

BC HYDRO SITE C CLEAN ENERGY PROJECT

GENERATING STATION AND SPILLWAYS CIVIL WORKS CONTRACT

for the Site C Clean Energy Project

Schedule 14

Dispute Resolution Procedure

GENERATING STATION AND SPILLWAYS CIVIL WORKS CONTRACT

SCHEDULE 14

DISPUTE RESOLUTION PROCEDURE

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SCHEDULE 14

DISPUTE RESOLUTION PROCEDURE

1 INTERPRETATION

1.1 Definitions

In this Schedule 14 [Dispute Resolution Procedure], in addition to the definitions set out in Schedule 1 [Definitions and Interpretation]:

“**BCICAC**” has the meaning set out in Section 2.11(a) of this Schedule 14 [Dispute Resolution Procedure];

“**Dispute**” means any disagreement, failure to agree or other dispute between BC Hydro and the Contractor arising out of or in connection with this Contract, including in respect of the interpretation, breach, performance, validity or termination of this Contract, whether in the law of contract or any other area of law;

“**Dispute Notice**” has the meaning set out in Section 2.2 of this Schedule 14 [Dispute Resolution Procedure];

“**Dispute Resolution Procedure**” has the meaning set out in Section 2.1 of this Schedule 14 [Dispute Resolution Procedure];

“**Referee**” has the meaning set out in Section 2.6 of this Schedule 14 [Dispute Resolution Procedure];

“**Referee Agreement**” has the meaning set out in Section 2.7(b) of this Schedule 14 [Dispute Resolution Procedure];

“**Referee Notice**” has the meaning set out in Section 2.6 of this Schedule 14 [Dispute Resolution Procedure];

“**Settlement Agreement**” has the meaning set out in Section 2.4 of this Schedule 14 [Dispute Resolution Procedure]; and

“**Settlement Meeting**” has the meaning set out in Section 2.4 of this Schedule 14 [Dispute Resolution Procedure].

2 DISPUTE RESOLUTION PROCEDURE

2.1 Dispute Resolution Procedure

Except as expressly provided otherwise in the Contract, including in this Schedule 14 [Dispute Resolution Procedure], or unless both parties otherwise agree in writing, all Disputes will be resolved in accordance with the procedure set out in Section 2 of this Schedule 14 [Dispute Resolution Procedure] (the “**Dispute Resolution Procedure**”), and for certainty a party will not be entitled to adopt or enforce a procedure to settle a Dispute that varies from the Dispute Resolution Procedure without the express written consent of the other party.

2.2 Commencement of Dispute Resolution Procedure - Dispute Notice

The Dispute Resolution Procedure to settle a Dispute will be invoked and started by the delivery by either party of written notice to the other party (the “**Dispute Notice**”) that at a minimum sets out the nature and extent of the Dispute and the remedy or relief sought. A Dispute Notice will include:

- (a) a summary of the pertinent facts relating to the Dispute, and include supporting documentation, if any, as may be available;
- (b) a statement of the remedy or relief (such as amount of payment or adjustment to the time for the performance of the Work) sought by the disputing party in settlement of the Dispute; and
- (c) a summary of the applicable provisions of the Contract relevant to the Dispute, or other grounds on which the disputing party relies, as the basis of the Dispute.

2.3 Reply

Upon receipt of a Dispute Notice, the receiving party may, at its election, deliver a written reply to the disputing party setting out the receiving party’s counter-arguments with respect to the Dispute, but for certainty a written reply to a Dispute Notice is not a requirement of the Dispute Resolution Procedure.

2.4 Settlement Meeting

Within 20 days after receipt of the Dispute Notice by the receiving party, or such other time as the parties may agree in writing, the Dispute will, if not already settled by a written agreement signed by both parties (the “**Settlement Agreement**”), be referred to a senior representative(s) of each of the parties who, to the extent reasonably practicable, have not been previously involved in the events leading to the Dispute for a settlement meeting (a “**Settlement Meeting**”) to occur within such 20 day period. Representatives of the parties will make good faith efforts to resolve the Dispute by without prejudice negotiations. Either party may provide to the other party proposals or other information at any time and on a with prejudice basis in its discretion.

2.5 Additional Settlement Meetings

If a Dispute is not settled by a Settlement Agreement after an initial Settlement Meeting held in accordance with Section 2.4 of this Schedule 14 [Dispute Resolution Procedure], then, without extending the time limit set out in Section 2.10 of this Schedule 14 [Dispute Resolution Procedure], BC Hydro may, in its discretion, direct in writing that an additional Settlement Meeting or Settlement Meetings be convened at which BC Hydro will be represented by a new representative(s). The Contractor will use reasonable commercial efforts to attend and participate in any additional Settlement Meetings as directed by BC Hydro under this Section 2.5.

BC Hydro will give consideration to a request from the Contractor for an additional Settlement Meeting or Settlement Meetings and for specific BC Hydro representatives to be in attendance at such Settlement Meetings, but BC Hydro will not be obligated to agree to attend an additional Settlement Meeting or Settlement Meetings requested by the Contractor nor to bring the BC Hydro representative as may be requested by the Contractor.

2.6 Referee Notice

If the Dispute is not settled by a Settlement Agreement within the earlier of:

- (a) 20 days following the initial Settlement Meeting held in accordance with Section 2.4 of this Schedule 14 [Dispute Resolution Procedure]; or

(b) 40 days after receipt of the Dispute Notice by the receiving party,

then, unless both parties agree in writing to a time extension, either party may by notice to the other (a "**Referee Notice**"), request the appointment of a referee (a "**Referee**") as provided under the terms of Section 2.7 of this Schedule 14 [Dispute Resolution Procedure].

2.7 Appointment and Engagement of Referee

The Referee will be appointed and retained by the parties as follows:

- (a) unless both parties otherwise agree, the parties will appoint a Referee as follows:
- (i) within two Business Days of the delivery of a Referee Notice, each party will submit in writing to the other party, the names of no more than two candidates for Referee from the Referee Panel listed on Appendix 14-1 [Referee Panel] to this Schedule 14 [Dispute Resolution Procedure], each of whom:
 - (A) is independent of the parties;
 - (B) is immediately available to perform the role of Referee in respect of the Dispute at hand; and
 - (C) has not been previously involved with the Dispute;
 - (ii) if a party has an objection to a candidate, it will give written notice of such objection with reasons to the other party; and
 - (iii) if for any reason within three Business Days of the delivery of a Referee Notice, a Referee meeting the criteria set out in Section 2.7(a)(i) of this Schedule 14 [Dispute Resolution Procedure] has not been appointed, then either party may request the British Columbia International Commercial Arbitration Centre to promptly appoint the Referee; and
- (b) no later than two Business Days after the Referee's appointment, the parties will enter into an agreement with the Referee generally in the form attached to this Schedule 14 [Dispute Resolution Procedure] as Appendix 14-2 [Referee Agreement] (the "**Referee Agreement**"). If a party fails or refuses to enter into the Referee Agreement without lawful excuse, that party will be deemed to have entered into and delivered the Referee Agreement to the other party and the Referee. The Referee's fees and expenses will be shared equally by BC Hydro and the Contractor. BC Hydro will pay the full amount of the Referee's fees and expenses on the day that such fees and expenses are due (including any advances on fees and expenses) in accordance with the Referee Agreement and the Contractor will pay to BC Hydro the Contractor's share of all such fees and expenses within five Business Days of receipt of a written demand from BC Hydro, failing which BC Hydro will be entitled to deduct the amount of the Contractor's share of the Referee's fees and expenses from amounts otherwise payable by BC Hydro to the Contractor under the Contract. If BC Hydro fails to pay the Referee, the Contractor will be entitled to pay the sums due to the Referee and to recover such sums from BC Hydro (including by setting off such sums against any amounts due by the Contractor to BC Hydro under the Contract).

2.8 Referee Procedure

The Referee will proceed as follows:

- (a) the Referee will conduct an impartial review of the Dispute which is subject to a Dispute Notice in such manner, and according to a procedure, as the Referee may decide, including carrying out

site inspections and interviews with any persons identified by the Referee. The parties will comply with all reasonable requests from the Referee for additional information, documents and access to personnel as the Referee may decide is required. Any submission or documentation in respect of the Dispute provided to the Referee by a party will also be provided to the other party;

- (b) the Referee will not be required to conduct enquiries in the presence of representatives of either or both parties or to receive submissions from the parties. The Referee may invite submissions from only one party. The Referee may deliver a decision notwithstanding the failure or refusal of a party to cooperate with the Referee or participate in the proceedings as conducted by the Referee;
- (c) the Referee may, with the written approval of both parties, retain other professional persons or experts to assist with the review, and will give reasonable consideration to a request by the parties that the Referee retain such other professional persons or experts;
- (d) within 10 Business Days of the execution of the Referee Agreement by the Referee and both parties (or the deemed execution of the Referee Agreement as the case may be), or such longer period of time as both parties may agree in writing, acting reasonably, considering any recommendations by the Referee with respect to timing for the delivery of a decision, the Referee will render a brief, written, reasoned and impartial decision on the Dispute, with copies to both parties;
- (e) each party acknowledges the value of having the Referee render a timely decision regarding the Dispute. If the Referee is unable to render his decision within the time period described in Section 2.8(d) of this Schedule 14 [Dispute Resolution Procedure], or as extended by the mutual agreement of the parties, then the Referee will within such time provide to the parties such analysis of the Dispute as the Referee is able to complete within that time, together with a description of the remaining work required to arrive at a reasoned decision;
- (f) the proceedings under Section 2.8 of this Schedule 14 [Dispute Resolution Procedure], all information, data or documentation disclosed or delivered by either party to the other party under these proceedings, or to the Referee as a result or in connection with his duties as Referee, and the decision of the Referee (and any other information issued by the Referee), will be treated as strictly confidential, and not disclosed to any third party without the prior written consent of the parties, and the parties will jointly instruct the Referee to maintain the strictest confidentiality of the proceedings, evidence and his or her decision (and any analysis and description);
- (g) neither party will be entitled to refer to, or enter into evidence, the decision of the Referee, or other information issued by the Referee, or any information that was prepared for the express purpose of submission to, or assistance of, the Referee, or to call on the Referee to provide any evidence, in any subsequent proceeding without the consent of the other party and the Referee; and
- (h) nothing contained in Section 2.8 of this Schedule 14 [Dispute Resolution Procedure] will prevent the submission in any subsequent proceedings of any evidence related to the Dispute, provided that neither party will submit in any subsequent proceedings any evidence that came into existence for the express purpose of submission to, or the assistance of, the Referee.

2.9 Referee's Decision Binding But Not Final

The decision of the Referee on the Dispute will have effect as follows:

- (a) subject to and without derogating from Section 3.4 of this Schedule 14 [Dispute Resolution Procedure], the decision will, when rendered and delivered to both parties, be immediately binding on both parties, and both parties will forthwith give effect to the decision, and the decision

will remain binding unless and until altered or varied by a Settlement Agreement or by proceedings commenced in respect of the Dispute under Section 2.10 of this Schedule 14 [Dispute Resolution Procedure]; and

- (b) if, within 30 days of receipt of the decision by both parties:
- (i) the decision is not altered or varied by a Settlement Agreement; or
 - (ii) proceedings have not been commenced in respect of the Dispute under Section 2.10 of this Schedule 14 [Dispute Resolution Procedure],

then the decision will be final and may not be appealed by either party on any grounds.

2.10 Commencement of Proceedings Regarding the Dispute

If:

- (a) the Referee's decision on the Dispute is not rendered within the time period described in Section 2.8(d) of this Schedule 14 [Dispute Resolution Procedure]; or
- (b) within 90 days after receipt of the Dispute Notice by the receiving party:
 - (i) the Dispute is not completely settled by a Settlement Agreement; or
 - (ii) the Referee's decision on the Dispute is not final as described in Section 2.9(b) of this Schedule 14 [Dispute Resolution Procedure],

then upon written notice of either party delivered to the other party, the Dispute will be submitted to arbitration pursuant to Section 2.11 of this Schedule 14 [Dispute Resolution Procedure]. Any Dispute decided by the Referee under Section 2.8 of this Schedule 14 [Dispute Resolution Procedure] and subsequently referred to arbitration under Section 2.11 of this Schedule 14 [Dispute Resolution Procedure] will be decided on a de novo basis and will not be, or considered to be, an appeal of the Referee's decision.

Without limiting Section 2.1 of this Schedule 14 [Dispute Resolution Procedure], in any such arbitration proceedings the scope of issues will not be limited strictly to the terms of the Dispute Notice, but may extend to include other matters in dispute that are related to the Dispute.

2.11 Arbitration

A Dispute submitted to arbitration will be conducted as follows:

- (a) the parties will, within ten days of submission, attempt to agree upon a single arbitrator who is available to act as arbitrator in the Dispute. Unless the parties otherwise agree, such arbitrator will be chosen from the panel list of arbitrators maintained by the British Columbia International Commercial Arbitration Centre (the "**BCICAC**");
- (b) if the parties cannot agree on an arbitrator within such ten day period, then either party may apply to a judge of the Supreme Court of British Columbia to have a single arbitrator appointed;
- (c) the arbitration will be conducted in accordance with the appropriate rules of the BCICAC;
- (d) the place of the arbitration will be Vancouver, British Columbia. The language of the arbitration will be English;

- (e) the arbitrator will endeavour to convene a hearing within 90 days of being nominated, and to complete the arbitration and render an award within 150 days of such nomination. The arbitrator may, in his or her discretion, on application of either party or on the motion of the arbitrator, extend either or both of the time periods referred to in this Section 2.11(e), and such discretion may be exercised both before and after any such time period, or extended time period, has expired;
- (f) the arbitrator will conduct the arbitration in a cost effective manner and on an expedited basis, having regard for the subject matter of the Dispute;
- (g) subject to the arbitrator's ruling on costs:
 - (i) the cost of the arbitrator and other administrative costs of the arbitration will be shared equally between the parties; and
 - (ii) each party will bear its own costs incurred in participating in the arbitration;
- (h) except as expressly set out otherwise in the Contract, any award by the arbitrator will be final and binding upon the parties and may not be appealed by either party on any grounds;
- (i) an award of the arbitrator may be filed in any court of competent jurisdiction, and may be enforced by either party as a final judgment of such court as permitted by Law in the jurisdiction in which enforcement is sought;
- (j) subject to Section 3.1 of this Schedule 14 [Dispute Resolution Procedure], the arbitration proceedings, evidence at the arbitration proceedings, and, subject to Section 2.11(i) of this Schedule 14 [Dispute Resolution Procedure], any award of the arbitrator, will be treated as strictly confidential, and not disclosed to any third party without the prior written consent of the parties, and the parties will jointly instruct the arbitrator to maintain the strictest confidentiality of the proceedings, evidence and his or her award;
- (k) if a Dispute that is subject to arbitration under Section 2.11 of this Schedule 14 [Dispute Resolution Procedure] is pending concurrently with a related dispute(s) which is subject to separate arbitration(s), then the parties will consent and agree to the consolidation of all related arbitration proceedings before one arbitrator if such consolidation of proceedings is feasible. If a Dispute relating to an Interface is subject to arbitration that is pending concurrently with arbitration proceedings of a claim by an Other Contractor relating to the same Interface then the parties will be deemed to have consented to the consolidation of proceedings. The Contractor will, upon request of BC Hydro, participate as a direct party in any arbitration arising in connection with this Contract or the Project, as if the Contractor were: (i) a direct party to the issue in dispute and to the relevant arbitration agreement; and (ii) subject to the relevant arbitration rules of procedure; and
- (l) the Contractor will include provisions within its agreements with first tier Subcontractors, and require its first tier Subcontractors to include provisions in such first tier Subcontractor's agreements with other Subcontractors, a dispute resolution provision substantially similar to Section 2.11 of this Schedule 14 [Dispute Resolution Procedure], including the obligation to consent and agree to the consolidation of all related arbitration proceedings before one arbitrator if such consolidation of proceedings is feasible. The Contractor will cause (including specifying in applicable agreements) its first tier Subcontractors and other Subcontractors to participate, upon the request of BC Hydro, in any arbitration arising in connection with the Work or this Contract, as if the first tier Subcontractor or other Subcontractor were: (i) a direct party to the issue in dispute and to the relevant arbitration agreement; and (ii) subject to the relevant arbitration rules of procedure.

3 GENERAL

3.1 Permitted Disclosure

Notwithstanding anything to the contrary in the Contract, the Contractor acknowledges and agrees that BC Hydro may disclose any referee or arbitration proceedings and any information, data or documentation disclosed or delivered by either party to the other party, to the Referee or to the arbitrator in connection with a Dispute, including any evidence in a referee or arbitration proceeding, and any decision of a Referee or award of an arbitrator (and any other information issued by the Referee or arbitrator):

- (a) to any Governmental Authority, as required or requested by such Governmental Authority;
- (b) to the British Columbia Utilities Commission for the purpose of any regulatory application or submission to the British Columbia Utilities Commission;
- (c) to any provincial ministry or to the Province of British Columbia; and
- (d) as otherwise required by Law, by Permits, or permitted by the Contract.

BC Hydro will use commercially reasonable efforts to cause such Governmental Authority, provincial ministry, the Province of British Columbia or the British Columbia Utilities Commission, as the case may be, to maintain the confidentiality of such proceedings, information, data, documentation, evidence, decision or award, but does not guarantee that such entity will agree to maintain the proceedings, information, data, documentation, evidence, decision or award in confidence.

3.2 Other Remedies

Nothing contained in this Schedule 14 [Dispute Resolution Procedure] will preclude a party from initiating a proceeding in a court of competent jurisdiction for the purpose of obtaining an emergency or provisional remedy to protect its rights as necessary in the circumstances, including obtaining temporary and preliminary injunctive relief and other orders, whether before or after the Dispute Resolution Procedure has been initiated by delivery of a Dispute Notice.

3.3 Strict Compliance with Time Limits

The parties acknowledge that timely resolution of Disputes is mutually beneficial and the time limits set out in this Schedule 14 [Dispute Resolution Procedure], or as otherwise agreed by the parties, will therefore be strictly complied with and enforced.

3.4 Interim Direction

Notwithstanding a Dispute, or the commencement of a Dispute Resolution Procedure, BC Hydro and the Contractor will in good faith carry out their respective obligations under the Contract without delay concurrently with a Dispute Resolution Procedure or other process or steps as agreed to settle the Dispute. Prior to the final resolution of the Dispute, BC Hydro may in its discretion by written notice to the Contractor direct the Contractor to proceed with the Work in respect of the matter in Dispute and the Contractor will comply with and implement such direction without delay. If a binding determination is made in respect of such Dispute to the effect that BC Hydro's direction, in whole or in part, required the Contractor to do anything that was otherwise beyond the Contractor's obligations under this Contract then the direction, to the extent it changed the Contractor's obligations under this Contract, will be deemed to be a Change pursuant to Schedule 12 [Changes]. Nothing in this Schedule 14 [Dispute Resolution Procedure] will limit BC Hydro's right to require a Change. For certainty, BC Hydro will not be entitled to give a direction to require the Contractor to do anything that constitutes a Change which is not permitted in accordance with Section 2.2(a) to Section 2.2(e) of Schedule 12 [Changes].