

# Schedule E: WFO Service and Maintenance Agreement - LV

THIS AGREEMENT made this            day of            , 20

BETWEEN:            , hereinafter called the "Customer"

**AND: HYDRO OTTAWA LIMITED, hereinafter called the "Hydro Ottawa"**

**1. DESCRIPTION OF THE WORK** - Hydro Ottawa will undertake the work on equipment owned by the Customer in accordance with Schedule A (the "Work").

## **2. HYDRO OTTAWA'S WORK**

- (1) Hydro Ottawa shall undertake the Work on the basis of information provided by the Customer and as set out in Schedule D.
- (2) If Hydro Ottawa incurs any costs or expenses in the performance of any Work contemplated in the Agreement, resulting from any errors, omissions, defects or other problems contained in any information, materials and/or instructions provided to it by the Customer, the Customer shall pay to Hydro Ottawa an amount equal to Hydro Ottawa's reasonably incurred costs (including internal costs, fairly apportioned) and expenses incurred as a result thereof upon the receipt of an invoice from Hydro Ottawa.

**3. COMMENCEMENT DATE** - The date of the commencement of the Work will be a date mutually acceptable to both Hydro Ottawa and the Customer (Commencement Date). Notwithstanding the foregoing, the Commencement Date shall not be earlier than the date on which Hydro Ottawa receives from the Customer a certified cheque, bank draft, or duly authorized purchase order, if Hydro Ottawa so consents, for the full amount of the Estimate. Follow-up work by the Customer maybe required outside the scope of this work to ensure on-going reliability, standards/codes compliance, and clean-up.

## **4. CHANGES DURING CONSTRUCTION**

- (1) The Customer shall not vary the scope of the work, as outlined in Schedule A, on or after the Commencement Date, without first submitting such change in writing to Hydro Ottawa for approval ("Change Request").
- (2) A Change Request shall not be binding on Hydro Ottawa unless and until Hydro Ottawa has consented, in writing, to the change. In such case, Hydro Ottawa reserves the right to amend the terms of this Agreement including, but not limited to, charges for Hydro Ottawa's work, the estimate, warranty, and Schedule A.
- (3) Any Change Request accepted by the parties shall be incorporated into this Agreement as an addendum and shall be immediately invoiced by Hydro Ottawa. Such invoice is payable by the Customer upon receipt.

## **5. CHARGES FOR HYDRO OTTAWA'S WORK**

- (4) The charges (the "Applicable Charges") payable by the Customer for the performance of a Work Order under this Agreement shall be determined in accordance with the following terms and conditions:
- (5) There are two methods of payment available under this Agreement. The appropriate method of payment will be determined at the time the Work Order is submitted. The methods of payment are: (i) Cost of the Work Plus, which shall be payable in accordance with the payment schedule set out in the work order; or (ii) fixed price, exclusive of any applicable taxes.
- (6) For the purposes of this Section, "Cost of the Work Plus" means the Cost of the Work, as set out in subsection 5(3), plus the current Cost of the Work for project management services.
- (7) Cost of the Work shall include:
  - (a) wages and benefits paid for labour in the direct employ of Hydro Ottawa under applicable collective bargaining agreements;
  - (b) salaries, wages and benefits of Hydro Ottawa's personnel, when stationed at the field office, in whatever capacity employed; or personnel engaged at shops or on the road, in expediting the production or transportation of materials or equipment;
  - (c) salaries, wages and benefits of Hydro Ottawa's office personnel engaged in a technical capacity for the time spent in the performance of the Work;
  - (d) contributions, assessments or taxes incurred for such items as employment insurance, provincial or territorial health insurance, workers' compensation, and Canada or Quebec Pension Plan, insofar as such cost is based on wages, salaries or other remuneration paid to employees of Hydro Ottawa;
  - (e) travel and subsistence expenses of Hydro Ottawa personnel;
  - (f) the cost of materials, supplies, equipment, temporary services and facilities including transportation and maintenance thereof, which are consumed in the performance of the Work;
  - (g) the cost of all tools, machinery and equipment used in the performance of the Work, including installation, minor repairs and replacements, dismantling, removal, transportation and delivery cost thereof;

- (h) the amounts of all contracts or written agreements with subcontractors and suppliers and the costs to Hydro Ottawa that result from any subcontractors or supplier's insolvency or failure to perform;
  - (i) the cost of quality assurance such as independent inspection and testing services;
  - (j) the cost of removal and disposal of waste products and debris;
  - (k) the cost of removal or containment of toxic or hazardous substances;
  - (l) costs incurred due to emergencies affecting the safety of persons or property;
  - (m) charges levied by authorities having jurisdiction with respect to the Work;
  - (n) royalties, patent license fees, and damages for infringement of patents and cost of defending suits therefore subject always to Hydro Ottawa's obligations to indemnify the Customer as provided in Section 6;
  - (o) all taxes and duties for which Hydro Ottawa is liable in relation to the performance of the Work; and
  - (p) the cost of auditing when requested by the Customer.
- (8) Where the method of payment is Cost of the Work Plus, the estimated cost for providing the Work is as set out in Schedule B (the "Estimate").
  - (9) All estimates are based on the information available to Hydro Ottawa at the time of the estimate. Hydro Ottawa is in no way bound by the estimated amount, which is subject to change due to, but not limited to, fluctuations in the cost of materials and/or services, changes in the scope of work, and /or events beyond Hydro Ottawa's control. Charges for Hydro Ottawa's Work shall be based on the actual time spent and actual cost of the materials and services.
  - (10) Upon completion of the Work, Hydro Ottawa shall provide a final invoice to the Customer. If the amount of the final invoice exceeds the Estimate, then the Customer shall pay to Hydro Ottawa the difference within thirty days of the date of the invoice. If the amount in the final invoice is less than the Estimate, Hydro Ottawa will refund to the Customer the difference within thirty (30) days of the date of the invoice. .
  - (11) Should the Customer fail to pay any invoice when due, Hydro Ottawa will not be obligated to continue performance under this Agreement after ten days from the date of written notice to the Customer unless full payment is received within such time. All amounts payable under the Agreement that are not paid when due shall bear interest at a rate of 1.5% per month (19.56% per annum) and shall be calculated from the date payment is due up to and including the date of payment.
  - (12) Where the method of payment is Fixed Price, the amount payable by the Customer shall be as set out in Schedule C.
- ## **6. INDEMNIFICATION AND LIABILITY**
- (1) The parties will indemnify, defend and hold harmless each other, their Affiliates and each of their directors, officers, employees, contractors, consultants, affiliates and agents from and against all third-party claims, demands, suits, causes of action, awards, judgments and liabilities, reasonable lawyers' fees and costs (collectively "**Claims**") arising out of: (a) the failure of the other party, its employees, agents or other person operating on its behalf to observe or perform any duties or obligations of the other party under this Agreement; (b) the failure of the other party, its employees, agents or other person operating on its behalf to observe or perform any duties under any third party agreement; (c) an actual or alleged infringement or violation of third party intellectual property rights; or (d) the intentional or negligent acts of the other party, its employees, agents or other person operating on its behalf.
  - (2) In no event shall either party be liable to the other party for special, indirect, incidental, consequential, or punitive damages, including without limitation, damages for loss of profits, loss of use, business interruption, loss of data or other pecuniary loss, even if the parties has been advised of the possibility of such damages.
- ## **7. TERMINATION**
- (1) Subject to the termination rights contained in this Agreement, and subject to the survival of provisions that may properly be construed to continue to apply after expiration or termination of this Agreement, this Agreement shall terminate on the date that Hydro Ottawa advises the Customer in writing that the Work is complete in accordance with Schedule A.
  - (2) This Agreement shall automatically terminate without notice, act or formality, effective immediately if the Customer becomes insolvent, makes a general assignment for the benefit of creditors, permits a Receiver to be appointed for its business or assets or becomes subject to any proceedings under the *Bankruptcy and Insolvency Act* or any statute of any provinces, state or other jurisdiction relating to insolvency or the protection of creditor's rights.
  - (3) Hydro Ottawa may terminate this Agreement is the Customer fails to make any payment if such failure is not remedied within five (5) days after written notice of such failure from Hydro Ottawa.
  - (4) Any termination pursuant to subsections (2) and (3) shall be without prejudice to the rights accruing and remedies subsisting under this Agreement at the date of such termination. In addition, Hydro Ottawa shall be entitled to obtain damages

from the Customer for any losses incurred as a result of the termination. Furthermore, in addition to its rights of set-off available to it under this Agreement or at law, Hydro Ottawa may hold back payment or set-off its obligation to make such payment against any payments owed to it if the Customer fails to comply with its obligations on termination.

8. **FORCE MAJEURE** – No party will be liable for any default or delay in the performance of its obligations under this Agreement if and to the extent such default or delay is caused, directly or indirectly, by fire, flood, earthquake, elements of nature or acts of God, epidemics, pandemics, riots, civil disorders, political instability, work stoppages, strikes, lock-outs, embargoes or any other cause beyond the reasonable control of such party; provided the non-performing party is without fault in causing such default or delay.

9. **WARRANTY**

- (1) Hydro Ottawa warrants that, for a period of ninety (90) days from the date of notice of completion in accordance with subsection 7(1), the Work shall, under normal use and service, be free from defects in material and workmanship, and materially conform to Schedule A. However, Hydro Ottawa makes no warranty that any equipment or software will operate uninterrupted or error free. Any services provided shall be materially performed in accordance with Hydro Ottawa standards, or in the absence of such standards, in a professional and workmanlike manner. However, notwithstanding the foregoing, for equipment not manufactured by Hydro Ottawa and software not owned by Hydro Ottawa (collectively, "Third Party Products"), Hydro Ottawa agrees in lieu of its warranty obligation described above, to instead pass through to the Customer, to the extent possible, the warranty provided by the manufacturer of such Product.
- (2) If any Work is not as warranted in this Section, then Hydro Ottawa, may at its sole option, repair, replace, or correct the Work. If Hydro Ottawa determines that the Work was operating in conformance with its applicable warranty, Hydro Ottawa may charge the Customer for error identification or correction efforts, repair, replacement and shipment costs at Hydro Ottawa's then current rates.
- (3) If any Work is repaired, replaced or corrected, then the warranty period shall continue for the longer of (a) the remainder of the warranty period otherwise applicable, or (b) ninety (90) days after the date of the repair, replacement, or correction. If, Hydro Ottawa determines that it cannot, in a commercially reasonable manner repair, replace or correct, then Hydro Ottawa may, in its sole discretion, refund to the Customer the charges for Hydro Ottawa's Work, less a reasonable adjustment for beneficial use.
- (4) Notwithstanding any provision of this Agreement to the contrary, Hydro Ottawa shall have no obligation to repair, replace, or correct any Work if:
  - (a) the Work has been modified, repaired or reworked by anyone other than Hydro Ottawa, and/or
  - (b) the defect is the result of:

- (i) any improper storage, handling or use by anyone other than Hydro Ottawa,
- (ii) failure to provide a suitable climatic environment,
- (iii) operator error,
- (iv) improper installation by anyone other than Hydro Ottawa,
- (v) any use of the Product in conjunction with another product not supplied by Hydro Ottawa hereunder
- (vi) products supplied by Hydro Ottawa that have had their original manufacturer's serial numbers altered, defaced or deleted
- (vii) consumable items such as fuses, and defects arising from normal wear and tear; and/or
- (viii) any damage caused by power failure, fire, explosion or any act of God or other cause beyond Hydro Ottawa's control.

The warranties set forth in this Section are nontransferable.

(5) Notwithstanding any provision of this agreement to the contrary, the provisions of this Section constitute the Customer's sole and exclusive remedy and Hydro Ottawa's sole and exclusive liability with respect to any defective product, deliverable or services. Except as otherwise expressly provided in this section, Hydro Ottawa makes no representation, warranty, covenant or condition of any kind, by statute, usage, custom of the trade or otherwise, with respect to any product, deliverable or services, and Hydro Ottawa disclaims any and all implied warranties relating thereto, including, but not limited to, any and all implied warranties of non-infringement, merchantability or fitness for any intended or particular purpose.

8. **ENTIRE AGREEMENT** - The terms and conditions set forth in this Contract constitute the full and final expression of the contract in respect of the Work, and all matters contemplated in this Contract, and supersedes all prior quotations, purchase orders, correspondence or communications whether written or oral between the Customer and Hydro Ottawa. Notwithstanding any contrary language in the Customer's purchase order, correspondence or other form of acknowledgement, the Customer shall be bound by this Contract. **ANY ADDITIONAL OR ANY DIFFERENT TERMS ARE REJECTED UNLESS EXPRESSLY AGREED TO IN WRITING BY BOTH THE HYDRO OTTAWA AND THE CUSTOMER.**

9. No amendment or waiver of any provision of this Contract shall be binding on either party unless consented to in writing by such party. No waiver of any provision of this Contract shall constitute a waiver of any other provision, nor shall any waiver constitute a continuing waiver, unless otherwise provided.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seal or affixed their corporate seals under the hands of their proper signing officers authorized in that behalf, as the case may be

\_\_\_\_\_  
Name:  
Title:  
Date:

I have authority to bind the

OR

**Customer**

\_\_\_\_\_  
Name:  
Title:  
Date:

I have authority to bind the

**Witness**

\_\_\_\_\_  
Name:  
Date:

**Hydro Ottawa Limited**

\_\_\_\_\_  
Name:  
Date: