

PORT MANN/HIGHWAY 1 PROJECT

SCHEDULE 30  
FORM OF PERFORMANCE GUARANTEE

THIS PERFORMANCE GUARANTEE is made as of [●]

BY:

[Name of GUARANTOR], a [●] under the laws of [●]

(and its successors and permitted assigns, the "Guarantor")

IN FAVOUR OF:

TRANSPORTATION INVESTMENT CORPORATION

(and its successors and assigns, the "Authority")

WHEREAS:

- A. Kiewit/Flatiron, General Partnership (the "Constructor") is concurrently entering into a Design Build Agreement dated [●] (as amended, modified, supplemented and restated from time to time, the "DB Agreement") with the Authority and it is contemplated under the terms of the DB Agreement that the Authority and the Constructor will also enter into the Independent Certifier Contract and may enter into the Interface Agreement, in each case, at a future date (the DB Agreement and, as amended, modified, supplemented and restated from time to time, the Independent Certifier Contract and, if and when entered into and as amended, modified, supplemented and restated from time to time, the Interface Agreement, collectively, the "Guaranteed Agreements"); and
- B. it is a term of the DB Agreement that the Guarantor, being the parent company of a partner in the Constructor, execute and deliver this performance guarantee in favour of the Authority;

NOW, THEREFORE, as a condition to, and in consideration of, the Authority entering into the DB Agreement with the Constructor and other good and valuable consideration (the receipt and sufficiency of which is hereby acknowledged), the Guarantor agrees as follows:

1. Capitalized terms used but not defined in this Guarantee have the meanings ascribed to such terms in the DB Agreement. For the purposes of this Guarantee, "Applicable Laws" means all applicable laws, statutes, rules, regulations, official directives, published guidelines, standards, codes of practice and orders of all federal, provincial, municipal and local governmental bodies and industry bodies with jurisdiction (whether administrative, legislative, executive or otherwise) and judgments, orders and decrees of all courts, arbitrations, commissions or bodies exercising similar functions in actions or proceedings.
2. The Guarantor irrevocably and unconditionally guarantees to the Authority, and its permitted successors and assigns, the full and timely performance and observance of each and every one of the obligations, terms, provisions, conditions, stipulations and indemnities on the part of the Constructor to be performed or observed under each of the Guaranteed Agreements (including without limitation payment by the Constructor of all amounts payable thereunder) or as a result of a breach of any thereof, now or as either of them may be amended, modified, supplemented and restated from time to time (collectively, the "Obligations"). The Guarantor acknowledges,

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confirms and agrees that, if the Constructor shall in any respect fail to perform and observe any of the Obligations, the Guarantor shall, as principal obligor, perform and observe or have performed and observed such Obligation without any requirement that the Authority first proceed against the Constructor, any other guarantor or any other person or any security. This Guarantee is a continuing guarantee and is in addition and without prejudice to any security of any kind now or hereafter held by the Authority

3. The Guarantor covenants that it will not cause or permit the Constructor to cause any act or omission, the effect of which is a default (including a Constructor Default) under the DB Agreement or any of the other Guaranteed Agreements.
4. The obligations of the Guarantor under this Guarantee shall be primary, absolute and unconditional obligations of the Guarantor and shall not be subject to any counterclaim, set-off, deduction, diminution, abatement, recoupment, suspension, deferment, reduction or defence based upon any claim the Guarantor may have against the Authority or the Constructor, provided that if, at any time, the Guarantor is required by law to make any deduction or withholding in respect of any taxes, duties or other charges or withholdings from any payment due under this Guarantee, the sum due from the Guarantor in respect of such payment shall be increased to the extent necessary to ensure that, after the making of such deduction or withholding, the Authority receives on the payment date and retains (free of any liability in respect of such deduction or withholding) a net sum equal to the sum that it would have received from the Constructor under the relevant Guaranteed Agreement had no such deduction or withholding been required to be made. To the fullest extent permitted by Applicable Laws, this Guarantee shall remain in full force and effect without regard to, and shall not be released, discharged or in any way affected by:
  - (a) any termination, amendment, modification or assignment of or deletion from or addition to or other change in any of the Guaranteed Agreements or any other instrument or agreement applicable to any of the parties to any of the Guaranteed Agreements whether or not the Guarantor has consented thereto;
  - (b) any impossibility, impracticability, frustration of purpose, illegality, force majeure or act of government;
  - (c) any release, substitution or addition of any co-signer, endorser or other guarantor of the Obligations or any security therefor;
  - (d) any voluntary or involuntary bankruptcy, insolvency, reorganization, arrangement, re-adjustment, assignment for the benefit of creditors, composition, receivership, conservatorship, custodianship, liquidation, marshalling of assets and liabilities or similar proceedings with respect to the Constructor, either Partner (which in this Guarantee shall include the successors and permitted assigns of each Partner), the Guarantor, any other guarantor or any other person or any of their respective properties or creditors, or any action taken by any receiver, interim receiver, monitor, intervenor or conservator of, or trustee or similar officer for, the Constructor, either Partner, the Guarantor or any substantial part of their respective property or otherwise or by any court in any such proceeding;

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- (e) any merger or consolidation of the Constructor, either Partner or the Guarantor into or with any other person;
  - (f) any sale, lease or transfer of any of the assets of the Constructor, either Partner or the Guarantor to any other person;
  - (g) any change in the ownership of any interests in the Constructor or either Partner or any change in the relationship between the Constructor, either Partner and the Guarantor or any other guarantor, or any termination of such relationship;
  - (h) any failure of the Constructor to comply with any provision of any of the Guaranteed Agreements, or any other agreement;
  - (i) the invalidity, the illegality or the unenforceability of any of the Obligations; or
  - (j) any waiver, extension of time or other forbearance by the Authority in respect of any of the Obligations or any failure or delay on the part of the Authority to enforce any of its rights under any of the Guaranteed Agreements.
5. The Guarantor unconditionally waives, to the extent permitted by Applicable Laws, (a) notice of any of the matters referred to in Section 4; (b) any requirement to exhaust any remedies against the Constructor, either Initial Partner or other guarantors or under any security; (c) notice to the Guarantor of any breach of or defaults under or with respect to any of the Guaranteed Agreements or any other agreement or any other notice that may be required by statute, law or otherwise to preserve any right of the Authority against the Guarantor; and (d) any other circumstance whatsoever which might otherwise constitute a legal or equitable discharge, release or defence of a guarantor or security or which might otherwise limit recourse against the Guarantor.
6. The Guarantor agrees that any and all present and future debts or obligations of any nature whether arising in connection herewith or otherwise of the Constructor to the Guarantor and any security therefor are postponed and subordinated to the claims of the Authority with respect to the Obligations. If the Guarantor receives any monies in respect thereof from the Constructor, such monies are hereby assigned to the Authority and the Guarantor shall forthwith pay such monies to the Authority.
7. The Guarantor represents and warrants that:
- (a) it has taken, fulfilled and done all actions, conditions and things required in order to enable it to lawfully enter into and perform and comply with its obligations contained in this Guarantee and to ensure that those obligations are legally binding and enforceable;
  - (b) all necessary actions of its board of directors have been duly and properly taken to authorize the execution and performance of this Guarantee and such actions are in full force and effect and have not been varied;
  - (c) giving this Guarantee will not result in:

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- (i) any breach [of any federal laws of the Republic of Germany to which it is subject or of any of its articles of association or other constitutional documents]<sup>1</sup> [of any federal, state or local laws of the United States of America or the State of Delaware to which it is subject or of any of its articles of association or other constitutional documents]<sup>2</sup>; or
  - (ii) any breach by the Guarantor of any deed, agreement or obligation made with or owed to any other person; and
  - (d) its obligations hereunder constitute legal, valid and binding obligations of the Guarantor enforceable in accordance with their terms, except to the extent that the effectiveness of any enforcement action may be limited by bankruptcy, insolvency, liquidation, reorganization or similar laws of general application affecting creditors' rights generally and except that equitable remedies are in the discretion of the court.
8. Until all Obligations have been irrevocably and indefeasibly paid or discharged in full:
- (a) the Guarantor shall not exercise any rights which the Guarantor may have to be indemnified or otherwise compensated or reimbursed by, or to receive contribution from, the Constructor including to be compensated for any amounts paid by the Guarantor under this Guarantee or as a result of the performance of any of the Obligations by the Guarantor; and
  - (b) notwithstanding any payment made by the Guarantor under this Guarantee, any setoff or application of funds of the Guarantor by the Authority or the performance of any of the Obligations by the Guarantor, the Guarantor will not under any circumstances be subrogated to or entitled to exercise or enforce any of the rights or remedies which the Authority now has or may hereafter have against the Constructor or any security granted by the Constructor in favour of the Authority;
- and the Guarantor waives any right to be so indemnified, compensated, reimbursed, subrogated or entitled, provided that, if the Guarantor receives any monies from the Constructor in breach of this Section 8, such monies are hereby assigned to the Authority and the Guarantor shall forthwith pay such monies to the Authority.
9. This Guarantee and the terms, covenants and conditions hereof shall be binding upon the Guarantor and its successors and shall enure to the benefit of the Authority and its successors and assigns, it being hereby expressly acknowledged by the Guarantor that the Authority shall be entitled to assign, transfer or otherwise dispose of its rights under and interest in this Guarantee to any person to whom it is entitled to assign its rights under the DB Agreement. The Guarantor shall not be entitled to assign, transfer, novate or otherwise dispose of any of its obligations or rights hereunder without obtaining the prior written consent of the Authority.
10. The obligations of the Guarantor set forth herein constitute the full recourse obligations of the Guarantor enforceable against it to the full extent of all its assets and properties.

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<sup>2</sup> To be used in Hochtief Guarantee

<sup>2</sup> To be used in Kiewit Guarantee

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11. The obligations of the Guarantor under this Guarantee will be joint and several with the obligations of any other guarantor of the Obligations.

12. This Guarantee shall be interpreted and governed by the laws of British Columbia and the federal laws of Canada applicable therein and shall be binding upon the Guarantor and its successors and assigns. The Guarantor hereby attorns to the non-exclusive jurisdiction of the court of British Columbia. This Guarantee may also be enforced in any jurisdiction in which the Guarantor conducts business or owns assets. The Guarantor hereby appoints [*name of BC Flatiron or Hochtief entity (or other agent)*] of [*address of appointed agent*] to be its agent to accept service of any proceedings in connection with this Guarantee. The Authority agrees that it will send a copy of any proceedings served by it on any such agent to the Guarantor.

13. Any notice under this Guarantee shall be in writing and shall be given by way of courier service or by way of fax. Any notice forwarded by courier shall be deemed to be received on the day of delivery if it is a Business Day and otherwise on the next Business Day. Any notice forwarded by fax shall be deemed to be received on the next Business Day following the day on which transmission is confirmed by the recipient. The address and the fax number for the Authority shall be as set out in the DB Agreement and for the Guarantor shall be as follows:

**[Insert name and contact details of Guarantor]**

[HOCHTIEF Aktiengesellschaft

Attention: [REDACTED]

Opernplatz 2

45128 Essen

Germany

Fax: +49 201 824-2750]<sup>3</sup>

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15. In the event that the Authority obtains judgment in any currency other than Canadian dollars in respect of any liability of the Guarantor, the Guarantor agrees that the rate of exchange to be used to determine the amount of the judgment shall be the rate of exchange quoted by the Authority's bankers as the rate at which they could purchase Canadian dollars with such other currency on the banking day preceding the day on which the judgement is rendered. The liability of the Guarantor in respect of any amount due in Canadian dollars which is paid in any other currency shall, despite any judgement in such other currency, be discharged only to the extent that, on the banking day following receipt of the payment or satisfaction of the judgment, the Authority, through its bankers, is able to purchase Canadian dollars with such other currency. If the amount of Canadian dollars purchased by the Authority is less than the

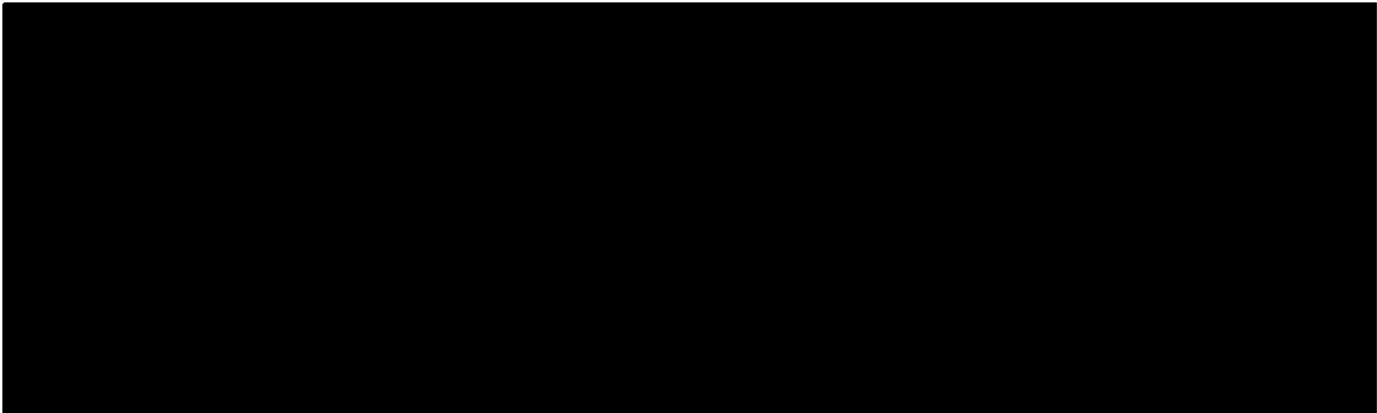
<sup>3</sup> To be used in Hochtief Guarantee.

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amount of Canadian dollars originally due to it, the Guarantor agrees, as a separate obligation, to indemnify the Authority against such loss within three Business Days after demand by the Authority.



EXECUTED as of the date first written above.

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**[NAME OF GUARANTOR]**

By: \_\_\_\_\_  
Name:  
Title:

By: \_\_\_\_\_  
Name:  
Title: