parties and not subject to appeal, arbitration, litigation or any other dispute resolution process.

3.6 Procedure for Expert Review

The Expert selected pursuant to Section 3.5 [Selection of Expert] of this Schedule shall determine the appropriate process for timely and cost effective resolution of the dispute and, without limiting the generality of the foregoing, the Expert has discretion to, among other things:

- (a) solicit submissions and documents from the parties, and impose deadlines for the receipt of such submissions;
- (b) require some or all of the evidence to be provided by affidavit;
- (c) direct the parties or either of them to prepare and provide the Expert with such documents, test results or other things as the Expert may require to assist the Expert in the resolution of the dispute and rendering of a decision;
- (d) require a party to supply or prepare for examination by the Expert and the other parties any document or written or oral information or evidence the Expert considers necessary;
- (e) inspect the Project Site and Project Infrastructure, giving reasonable notice to each party of the time when, and the place where, the Expert intends to conduct any inspection;

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- (f) convene meetings of the parties to have the parties discuss the issues in dispute in the presence of the Expert;
- (g) take, or require any party to take and provide to the Expert, such measurements, make such calculations, perform such tests, audit such processes and procedures, and take any and all such other measures and steps as the Expert considers necessary to make a final determination in the dispute; and
- (h) seek advice from one or more of the Panels or any other qualified independent professional advisors in respect of the dispute.

3.7 Decision of Expert

The Expert shall render a decision as soon as possible and, in any event, shall use all reasonable efforts to render a decision no later than 10 Business Days after the date of selection of the Expert, or such longer period of time as agreed to in writing by the parties, acting reasonably. The Expert shall give reasons or a summary of reasons for the Expert's decision.

3.8 Confidentiality of Expert

The Expert shall keep all information about the dispute confidential and shall not disclose that information to anyone other than the parties and, as required, representatives and advisors of each of them, on an as-needed basis.

3.9 Costs of Expert Review

Notwithstanding Section 9.1 [Indemnification by Concessionaire], Section 9.5 [Indemnification by the Province] and Section 9.6 [Limited Indemnity for Existing Contamination], or any other provision of this Agreement, each party shall bear its own costs of the process for resolution of the dispute by the Expert (including all legal fees and expenses). The parties shall share equally, and be responsible for their respective share of, all costs of the Expert as and when due.

3.10 Decision of Expert

The Expert's determination shall be final and binding on the parties unless and until revised, cancelled, varied or overturned by an Arbitrator or Court in accordance with the provisions of this Schedule, and each of the parties expressly waives all rights of appeal in connection with the Expert's decisions except as expressly provided in this Schedule.

**PART 4
REFERRAL TO ARBITRATION**

4.1 Referral to Arbitration

A party (the "**Initiating Party**") may commence arbitration proceedings in respect of a dispute by giving a written notice (the "**Arbitration Dispute Notice**") to another party (the "**Responding Party**") requiring that the dispute be resolved by arbitration proceedings in accordance with this Part in the following circumstances:

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- (a) a dispute has arisen between the parties in relation to a decision of the Independent Certifier;
- (b) a dispute has arisen between the parties other than in relation to a decision of the Independent Certifier and either:
 - (i) the parties have referred the dispute for resolution through reference to an Expert pursuant to Part 3 [Referral to Expert] of this Schedule, and the amount awarded by the Expert to a party is more than the following amounts or the result of the Expert's determination results in a party doing or not doing something that has a value or consequence to that party or to another party that is, in the reasonable opinion of the Initiating Party, more than the following amounts:
 - (A) \$500,000 (index linked) in the aggregate; or
 - (B) \$100,000 (index linked) per year, in the case of a decision by the Expert that would result in either a recurring annual cost or saving (for a period of at least five years) to the Province or a recurring annual cost or saving (for a period of at least five years) to the Concessionaire,or the determination by the Expert involves issues other than monetary claims by one party against another party that the Initiating Party reasonably believes are material and significant to the Initiating Party; or
 - (ii) all parties have waived their right to resolve the dispute through reference to an Expert pursuant to Part 3 [Referral to Expert] of this Schedule and in the reasonable opinion of the Initiating Party the dispute would, if it had been referred to an Expert pursuant to Part 3 [Referral to Expert] of this Schedule, have met the criteria for referral to arbitration as set out in Section 4.1(b)(i) of this Schedule; or
- (c) the parties agree in writing in any other circumstances to refer a dispute to be resolved by arbitration in accordance with this Part.

The Arbitration Dispute Notice shall identify the nature of the dispute, the determination of the Expert or the Independent Certifier (where applicable) that is to be the subject of the arbitration, and any amount involved and the remedy sought.

4.2 Initiation of Court Proceedings rather than Arbitration

- (a) If the amount in respect of a specific dispute, as determined by a party in accordance with Section 4.1(b)(i)(A) or Section 4.1(b)(i)(B) of this Schedule, is greater than \$2,000,000 (index linked) or \$400,000 (index linked), respectively:
 - (i) such party may, instead of issuing an Arbitration Dispute Notice pursuant to Section 4.1(b) of this Schedule in respect of such dispute, give to another party written notice that it will initiate a proceeding in a Court to resolve the dispute in accordance with Section 5.1(a) of this Schedule; or

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- (ii) the Responding Party may, within 10 Business Days of receipt of an Arbitration Dispute Notice pursuant to Section 4.1(b) of this Schedule in respect of such dispute, give written notice to the Initiating Party that it vetoes the referral of the dispute to be resolved by arbitration in accordance with this Part, and may initiate a proceeding in a Court to resolve the dispute in accordance with Section 5.1(b) of this Schedule.
- (b) If the Responding Party issues a notice to the Initiating Party pursuant to Section 4.2(a)(ii) of this Schedule then, unless the Initiating Party gives written notice to the Responding Party within 10 Business Days that it will initiate a proceeding in a Court to resolve the dispute in accordance with Section 5.1(c) of this Schedule, the Initiating Party shall have no further access to any appeal, arbitration, litigation or other dispute resolution process in respect of such dispute without the express agreement of the Responding Party.

4.3 Commercial Arbitration Act

If a dispute is referred to arbitration pursuant to this Part, the *Commercial Arbitration Act* (British Columbia) and the rules of the BCICAC shall apply to any arbitration conducted hereunder except to the extent that its provisions are modified by the express provisions of this Part or by agreement of the parties.

4.4 Appointment of Arbitrator

- (a) Within 15 Business Days following receipt of an Arbitration Dispute Notice by the Responding Party under Section 4.1 [Referral to Arbitration] of this Schedule, and subject to the Responding Party exercising its veto pursuant to Section 4.2(a) of this Schedule, the Initiating Party and the Responding Party shall designate a single arbitrator acceptable to both of them.
- (b) If the parties fail to appoint such a single arbitrator within the period of time and in the circumstances set out in Section 4.4(a) of this Schedule, the following procedure shall apply:
 - (i) The Initiating Party shall, by written notice to the Responding Party, appoint an arbitrator.
 - (ii) The Responding Party shall, within 10 Business Days following receipt of such notice, appoint an arbitrator by written notice to the Initiating Party, and the two arbitrators so appointed shall select a third arbitrator acceptable to both of them.
 - (iii) If the Responding Party fails to appoint an arbitrator within such period of time (or such additional period of time as the parties may agree), the Initiating Party may appoint an arbitrator on behalf of the Responding Party and the Initiating Party is hereby appointed the agent of the Responding Party for such purpose.
 - (iv) If the two arbitrators so appointed are unable to agree upon the third arbitrator within 10 Business Days following the appointment of the arbitrator by (or on behalf of) the Responding Party, a party may apply under the *Commercial*

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Arbitration Act (British Columbia) to a judge of the Supreme Court of the Province of British Columbia to appoint the third arbitrator, and the provisions of the *Commercial Arbitration Act* (British Columbia) shall govern such appointment.

4.5 No Conflict for Arbitrator

Unless the parties otherwise agree, no person may be nominated or appointed to act as a single arbitrator or as part of a panel of arbitrators pursuant to Section 4.4 [Appointment of Arbitrator] of this Schedule (the “**Arbitrator**”) who:

- (a) is or at any time has been involved or interested in the conduct of:
 - (i) any of the Project Work on behalf of the Concessionaire or any of its Principal Contractors or Subcontractors; or
 - (ii) the Project on behalf of the Province,

including but without restricting the generality of the foregoing as a shareholder or any of its or their Affiliates; or
- (b) is a present or former member of any Panel.

4.6 Qualifications of Arbitrator

The Arbitrator shall have appropriate qualifications by profession or occupation to decide the matter in dispute.

4.7 No Discovery

There shall be no oral discovery unless otherwise ordered by the Arbitrator.

4.8 Meetings and Hearings of Arbitrator

Meetings and hearings of the Arbitrator shall take place in Vancouver, British Columbia or in such other place as the parties may agree. Subject to the foregoing, the Arbitrator may at any time fix the date, time and place of meetings and hearings in the arbitration and shall give the parties adequate notice thereof. All meetings and hearings shall be in private unless the parties otherwise agree, and each party may be represented at any meetings or hearings by legal counsel. Each party may examine and re-examine its witnesses and cross-examine those of the other parties at the arbitration.

4.9 Inadmissibility of Prior Decisions

- (a) If a party is entitled to refer a decision of an Expert under Part 3 [Referred to Expert] of this Schedule to arbitration pursuant to Section 4.1 [Referral to Arbitration] of this Schedule or otherwise to initiate or pursue any dispute resolution process, appeal or legal proceeding, then, subject to Section 4.9(b) of this Schedule or unless the parties otherwise expressly agree in writing:

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- (i) all submissions prepared by a party in connection with any proceedings involving the Expert and all information, documents, notes and records prepared by the Expert and all decisions and determinations of the Expert shall be confidential and inadmissible in any arbitration or other such dispute resolution process, appeal or legal proceeding; and
- (ii) all submissions prepared by a party in connection with any proceedings involving the Arbitrator and all information, documents, notes and records prepared by the Arbitrator and all decisions and determinations of the Arbitrator shall be confidential and inadmissible in any other such dispute resolution process, appeal or legal proceeding.
- (b) The restrictions on admissibility set out in Section 4.9(a) of this Schedule shall not apply to any appeal or litigation permitted pursuant to Section 4.11 [Limitation on Appeal of Arbitrator's Decision] of this Schedule.
- (c) Nothing herein shall prevent the tendering of the same oral or written evidence before a proceeding adjudicated by an Expert and a proceeding adjudicated by an Arbitrator.
- (d) Neither any Expert nor any Arbitrator may be required to testify or otherwise be compellable in or in connection with any dispute resolution process, litigation, arbitration, appeal or legal proceeding.

4.10 Decision of Arbitrator

Subject to the provisions of the *Commercial Arbitration Act* (British Columbia), the Arbitrator shall send a decision in writing to the parties within 30 Business Days following the conclusion of all hearings referred to in Section 4.8 [Meetings and Hearings of Arbitrator] of this Schedule unless such period of time is extended for a fixed period by the Arbitrator on written notice to each party because of illness or other cause beyond the Arbitrator's control and, unless the parties otherwise agree, shall state the reasons for the decision. If the Arbitrator is a panel, the decision of the majority of the panel shall be deemed to be the decision of the Arbitrator.

4.11 Limitation on Appeal of Arbitrator's Decision

- (a) Subject only to Section 4.11(b) of this Schedule, the decision of the Arbitrator shall be final and binding on the parties and not subject to any appeal, further arbitration, litigation or any other dispute resolution process, and each of the parties expressly waives all rights of appeal in connection with the Arbitrator's decision except as expressly provided in Section 4.11(b) of this Schedule.
- (b) A party may appeal a decision of the Arbitrator if:
 - (i) it is alleged that the Arbitrator has not followed the rules and procedures in this Schedule in good faith or has not proceeded in accordance with the principles of natural justice, in which case a party may appeal the decision in that regard pursuant to the provisions of the *Commercial Arbitration Act* (British Columbia);

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- (ii) the decision results in an award in excess of \$5,000,000 (index linked), in which case the decision of the Arbitrator may be appealed on a question of fact or on a question of mixed fact and law where permitted pursuant to the provisions of the *Commercial Arbitration Act* (British Columbia); or
- (iii) the decision is alleged to have been based upon an error in law, in which case a party may appeal the decision in that regard pursuant to the provisions of the *Commercial Arbitration Act* (British Columbia).

4.12 Arbitrator's Powers

The object of an arbitration hereunder is to ensure the just, expeditious, economical and final determination of the dispute. Without limiting the jurisdiction or powers of the Arbitrator under the *Commercial Arbitration Act* (British Columbia), a submission to arbitration hereunder shall confer on the Arbitrator the jurisdiction and power to:

- (a) determine any question of law arising in the arbitration;
- (b) determine any question as to the Arbitrator's jurisdiction;
- (c) determine any question of good faith or dishonesty arising in the dispute;
- (d) order any party to furnish further details of its case, in fact or in law to another party;
- (e) proceed with the arbitration notwithstanding any failure or refusal of a party to comply with these provisions or with the Arbitrator's orders or directions or to attend any meeting or hearing, but only after giving such party reasonable notice that the Arbitrator intends to do so;
- (f) receive and take into account such written or oral evidence tendered by the parties as the Arbitrator determines is relevant, whether or not strictly admissible in law;
- (g) make one or more interim awards;
- (h) hold meetings and hearings and make a decision (including without limitation a final decision) in British Columbia or elsewhere with the concurrence of the parties;
- (i) order the parties to produce to the Arbitrator, and to each other for inspection, and to supply copies of, any books and records, documents, materials and other information in their possession or control which the Arbitrator determines to be relevant;
- (j) order the preservation or storage of any property or thing relevant to the subject matter of the arbitration under the control of either of the parties; and
- (k) include, as part of any award, the payment of interest at the Prime Rate from an appropriate date as determined by the Arbitrator.

The jurisdiction and powers referred to in this Section shall be exercised at the discretion of the Arbitrator subject only to applicable Laws and the provisions of the Agreement.

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4.13 Costs of Arbitration

Notwithstanding Section 9.1 [Indemnification by Concessionaire], Section 9.5 [Indemnification by the Province] and Section 9.6 [Limited Indemnity for Existing Contamination], or any other provision of this Agreement, each party shall bear its own costs of the process for resolution of the dispute by arbitration (including all legal fees and expenses). The parties shall share equally, and be responsible for their respective share of, all costs of the Arbitrator as and when due.

**PART 5
COURT PROCEEDINGS**

5.1 Court Proceedings

A party may initiate a proceeding in a Court to resolve a dispute between the parties in the following circumstances:

- (a) such party has given notice to another party of its intention to initiate proceedings in a Court in accordance with Section 4.2(a)(i) of this Schedule;
- (b) such party is the Responding Party and has exercised its veto in accordance with Section 4.2(a)(ii) of this Schedule;
- (c) such party is the Initiating Party and has given notice to the Responding Party of its intention to initiate proceedings in a Court in accordance with Section 4.2(b) of this Schedule;
- (d) such party is appealing a decision of the Arbitrator in accordance with Section 4.11(b) of this Schedule; or
- (e) such party is initiating a proceeding in a Court for the purpose of obtaining any emergency or provisional remedy to protect its rights that may be necessary and that is not otherwise available under this Agreement, including temporary and preliminary injunctive relief and restraining orders and the appointment of a receiver or receiver and manager, but excluding any dispute arising under Section 5.16 [Qualified Refinancing].

**PART 6
CONTINUING PERFORMANCE**

6.1 Compliance with Agreement

- (a) At all times, notwithstanding the existence of any dispute or the referral of any dispute for resolution under this Schedule, except as may otherwise be expressly provided in this Agreement, the parties shall continue to comply with, observe and perform all of their respective obligations (including the obligation of the Concessionaire to proceed with the conduct of the Project Work) in accordance with the provisions of this Agreement without prejudice to the right to contest, dispute and challenge the relevant matter in accordance with the provisions of this Agreement.

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- (b) To the extent that any such dispute involves a disagreement as to the nature or scope of any of the Project Work (including as to the performance or method of performance of any of the Project Work, but excluding any dispute arising under Section 5.16 [Qualified Refinancing]), the Concessionaire shall comply with all instructions given by the Province's Representative pending the outcome of the dispute, but without prejudice to the rights of the Concessionaire as ultimately determined in accordance with the Dispute Resolution Procedure.

6.2 Payment Disputes

The provisions of Section 10.8 [Payment of Disputed Amounts] shall apply in the event of the submission of a dispute as to the amount of monies owing by one party to another party to the Dispute Resolution Procedure in accordance with this Schedule.