



No. S-222719  
Vancouver Registry

In the Supreme Court of British Columbia

Between

ACCIONA WASTEWATER SOLUTIONS LP by its general  
partner, AWS GENERAL PARTNER INC.

Plaintiff

and

GREATER VANCOUVER SEWERAGE AND DRAINAGE  
DISTRICT

Defendant

### RESPONSE TO CIVIL CLAIM

**Filed by:** Greater Vancouver Sewerage and Drainage District

#### Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

##### Division 1 – Defendant’s Response to Facts

1. The facts alleged in paragraphs 3, 5, 43, 45, 54, 60, 61 and 266 of Part 1 of the notice of civil claim are admitted.
2. The facts alleged in the remaining paragraphs of Part 1 of the notice of civil claim, other than the paragraphs identified in paragraph 3 immediately below, are denied.
3. The facts alleged in paragraphs 20, 46 and 47 of Part 1 of the notice of civil claim are outside the knowledge of the Greater Vancouver Sewerage and Drainage District.

##### Division 2 – Defendant’s Version of Facts

###### *The Parties and the Project*

1. The Greater Vancouver Sewerage & Drainage District (“**GVS&DD**”) is responsible for, among other things, the treatment and discharge of all wastewater from residences and businesses within the Metro Vancouver region, and is constituted under the *Greater Vancouver Sewerage And Drainage District Act*, SBC 1956, c. 59. The GVS&DD has an address for service in this proceeding at 1800 - 510 West Georgia Street, Vancouver, British Columbia.

2. The GVS&DD is the owner of the North Shore Wastewater Treatment Plant ("**NSWWTP**" or the "**Project**") currently being constructed in the District of North Vancouver to replace the Lions Gate Wastewater Treatment Plant. The GVS&DD is an experienced owner and operator of five wastewater treatment plants in the Lower Mainland.
3. The NSWWTP is being built to serve 250,000 residents in the Districts of West and North Vancouver, the City of North Vancouver, and the Squamish and Tsleil-Waututh Nations. The NSWWTP will include secondary and tertiary treatment of wastewater, which the existing wastewater treatment plant does not provide.
4. The Project is subject to Federal regulatory control administered by Environment and Climate Change Canada ("**ECCC**"), under a regulatory framework which includes the *Fisheries Act*, RSC 1985, c F-14 (the "**Fisheries Act**") and annexed to it, the *Wastewater Systems Effluent Regulation* ("**WSER**") (the "**Regulatory Framework**").
5. Acciona Wastewater Solutions LP ("**Acciona**") was created for the sole purpose of carrying out the design, construction, commissioning and one year performance period operation of the NSWWTP.
6. AWS General Partner Inc. ("**AWS**") is the general partner of Acciona.

*General Response to Acciona's Claims*

7. As will be particularized below, Acciona breached the Project Agreement, breached its duty of good faith and honest performance, was negligent and acted in a high-handed and reprehensible manner. Acciona's assertions of fact bear no resemblance to the realities of Acciona's incompetent, wrongful and negligent performance on the Project and breaches of the Project Agreement. If Acciona has suffered any losses, which is denied, Acciona is solely responsible for those losses.
8. The GVS&DD denies every allegation in the notice of civil claim unless expressly admitted herein.
9. All capitalized terms not defined in this response to civil claim are defined terms in the Project Agreement, defined below.
10. The GVS&DD denies that:
  - (a) it was impossible to build the NSWWTP on the Project Site in accordance with the Project Agreement;
  - (b) there were rampant errors, conflicts or inconsistencies in the Design and Construction Specifications of the Project Agreement;
  - (c) it wrongfully refused to agree to Changes under the Project Agreement;
  - (d) it interfered with Acciona's ability to perform its obligations under the Project Agreement;

- (e) it failed to undertake its obligations, including exercising its discretion, in accordance with the Project Agreement;
- (f) it breached any duty of good faith or honest performance;
- (g) it wrongfully refused to pay additional compensation or to grant extensions of time to the target dates in the Project Schedule;
- (h) Acciona was entitled under the Project Agreement to payment of Milestone 5;
- (i) the termination of the Project Agreement, the demand on the Design and Construction LC, the delivery of the Termination Notice, the delivery of the Proposed Transfer Notice and the assignment of the DCS Agreement were in breach of the Project Agreement, of any other agreement, or were wrongful or tortious; and
- (j) it acted capriciously, reprehensibly, arbitrarily or in a high-handed manner, or wrongfully or deliberately breached the Project Agreement,

all, as alleged or at all.

11. Acciona by its own actions and omissions could not, and did not, perform its obligations under the Project Agreement. Acciona breached the Project Agreement, breached its duty of good faith and honest performance, acted in a high-handed and reprehensible manner, and was negligent, the particulars of which include, but are not limited to:
- (a) the inability to, and failure to, properly interpret, understand and implement the Design and Construction Specifications;
  - (b) failing to undertake a comprehensive and properly coordinated approach to the Design of the Project resulting in innumerable design errors, omissions, PA non-compliances and delays to the Design and Construction of the Project;
  - (c) using multiple design consultants for different components of the Project without coordination, engaging consultants without experience in similar wastewater treatment plants, engaging consultants late in the design development process, and changing design consultants during the design of the Project, resulting in innumerable design errors and omissions and multiple failures to coordinate the Design and Construction of the Project, and causing delay to the Design and Construction of the Project;
  - (d) failing to understand and rectify PA non-compliances in its Design identified by the GVS&DD;
  - (e) undertaking and completing portions of the Design late;
  - (f) producing design Submittals with innumerable errors and omissions, and of poor quality, resulting in the need for multiple revisions and resubmittals for review

under the Project Agreement, causing increased costs to the GVS&DD and delay to the Design and Construction of the Project;

- (g) failing to prepare the Hazard Identification and Risk Assessment (HIRA) and Equipment Lifting and Replacement Plan to the standard prescribed in the Project Agreement causing unsafe working conditions, and which will negatively impact the operation and maintenance of the Facility;
- (h) failing to have sufficient and qualified site supervision during the Construction to ensure the Construction was carried out in accordance with Design requirements and with quality management requirements;
- (i) a lack of understanding of Good Industry Practice;
- (j) failing to undertake the Design and Construction of the Project in accordance with Good Industry Practice;
- (k) a lack of understanding of applicable Laws, including the British Columbia Building Code;
- (l) failing to undertake the Design and Construction of the Project in accordance with applicable Laws, including the British Columbia Building Code;
- (m) failing to comply with Permits, including breaching environmental requirements;
- (n) failing to obtain necessary Permits;
- (o) failing to properly coordinate information and activities between Design and Construction personnel;
- (p) failing to properly coordinate, manage and supervise Construction resulting in errors, deficiencies, poor quality construction and very low productivity, resulting in delays to the Construction of the Project;
- (q) failing to undertake Construction safely;
- (r) failing to comply with its obligations with respect to the Project Schedule;
- (s) producing untrue and inaccurate Project Schedules and Project Schedule Updates knowing they would be relied upon by the GVS&DD and knowing them to be untrue and inaccurate or reckless as to their truth or accuracy;
- (t) alternatively, producing untrue and inaccurate Project Schedules and Project Schedule Updates, knowing they would be relied upon by the GVS&DD, carelessly or without having reasonable grounds to believe they were true and accurate;
- (u) failing to undertake the Design and Construction in accordance with the Project Schedule;

- (v) manipulating the Project Schedule to conceal its inability to progress the Design and Construction in accordance with the Project Schedule;
- (w) wrongfully and intentionally withholding from the GVS&DD the extent of the delay to the Project Target Dates caused by its breaches, negligence, wrongful conduct and incompetence;
- (x) wrongfully and intentionally submitting RFIs claiming conflicts and inconsistencies in the Design and Construction Specifications which it knew were not conflicts and inconsistencies;
- (y) alternatively, submitting RFIs claiming conflicts and inconsistencies in the Design and Construction Specifications which it ought to have known were not conflicts and inconsistencies;
- (z) submitting RFIs seeking relaxations in the Project Agreement as a result of Acciona's previous Design errors and omissions;
- (aa) wrongfully and intentionally claiming Changes when there was, in fact, no Change under the Project Agreement;
- (bb) alternatively, claiming Changes when it ought to have known there was no Change under the Project Agreement;
- (cc) wrongfully and intentionally claiming Changes for components of the Design when it knew those claims had been resolved under the Amending Agreement and Amended PA;
- (dd) alternatively, claiming Changes for components of the Design when it ought to have known those claims had been resolved under the Amending Agreement and Amended PA;
- (ee) wrongfully and intentionally claiming Supervening Events when it knew no Supervening Events under the PA had occurred; and
- (ff) alternatively, claiming Supervening Events when it ought to have known no Supervening Events under the PA had occurred.

*The Procurement Process*

12. In or about April 2016, the GVS&DD issued a request for proposals ("**RFP**") to design, construct, finance, test, commission and operate for a one year performance period the NSWWT. Acciona was the lead member of a consortium, ADAPt, which was one of the proponents who responded to the RFP.
13. Acciona, as part of ADAPt, toured the Project Site during the RFP process.
14. During the RFP process, all proponents, including Acciona, were given access to a Data Room created by the GVS&DD for the RFP. The Data Room included an indicative

design for the Project undertaken by the GVS&DD's consultants (the "**Indicative Design**"), among other information and data.

15. The RFP expressly stated the GVS&DD made no representation as to the relevance, accuracy or completeness of any information in the Data Room, including the Indicative Design. Acciona was expressly responsible for making its own interpretations of data in the Data Room.
16. Acciona was provided with a draft form of the project agreement as part of the RFP process, which included the technical requirements and specifications for the Project. Acciona had the draft project agreement for approximately one year before it executed the Original PA.
17. As part of the RFP process, Acciona submitted various design and other information to the GVS&DD, and had meetings with the GVS&DD with respect to the design, construction and operation technical requirements for the Project. Proposals made by Acciona during this process regarding the design, construction and operation of the Facility became part of Schedule 2, Proposal Extracts, which formed part of the Project Agreement.
18. At the conclusion of the RFP process, Acciona was selected as the successful proponent.
19. On or about April 5, 2017 (the "**Effective Date**"), the GVS&DD and Acciona (by its general partner AWS) entered into an agreement commonly known as a "design build finance" ("**DBF**") agreement under which Acciona became the DBF contractor responsible for the design, construction, financing, testing and commissioning of the Project (the "**Original PA**").
20. The Original PA had a DB Price of approximately \$517 million, which included approximately \$13.2 million for an option available to the GVS&DD to include the District Energy System ("**DES**") in the scope of the Project, which option the GVS&DD exercised in November 2017.
21. The Original PA had the following target dates Acciona was required to meet:
  - (a) Target Secondary Treatment Completion Date – July 6, 2020;
  - (b) Target Acceptance Date – January 6, 2021; and
  - (c) Longstop Date – January 6, 2022.
22. As set out later in paragraphs 44 to 58, the Original PA was subsequently amended effective October 31, 2019 (the "**Amended PA**") pursuant to an Amendment to the Project Agreement between the GVS&DD and Project Co dated October 31, 2019 (the "**Amending Agreement**"). The Amended PA added Tertiary Treatment to the Project, approximately two and a half years for completion and approximately \$104 million to the

cost. The Original PA and the Amended PA are collectively referred to herein as the “**Project Agreement**” or “**PA**”.

*Project Agreement – Acciona’s Responsibilities and Risks*

23. The Project Agreement included specific allocations of responsibility and risk agreed by the GVS&DD and Acciona with respect to the Design and Construction of the Project. In general terms, Acciona was responsible to design and construct the Project in accordance with the Design and Construction Specifications, Good Industry Practice and applicable Laws. Specific risks, such as geotechnical conditions, were allocated to and accepted by Acciona.
24. The Project Agreement included provisions pursuant to which Acciona expressly assumed responsibilities and risks, and made representations as to those responsibilities and risks:
  - (a) Acciona assumed and accepted as its entire and exclusive responsibility all risks, costs and expenses in relation to the performance of Acciona’s obligations and the discharge of its liabilities under the Project Agreement, unless expressly allocated otherwise (section 2.3 of the PA);
  - (b) Acciona represented and warranted to the GVS&DD that prior to entering into the Project Agreement it had carefully reviewed the Project Agreement, its Schedules, the Disclosed Data and all applicable Laws, and had taken all steps it considered necessary to satisfy itself there was nothing in them which inhibited or prevented Acciona from performing and completing the Design and the Construction in accordance with the Project Agreement, in a good and safe manner, in accordance with Good Industry Practice so Acciona could achieve and satisfy the requirements of the Project Agreement (section 4.10(g) of the PA);
  - (c) Acciona agreed it was responsible to have conducted its own analysis and review of the Project and to have taken all steps it considered necessary to satisfy itself as to the accuracy, completeness and applicability of any Disclosed Data made available by the GVS&DD on which Acciona placed reliance, and to assess all risks related to the Project (section 4.11 of the PA);
  - (d) Acciona agreed it was not relieved from any obligation imposed on or undertaken by it under the Project Agreement on the grounds of any misunderstanding or misapprehension in respect of the Disclosed Data, or that the Disclosed Data was incorrect or insufficient (section 4.11 of the PA);
  - (e) Acciona agreed that in the performance of its obligations under the Project Agreement, it would comply, and cause all Project Contractors and Sub-Contractors to comply, with all applicable Laws (section 4.13 of the PA);

- (f) Acciona agreed it had complete responsibility for the Design and Construction of the Facility (generally, all buildings, structures, fixtures, equipment, roads, utilities, improvements, etc.):
  - (i) in accordance with all terms of the PA, including the Design and Construction Specifications;
  - (ii) in compliance with the requirements of all applicable Laws and Good Industry Practice;
  - (iii) in compliance with GVS&DD Standards;
  - (iv) so as to provide a new wastewater treatment facility that as at the Acceptance Date:
    - (1) is complete and operational and fit for its intended uses, as established by the requirements set out in the PA;
    - (2) complies with Treatment Standards;
    - (3) provides the benefits to the GVS&DD as described in the Proposal Extracts;
    - (4) permits the GVS&DD to operate and maintain the Facility in accordance with all applicable regulatory requirements based on Standard Staffing Levels (section 1.1 of Schedule 2 of the PA);
- (g) Acciona agreed all risks relating to the Design and Construction of the Project were transferred to it under the Project Agreement, unless expressly allocated otherwise (section 1.1 of Schedule 2 of the PA);
- (h) Acciona agreed to perform the Design and Construction in accordance with applicable Laws, and so all elements of the Design and Construction met or exceeded the requirements of all applicable Laws (section 1.3 of Schedule 2 of the PA);
- (i) Acciona agreed to take all action necessary to obtain and maintain all Permits necessary to commence, continue and complete the Design and Construction (section 1.5 of Schedule 2 of the PA);
- (j) Acciona agreed it was deemed to have inspected the Project Site in relation to the performance of its obligations under the Project Agreement, and to have satisfied itself and accepted all risks and related responsibilities relating to, among other things, environmental conditions and geotechnical conditions at the Project Site, unless expressly allocated otherwise (section 3.1 of Schedule 2 of the PA);



- (k) Acciona agreed the GVS&DD made no representation as to the accuracy or completeness of any information in the Site Reports, and specifically acknowledged that the GVS&DD assumed and accepted no responsibility that the geotechnical information, as may be available in the Site Reports, was accurate or completely described actual site conditions that may affect the Design or Construction (section 3.2(a) of Schedule 2 of the PA);
  - (l) Acciona agreed there is no warranty or guarantee from the GVS&DD, either express or implied, that the conditions indicated by any geotechnical investigations were representative of those existing in the Project Site, or that unforeseen developments may not occur (section 3.2(a) of Schedule 2 of the PA);
  - (m) Acciona agreed to use the services of a qualified geotechnical engineer to evaluate geotechnical conditions at the Project Site and to develop the geotechnical design for the Facility (section 3.2(b) of Schedule 2 of the PA);
  - (n) Acciona agreed to complete supplementary Project Site investigations to identify the scope, methodology and standards to be used to develop the geotechnical design for the Facility and to complete engineering analysis and provide a geotechnical and foundation design report in accordance with Schedule 3, Design Requirements, of the PA (section 3.2(b) of Schedule 2 of the PA);
  - (o) Acciona agreed to undertake the Project diligently and in compliance with the Project Schedule (section 6.4 of Schedule 2 of the PA);
  - (p) Acciona agreed the GVS&DD made no representation as to the accuracy or completeness of any aspect of the Indicative Design and the Indicative Design may not reflect all of the requirements included in the Design and Construction Specifications (section 1.9 of Schedule 3 of the PA);
  - (q) Acciona agreed it was responsible for all aspects of the Design and Construction whether or not it used all or any part of the Indicative Design, and that Acciona was responsible to independently verify the accuracy of any information contained in or inferred from the Indicative Design if Acciona used any such information in its design (section 1.9 of Schedule 3 of the PA); and
  - (r) Acciona agreed it was fully responsible for meeting all requirements of the Project Agreement notwithstanding that the GVS&DD had specified certain products, equipment or other items in the Design and Construction Specifications, and agreed that it would be deemed to have accepted all responsibility in relation to the use of any such products, equipment or other items (section 1.10 of Schedule 3 of the PA).
25. Acciona owed a duty of care to the GVS&DD to perform its obligations under the Project Agreement with the degree of skill and care, diligence, prudence and foresight of a DBF

contractor experienced with facilities similar in scope, nature and complexity to the Project.

### *Changes*

26. A Change to the Project Agreement came into effect only when the GVS&DD executed a Change Certificate. Acciona was not entitled to a Change under the Project Agreement unless and until the GVS&DD executed a Change Certificate. If Acciona claimed a Change, and the GVS&DD did not agree, Acciona could dispute its claim for a Change under the Dispute Resolution Procedure in the PA.

### *Supervening Events*

27. The Project Agreement included a process by which either party could claim entitlement to relief in relation to costs or time or both upon the occurrence of certain events defined as Supervening Events. To be entitled to claim a Supervening Event, a party had to comply with the requirements in the Project Agreement relating to Supervening Events, including giving written notice of a claimed Supervening Event within a specified time, and providing additional information regarding the claimed Supervening Event within a specified time (section 8.2 of the PA).
28. For Acciona to claim a Supervening Event it also had to demonstrate it could not have avoided the occurrence of the Supervening Event by complying with the requirements of the PA and taking steps which it might reasonably have taken, that the Supervening Event would cause Acciona to incur a Direct Loss, a delay in the Project Schedule or the need for other relief, and that it had complied with its mitigation obligations (section 8.2 of the PA).
29. If a party failed to give notice of a claimed Supervening Event within six months of knowing it caused or was reasonably likely to cause an entitlement, all of that party's rights with respect to the claimed Supervening Event were of no force or effect (section 8.11 of the PA).
30. Acciona agreed in the Project Agreement that to the extent it claimed relief or compensation for a Supervening Event, it cannot make any further claim against the GVS&DD for costs, losses, damages or expenses incurred by Acciona, or for any other relief, in respect of any such events (section 9.7 of the PA).

### *Duty to Mitigate*

31. Acciona was required pursuant to the Project Agreement to use all reasonable efforts to mitigate any amounts or extensions of time sought from the GVS&DD, and agreed it was not entitled to receive any amounts or extensions of time or other relief Acciona could have mitigated against, reduced or otherwise avoided by the exercise of all reasonable efforts (section 2.5 of the PA).

32. The GVS&DD also was required under the Project Agreement to mitigate where it was entitled to receive from Acciona any compensation, costs or damages, but not in any other case (section 2.6 of the PA).

#### *Priority of Documents*

33. If there was a conflict between any standards or requirements in the Project Agreement, the provisions establishing the higher quality, manner or method of performing the Design or Construction prevailed. If there was a conflict between Schedule 3, Design Requirements, and Schedule 4, Construction Requirements, the provisions in Schedule 3 prevailed. If Schedule 4 included additional requirements for higher standards of quality or performance or additional requirements for more extensive scope of design, work or services than required in Schedule 3, no conflict existed and Acciona was required to comply with all such additional requirements (section 4 of Schedule 1 of the PA).

#### *Requests for Information*

34. After the Effective Date, the GVS&DD and Acciona agreed on a process for Acciona to submit written requests for information (“RFI”) to the GVS&DD. Acciona submitted RFIs to GVS&DD to request information, to request documents, to request standards and codes, to seek clarification of PA requirements and to identify what Acciona interpreted as conflicts or inconsistencies in the PA requirements.
35. If a RFI may have resulted in a Change, Acciona could submit a written commercial RFI (“CRFI”) to the GVS&DD, setting out the commercial terms sought by Acciona in relation to the RFI.

#### *Project Schedule*

36. Acciona was required to provide monthly updates to the Project Schedule (“**Project Schedule Updates**”). Acciona was required to ensure each Project Schedule Update met certain requirements, and was at all times an accurate, reasonable and realistic representation of Acciona’s plans for the completion of the Project in accordance with the requirements of the Project Agreement (section 6.2 of Schedule 2 of the PA).
37. A Project Schedule Update is a Submittal under the Project Agreement, and is subject to the Review Procedure in Appendix 2B of Schedule 2 of the PA. The GVS&DD could, acting reasonably, assign a “Rejected”, “Correct Deficiencies” or “Reviewed” comment to Project Schedule Updates. Under the Review Procedure, Acciona had 15 Business Days to correct and resubmit to the GVS&DD a Submittal assigned a “Rejected” or “Correct Deficiencies” comment by the GVS&DD (section 6.1 of Schedule 2 and Appendix 2B of the PA).
38. The Independent Certifier under the Project Agreement, jointly retained by the GVS&DD and Acciona, also reviewed Project Schedule Updates as part of his services.

### *Project Co Material Breaches*

39. A failure by Acciona to provide a Project Schedule Update which complied with the requirements of the Project Agreement was a Project Co Material Breach under the Project Agreement ("**Project Schedule Material Breach**") (section 6.3 of Schedule 2 of the PA).
40. A breach, or a series of breaches, by Acciona of its obligations under the Project Agreement, the consequence of which is:
  - (a) a risk of material liability of the GVS&DD to third persons ("**Material Liability Risk Breach**"); or
  - (b) that the GVS&DD is reasonably likely to be materially deprived of the benefit of the Project Agreement ("**Material Deprivation Breach**"),is a Project Co Material Breach under the Project Agreement (definition (c)(2) and (c)(3) of Project Co Material Breach in Schedule 1 of the PA).
41. The Regulatory Framework places the GVS&DD, its officers, directors and agents at risk of significant fines and penalties, and potentially criminal consequences, if Secondary Treatment Completion is not achieved by the Target Secondary Treatment Completion Date.
42. If Acciona failed to remedy a Project Co Material Breach in accordance with the terms of the Project Agreement, the Project Co Material Breach became a Project Co Event of Default and gave the GVS&DD the right to terminate the Project Agreement (section 12.4 of the PA).

### *The 2019 PA Amendment*

43. In December 2018, Acciona delivered an updated Project Schedule which showed a nine month delay to the Target Acceptance Date to September 30, 2021. In January 2019, the GVS&DD gave notice to Acciona under the Project Agreement regarding Acciona's failure to comply with the Project Schedule.
44. In or about February 2019, Acciona terminated its Engineer of Record for the Project, which caused the District of North Vancouver, the authority having jurisdiction, to issue a stop work order on the Project.
45. After failing to meet its obligations under the Original PA, and failing to comply with the Project Schedule, in or about March 2019 Acciona claimed it was impossible for it to build the Project within the time mandated by the Project Agreement and within the DB Price. Acciona claimed it was experiencing difficulties with:
  - (a) the suitability of the Project Site, including its size and location in an urban area;

- (b) ground conditions at the GVS&DD Lands forming part of the Project Site, including the ability to achieve the seismic requirements in the Project Agreement;
- (c) insufficient space on the GVS&DD Lands to build the Project in accordance with the Project Agreement, including the ability to fit all of the processes and related equipment in the buildings;
- (d) inconsistencies and conflicts between the technical requirements in Schedule 3 and Schedule 4 of the Project Agreement; and
- (e) hydraulic issues.

(collectively the “**Acciona Issues**”)

- 46. Faced with the risk of significant fines, penalties and potentially criminal consequences under the Regulatory Framework because of Acciona’s failure to perform its contractual obligations, in an effort to complete the Project as soon as possible and to mitigate against the risk of further delays, the GVS&DD entered into discussions with Acciona regarding completion of the Project by Acciona, rather than terminating the Original PA and starting again.
- 47. Through the spring and summer of 2019, the GVS&DD and Acciona had a series of extensive and comprehensive meetings and technical workshops. During this process, the GVS&DD and Acciona reviewed the Acciona Issues, RFIs and CRFIs delivered by Acciona along with related information.
- 48. Following these meetings and workshops, in the interests of completing the Project to achieve the regulatory goals as soon as possible, and notwithstanding the delays to the Project already caused by Acciona, the GVS&DD agreed to adjustments to the Original PA, in good faith and trusting that Acciona would meet its obligations moving forward.
- 49. On July 12, 2019 the GVS&DD and Acciona executed a Framework Agreement (the “**Framework Agreement**”) which provided a framework for the parties to try to agree on an amended PA, including with respect to various RFIs and CRFIs.
- 50. On July 16, 2019 the District of North Vancouver lifted the stop work order.
- 51. At around this time, Acciona retained GeoPentech Geotechnical & Geoscience Consultants (“**GeoPentech**”) to undertake further analysis of geotechnical data for the Project Site. GeoPentech produced a draft report on September 6, 2019 and a final report on January 24, 2020. There are no differences between the draft report and final report in subsurface soil classifications, and the seismic analysis in the final report does not indicate worse conditions than anticipated in the draft report.
- 52. On October 31, 2019, as contemplated by the Framework Agreement, the GVS&DD and Acciona executed the Amending Agreement, which resolved all requests for adjustments

to the Project Agreement made by Acciona before October 31, 2019, whether made in a RFI or otherwise.

53. To address the Acciona Issues, the Amended PA provided for, among other things, adjustments to the Design and Construction Specifications, including the geotechnical, seismic and post-earthquake serviceability requirements. The GVS&DD and Acciona together drafted and agreed upon the adjustments.
54. The Amended PA added Tertiary Treatment.
55. The Amended PA also changed the Milestone payment structure in the Project Agreement. To be entitled to a Milestone payment, Acciona had to meet all criteria in Appendix 9A of Schedule 9 of the PA for the relevant Milestone, apply for and obtain a Milestone Certificate from the Independent Certifier, and submit an invoice to the GVS&DD including a certificate of an officer of Acciona certifying, among other things, that it was reasonable to expect the Project would achieve Acceptance by the Longstop Date.
56. Acciona was required under the Amended PA to update the initial Project Schedule to a specified level of detail and in accordance with specified requirements, and submit the updated project schedule to the GVS&DD by no later than November 1, 2019. The updated project schedule was to go through the Review Procedure and once it received a "Reviewed" comment, it would become the Project Schedule in place of the initial Project Schedule.
57. The Amended PA increased the DB Price by approximately \$104 million, of which approximately \$29 million was for Tertiary Treatment, for a total DB Price of approximately \$646 million.
58. The Amended PA changed the target dates under the Project Agreement, and added a new target date for Tertiary Treatment, as follows:
  - (a) Target Secondary Treatment Completion Date – May 1, 2023;
  - (b) Target Acceptance Date – June 19, 2023;
  - (c) Target Tertiary Filtration Completion Date – October 19, 2023; and
  - (d) Longstop Date – June 19, 2024.(together the "**Project Target Dates**")

*Milestone 3, Milestone 5 and Shop Drawings*

59. Acciona was required to enter into agreements to purchase various equipment as part of the Milestone 3 criteria. In advance of finalizing the purchase agreements, Acciona submitted procurement packages to the GVS&DD to review for PA compliance. The procurement packages for the cogeneration units and the standby diesel generators

indicated the suppliers would not be able to meet all of the acceptance testing requirements in Schedule 4 of the PA for that equipment.

60. The parties agreed Acciona could defer the delivery of project-specific Factory Acceptance Test (“FAT”) plans and Site Acceptance Test (“SAT”) plans for the cogeneration units and standby diesel generators to Milestone 5, specifically to be included with the shop drawings for that equipment required to be provided as part of the Milestone 5 criteria. This agreement meant Acciona was not precluded from receiving certification and payment for Milestone 3 because of these two purchase agreements.
61. The FAT plans and SAT plans delivered by Acciona with the shop drawings for the cogeneration system and standby diesel generators as part of the Milestone 5 criteria were incomplete, not project-specific, did not comply with the requirements of the PA, and thus the GVS&DD did not give them a “Reviewed” comment.
62. The lamella shop drawings submitted by Acciona for Milestone 5 also did not comply with other applicable PA requirements. After providing additional information and clarification as to how Acciona’s proposed lamella cleaning system would comply with the PA, the GVS&DD gave a “Reviewed” comment to the lamella shop drawings.
63. Acciona never submitted an invoice for payment for Milestone 5 to the GVS&DD.

*Change Certificate 012*

64. Three months after the Amended PA was executed, which gave Acciona an additional 34 months to achieve the first target date under the PA, Acciona again breached the PA by failing to comply with its PA obligations regarding Project Schedule Updates. In February, March and April 2020, the GVS&DD, acting reasonably, assigned a “Rejected” comment to Acciona’s Project Schedule Updates, and provided reasons to Acciona in accordance with the Project Agreement.
65. In further breach of the PA, Acciona failed to correct each “Rejected” Submittal and re-submit it to the GVS&DD within 15 Business Days as required under the Review Procedure.
66. On June 25, 2020 the GVS&DD gave Acciona notice of a Project Schedule Material Breach under section 6.3 of Schedule 2 of the PA.
67. Acciona claimed a Supervening Event on February 6, 2020 in relation to COVID-19 (the “**COVID-19 SEN**”).
68. Acciona claimed another Supervening Event on May 6, 2020 in relation to Undisclosed Environmental Liabilities (the “**Undisclosed Environmental Liabilities SEN**”).
69. On October 28, 2020 the GVS&DD and Acciona executed Change Certificate 012. Change Certificate 012 addressed Acciona’s Project Co Material Breach relating to Project Schedule Updates, and delays to the Project.

70. Acciona agreed in Change Certificate 012 to provide to the GVS&DD by October 30, 2020, a reasonable, realistic updated Project Schedule which complied with the PA and included specific information set out in Change Certificate 012. Acciona agreed it must obtain a “Reviewed” comment from the GVS&DD on this updated Project Schedule by November 13, 2020, failing which the Project Co Material Breach would continue.
71. Acciona agreed in Change Certificate 012 the Project was behind schedule as a result of delays for which Acciona was solely responsible.
72. In Change Certificate 012, Acciona released the GVS&DD from:
- (a) all claims for extensions of time or compensation or costs of any kind in relation to or arising from circumstances known on or before October 30, 2020, including any claims in the COVID-19 SEN and the Undisclosed Environmental Liabilities SEN, but excluding Acciona’s ability to claim compensation under the Undisclosed Environmental Liabilities SEN; and
  - (b) all claims for extensions of time or compensation or costs of any kind in relation to or arising from circumstances related to COVID-19 which occur after October 30, 2020 and which are a continuation of, or do not materially differ from, the circumstances related to COVID-19 that occurred or existed on or before October 30, 2020.
73. Acciona also agreed that no effects of a Supervening Event were persisting as at October 30, 2020.
74. The GVS&DD did not agree COVID-19 constituted a Supervening Event under the PA but acknowledged it had some impact on the Project and agreed in Change Certificate 012 to extend the Project Target Dates in the Project Agreement by a further three months, as follows:
- (a) Target Secondary Treatment Completion Date – August 1, 2023;
  - (b) Target Acceptance Date – September 19, 2023;
  - (c) Target Tertiary Filtration Completion Date – January 19, 2024; and
  - (d) Longstop Date – September 19, 2024.
75. No compensation was paid by the GVS&DD to Acciona for Change Certificate 012.

*Acciona’s Further Project Co Material Breaches.*

76. Two months after Change Certificate 012, Acciona again breached the PA by failing to comply with the requirements relating to Project Schedule Updates. The GVS&DD, acting reasonably, assigned a “Rejected” comment to Acciona’s Project Schedule Updates for January, February and March 2021. In addition to failing to meet the PA requirements, Acciona made hundreds of changes to dates and durations of completed



work so the Project Schedule Updates did not accurately reflect the actual completion dates, and made hundreds of other changes contrary to proper and good scheduling practice.

77. Acciona again failed to correct the Project Schedule Updates in breach of the Review Procedure in the PA.
78. As a result, the GVS&DD gave Acciona a second notice of Project Schedule Material Breach on May 26, 2021.
79. The Independent Certifier confirmed numerous failures to comply with the Project Agreement in Acciona's Project Schedule Updates.

#### *June 30 Project Schedule Update*

80. On June 30, 2021, Acciona submitted a Project Schedule Update (the "**June 30 Project Schedule Update**") which, unilaterally and in the absence of any right or entitlement under the Project Agreement, purported to extend the Project Target Dates by approximately 26 months, a non-excusable extension of the Project Schedule of more than 55 percent of the construction period agreed upon in the Amended PA.
81. The purported extension by Acciona of the Project Target Dates by approximately 26 months would put the GVS&DD at risk of material liability to third parties, specifically fines, penalties and other regulatory consequences under the Regulatory Framework.
82. The purported extension by Acciona of the Project Target Dates by approximately 26 months would materially deprive the GVS&DD of the benefit of the Project Agreement as it would not receive a complete and operational and fit for its intended uses wastewater treatment facility until more than two years after the Target Acceptance Date and more than 14 months after the Longstop Date.
83. Subsequent to the delivery of the June 30 Project Schedule Update, and without entitlement under the PA, Acciona purported to extend the Target Acceptance Date by another five months, further increasing the delay for this target date to 31 months.
84. The GVS&DD gave Acciona notice on July 14, 2021 of a Material Liability Risk Breach and a Material Deprivation Breach.
85. Acciona failed to remedy the Project Schedule Material Breach, the Material Liability Risk Breach and the Material Deprivation Breach in accordance with the terms of the Project Agreement. Accordingly, each became a Project Co Event of Default. On October 15, 2021, the GVS&DD gave notice to Acciona of the Project Co Events of Default in accordance with the Project Agreement.
86. Under a related agreement with Acciona's lenders, there was a 90 day period in which the lenders could, in the event of a Project Co Event of Default, step in. The GVS&DD could not terminate the Project Agreement during this 90 day period unless the lenders advised they were not exercising their step in rights.

87. At the end of the 90 day step in period, on January 20, 2022, the Project Co Events of Default continued unremedied by Acciona. As a result, the GVS&DD terminated the Project Agreement in accordance with its terms.

*Responses to Specific Allegations in Part I of Notice of Civil Claim*

88. Contrary to Acciona's assertion in paragraph 11, and elsewhere, the GVS&DD was not solely responsible for creating the Design and Construction Specifications in the PA. Acciona:

- (a) participated in a detailed review of the draft Design and Construction Specifications during the RFP process, and provided input on the drafting of the Design and Construction Specifications included in the Original PA;
- (b) prepared design criteria, design evaluations and reports, among other things, during the Project which then formed part of the Design and Construction Specifications;
- (c) again participated in a detailed review of the Design and Construction Specifications as part of the meetings in 2019 leading to the Amended PA, and again provided input on the drafting of adjustments to the Design and Construction Specifications in the Amended PA; and
- (d) continued to prepare design criteria, design evaluations and reports, among other things, for the Design and Construction Specifications;

all of which was consistent with Acciona having complete responsibility under the PA for the Design and Construction of the Project.

89. In response to paragraph 49, the GVS&DD denies it or Acciona entered into the Project Agreement on assumptions regarding the Project Site and its subsurface conditions. Acciona expressly accepted all risks with respect to the subsurface conditions at the Project Site in 2017 and again in the Amended PA in 2019 after it undertook further geotechnical investigations and analysis.

90. In response to paragraph 55, Acciona has misstated various PA provisions and their application, examples of which include:

- (a) the PA provisions cited in subparagraphs 55(m)(iii), (iv), (v) and (vi) have no application to Equipment;
- (b) the statement in subparagraph 55(p) is incorrect as section 4.12 of Schedule 2 of the PA expressly permitted construction in advance of a "Reviewed" comment on the 100% Design Phase Report, and Acciona did proceed with construction of elements of the Facility foundations, substructures and superstructure in advance of receiving a "Reviewed" comment on the 100% Design Phase Report; and

- (c) the statement in subparagraph 55(q) is wrong as section 7.1 of Appendix 2B of Schedule 2 of the PA expressly permitted fabrication, installation, construction and placement in certain circumstances when a “Correct Deficiencies” comment was given.
91. In response to paragraph 58, Acciona misstates section 3.1 of Schedule 2. There is no language in section 3.1 of Schedule 2 which limits Acciona’s acceptance of all risks and responsibilities for the Project Site, including geotechnical conditions, to risks an inspection of the Project Site would have disclosed.
92. In response to paragraph 59, Acciona’s reference to section 3.3 of Schedule 2 is incorrect as that section deals with environmental contamination. Assuming the correct reference is section 3.2(b) of Schedule 2, geotechnical investigations, there is nothing in this section permitting Acciona to claim a Change as a result of geotechnical investigations. Acciona expressly accepted in the PA all risks and responsibilities related to geotechnical conditions at the Project Site.
93. In response to paragraph 62, the GVS&DD denies there were particularly unique or challenging features at the Project Site or severe space constraints. Acciona was aware of all Project requirements before it entered into the Project Agreement in 2017, and again in 2019 after it had undertaken further analysis of the Project Site.
94. In further response to paragraph 62, Acciona misrepresents the following design parameters:
- (a) contrary to subparagraph 62(e), various components of buildings such as foundation slabs, tanks and channels are permitted to be constructed at an elevation below 4.1 metres above sea level; and
  - (b) contrary to subparagraph 62(f), most of the Facility is at an elevation higher than 12 metres in the Development Permit.
95. In response to paragraph 66, the GVS&DD denies there were numerous errors, inconsistencies and impossibilities in the Design and Construction Specifications. Acciona’s innumerable failures to properly understand, coordinate and undertake the Design led to it being unable to meet its obligations under the Original PA.
96. In further response to paragraph 66, the GVS&DD did not obligate Acciona to submit RFIs. The parties agreed on the use of RFIs as the method by which Acciona could ask for various information, including such things as codes and standards it needed for the Design.
97. In response to paragraph 68, at no time was it apparent to the GVS&DD it was impossible to perform the Design and Construction in compliance with the Project Agreement. Acciona failed, or alternatively chose not, to perform the Design and Construction in compliance with its obligations under the Project Agreement.

98. In response to paragraph 71, the GVS&DD denies the parties agreed in the Framework Agreement that further Changes may be necessary based on the results of future studies.
99. In response to paragraph 72(a), the GVS&DD denies the Amended PA included Changes to Design requirements with which compliance was impossible. To the extent Changes were made to the Design, they were made to address Acciona's complete and utter failure to meet the requirements in the Original PA.
100. In response to paragraph 72(b), Acciona's statement that Deviation Lists were to be used to amend the Design and Construction Specifications is wrong. Acciona's reference to Deviation Lists for Equipment also is wrong. Appendix 2B of Schedule 2 of the PA does not include a process for submitting a deviation list for Equipment. Section 7.1 of Appendix 2B provides a process for submitting a Deviation List for items and equipment to be submitted under Schedule 4.
101. In response to paragraph 72(e), the GVS&DD denies the parties expected to make further Changes after the Amended PA, and denies the parties agreed to terms beyond the terms in the Project Agreement.
102. In response to paragraphs 73-74, the GVS&DD denies new information became available to Acciona in January 2020 from further geotechnical investigations and seismic analysis. Tellingly, Acciona did not issue a RFI in January 2020, or at any point, regarding the alleged new information.
103. In June 2021, Acciona claimed for the first time that it discovered in January 2020, 18 months earlier, a new liquefiable layer of subsurface soil at elevation 49 – 90 m at the Project Site and that this discovery caused it to add significantly more reinforcing steel in various structures. The final GeoPentech report dated January 24, 2020 did not identify a new layer of liquefiable subsurface soils at the Project Site. Also, Acciona expressly accepted all geotechnical risks at the Project Site.
104. In response to paragraph 75, a number of the RFIs issued by Acciona after the Amended PA did not relate to Design clarifications. Many RFIs were issued by Acciona for other requests for information, e.g. for documents, codes and standards. These RFIs were indicative of Acciona's general incompetence, and specifically its failure to understand the Design and Construction Specifications and its obligations under the PA.
105. In response to paragraph 77, the GVS&DD did not agree to extend the Project Target Dates because of two Supervening Events. Acciona had claimed a nine month delay and then acknowledged it was responsible for most of that delay. COVID-19 was not a Supervening Event under the Project Agreement. To resolve all of Acciona's claims for time extensions, including in the Undisclosed Environmental Liabilities SEN, the GVS&DD agreed to extend the Project Target Dates by three months.
106. In response to paragraphs 78 and 79, if Acciona realized in late 2020 and early 2021 that its design required significant reinforcing steel which restricted space inside

buildings and structures, which is not admitted, such realization was caused by Acciona's wholesale failure to meet its Design obligations under the Project Agreement, including failing to undertake the Design properly and in a comprehensive and coordinated manner.

107. In response to paragraph 80, the GVS&DD denies the Indicative Design is defective as alleged. More importantly, Acciona's allegations regarding the Indicative Design highlight its fundamental lack of understanding of its obligations under the PA. During both the RFP and under the Project Agreement, Acciona was expressly responsible for making its own interpretations of the Indicative Design, and agreed the GVS&DD made no representations as to its accuracy, completeness or applicability. Acciona was responsible to satisfy itself as to the accuracy, completeness and applicability of the Indicative Design if it chose to rely on it. Acciona was not relieved from any PA obligation because of any misunderstanding or misapprehension it had, or because the Indicative Design was incorrect or insufficient. Any reliance Acciona placed on the Indicative Design was entirely at its own risk.
108. In response to paragraph 82, the GVS&DD denies the Project was radically different in nature. By mid-2021 what was confirmed was that Acciona was incapable of meeting its obligations under the PA as a result of its innumerable breaches of the PA, negligence, breaches of duties of good faith and honest performance, incompetence and poor management.
109. In response to paragraph 85, it was not impossible to build the Project in accordance with the requirements of the Project Agreement. Rather, it was not possible for Acciona to do so because of its innumerable breaches of the PA, negligence, breaches of duties of good faith and honest performance, incompetence and poor management.
110. In response to paragraph 88, Acciona again misrepresents what the PA states, in this case the representation and warranty given by the GVS&DD. The GVS&DD represented and warranted that the parcels comprising the Project Site and the interests of the GVS&DD in the Project Site permitted the grant of license by the GVS&DD to Acciona and the performance of Acciona's obligations under the PA, all of which is true.
111. In response to paragraph 90, the GVS&DD's obligations with respect to the Submittal and Review Procedure are set out in Appendix 2B of Schedule 2 of the PA. In assigning comments to Submittals, the GVS&DD had to act reasonably in forming its opinion whether a Submittal would receive a "Reviewed", a "Correct Deficiencies" or a "Rejected" comment. At all times the GVS&DD acted reasonably, and in good faith, in commenting on Submittals.
112. In response to paragraphs 90(e) and (f), there is no express or implied obligation in the Project Agreement on the GVS&DD to "take all commercially reasonable steps in good faith and with due diligence to meet the commercial objectives of the PA" in relation to the review of Submittals or anything else. That phrase is not in section 3(n) of Schedule

1 of the PA or elsewhere. Acciona again has misstated the Project Agreement, and misrepresented the obligations of the GVS&DD under it.

113. Acciona misstates the GVS&DD's obligations in the same manner in paragraphs 17, 53, 55, 72, 94(b) and all such assertions are wrong, misleading and misrepresent the GVS&DD's obligations under the PA. At all times the GVS&DD acted in accordance with its obligations under the PA, and its duty of good faith and honest performance.
114. In response to paragraphs 91-92, the GVS&DD denies it breached the Project Agreement or any duty of good faith or honest performance in relation to the Submittals and Review Procedure. Acciona repeatedly failed to understand or to properly take into account the Design and Construction Specifications, Good Industry Practice and applicable Laws and its Submittals reflected those failings. The GVS&DD did on occasion raise with Acciona options with a view to assisting Acciona achieve compliance with the PA requirements given its repeated failures to do so.
115. In response to paragraphs 94-95, the GVS&DD denies it breached the Project Agreement or any duty of good faith or honest performance in relation to Changes. Acciona's fundamental failure to understand the Design and Construction Specifications, Good Industry Practice and applicable Laws, as well as its failure to undertake the Design in a comprehensive and coordinated manner, resulted in numerous, significant PA non-compliances in Acciona's design. The GVS&DD properly, and in accordance with its rights under the PA, declined to agree to these non-compliances.
116. In response to paragraph 96, the GVS&DD denies it failed to agree to Changes for the design, equipment or systems in the RFIs, or breached the PA, any duty of good faith or honest performance. The GVS&DD says:
  - (a) a number of RFIs were contrary to the PA requirements, including Schedule 3, Design Requirements, and could not be approved as Changes;
  - (b) a number of the RFIs had insufficient information and the GVS&DD properly sought further information from Acciona in accordance with its rights under the PA;
  - (c) in many cases, the RFI was necessary because of a design error by Acciona, including selecting piping or ducting which could not meet the velocity limits in the PA, proposing valves which could not withstand the testing pressures specified in the PA, locking in the design of structures before confirming the equipment and related systems which needed to fit within those structures, and proposing above ground fixtures for use in below ground applications;
  - (d) in response to some RFIs, even though the proposal was contrary to PA requirements, the GVS&DD did not reject the proposal but sought further information from Acciona in accordance with the GVS&DD's rights under the PA, which information was not provided by Acciona;

- (e) in good faith efforts to help mitigate against further PA non-compliances by Acciona, it agreed to some of the RFIs subject to Acciona demonstrating how it would comply with related PA requirements, which Acciona did not do;
  - (f) it agreed to some of the RFIs but the parties could not agree on commercial terms under the CRFI, or Acciona did not submit a CRFI; and
  - (g) in the case of RFI-00913, the requirement Acciona had to meet was not a PA requirement but was a requirement of BC Hydro, a Governmental Authority, with whose requirements Acciona was required to comply under the PA.
117. In response to paragraph 102, Acciona is responsible under the PA for the cost of disposing soils removed from the Project Site, subject to its rights in relation to Undisclosed Environmental Liabilities. The GVS&DD has agreed that to the extent Acciona can demonstrate it incurred additional disposal costs because of the presence of Undisclosed Environmental Liabilities in the soils, and subject to Acciona's duty to mitigate, it will compensate Acciona for any reasonable additional disposal costs.
118. Acciona failed to provide sufficient information in accordance with its obligations under section 8.2 of the PA with respect to the Undisclosed Environmental Liabilities SEN, and accordingly has not received any compensation.
119. In response to paragraphs 110-115, pursuant to Change Certificate 012 Acciona has no entitlement to relief of any kind for the second wave of COVID-19. The circumstances were a continuation of, and did not materially differ from, the circumstances known as of October 30, 2020.
120. The GVS&DD denies the allegations in paragraphs 116-153 regarding HVAC controls, all of which are without merit, and denies it breached the PA, and any duty of good faith and honest performance. The GVS&DD says:
- (a) the use of programmable logic controllers ("PLCs") on HVAC equipment for the Project was generally not permitted or desired, which Acciona knew and understood as early as the RFP process;
  - (b) the parties specifically agreed during the RFP technical and design meetings which equipment would have PLCs; HVAC equipment in the Treatment Buildings was not included on that list;
  - (c) this agreement was confirmed in Acciona's technical proposal, which became Part 1 of Schedule F, Proposal Extracts, of the PA;
  - (d) this agreement was also confirmed in Part 2 of Schedule F, Proposal Extracts, of the PA;
  - (e) the programming to control and monitor all HVAC equipment for the Treatment Buildings was to be located within the CDAC System;

- (f) despite the above, in breach of the PA Acciona submitted a design for the HVAC equipment for the Treatment Buildings which had PLCs;
- (g) Acciona wrongfully used PLCs in its HVAC controls design when it knew the provisions in Schedule F, Proposal Extracts and in Schedule 3, Design Requirements governed the design;
- (h) Acciona's stated reliance on provisions in Schedule 4, Construction Requirements, further demonstrated its incompetence and lack of understanding of the Design Specifications, or alternatively, was used intentionally by Acciona for its own financial benefit to be gained by evading its Design responsibilities under the PA;
- (i) it properly and reasonably assigned a "Rejected" comment to Acciona's Submittals which showed PLCs for HVAC equipment and did not comply with numerous other requirements in Schedule 3, Design Requirements;
- (j) it acted in accordance with its obligations under the PA, its duty of good faith and honest performance;
- (k) faced with Acciona's continuing delay and failure to meet its Design obligations, in February 2021 the GVS&DD issued a directive under the Dispute Resolution Procedure confirming the programming to control and monitor all HVAC equipment for the Treatment Buildings was to be located within the CDAC System;
- (l) Acciona could not produce a HVAC controls design which complied with the PA, so the GVS&DD and Acciona held meetings to discuss an alternative HVAC controls design;
- (m) On April 21, 2021, as a result of those meetings, the GVS&DD adjusted the PA requirements to allow Acciona to use PLCs, asked Acciona to provide panel capacity to permit the GVS&DD to retrofit the controls system in the future, and permitted the programming for the HVAC equipment to reside in the PLCs, not in the CDAC System, a fundamental Change to the PA requirements for which the GVS&DD sought a significant credit from Acciona (the "**Alternative Configuration**");
- (n) the Alternative Configuration meant the GVS&DD would not get the Facility and functionality for which it had contracted;
- (o) despite the Alternative Configuration being agreed on April 2021, Acciona did not deliver RFI 00938 until October 1, 2021 and it:
  - (i) was incomplete;
  - (ii) did not provide information why the four Acceptable Manufacturers did not provide proposals;



- (iii) included proposals from four Alternative Manufacturers which did not align with the Alternative Configuration agreed in April;
  - (iv) did not provide information as to the specifications on which the four Alternative Manufacturers were asked to provide proposals, which was necessary given the proposals did not align with the Alternative Configuration;
  - (v) included proposals with an inferior quality controller even though Acciona confirmed to the GVS&DD in April it would provide a higher quality controller; and
  - (vi) did not provide sufficient information for the GVS&DD to assess whether any proposed PA deviations from the four Alternative Manufacturers were acceptable;
- (p) in addition to providing detailed comments on RFI 00938, on October 22, 2021 the GVS&DD asked Acciona:
- (i) to provide the RFP packages sent to the four Alternative Manufacturers;
  - (ii) to provide written confirmation the four Acceptable Manufacturers were asked to submit proposals and the reasons why they did not;
  - (iii) to organize meetings between Acciona, the GVS&DD and each of the four Alternative Manufacturers so the technical issues arising from the proposed PA deviations could be addressed and the design process concluded;
- (q) Acciona provided limited information regarding the Acceptable Manufacturers, did not provide the RFP packages sent to the four Alternative Manufacturers, and did not organize meetings with Acciona, the GVS&DD and the four Alternative Manufacturers;
- (r) Despite the GVS&DD's efforts, Acciona failed to progress the HVAC controls design and on December 3, 2021, the GVS&DD again told Acciona it needed the RFP packages so it could identify PA deviations it might be willing to accept, and asked Acciona again to arrange meetings with each of the four Alternative Manufacturers;
- (s) Acciona failed to provide more information, and failed to arrange the requested meetings with the Alternative Manufacturers;
- (t) Acciona was not delayed by the GVS&DD, and specifically there were no delays to the critical path of the Project Schedule caused by the GVS&DD;
- (u) if Acciona incurred costs, any costs it incurred were caused by its own failures to comply with the PA; and

- (v) in any event, Acciona is not entitled to any relief relating to HVAC controls pursuant to section 8.11 of the Project Agreement.
121. In response to paragraph 127, Acciona's assertion a "Reviewed" comment was required for Acciona to complete the procurement of the HVAC units is wrong, or misleading. Section 7.1 of Appendix 2B, Submittals and Review Procedure, expressly permitted Acciona to proceed with fabrication upon receipt of either a "Reviewed" or "Correct Deficiencies" comment.
122. In response to paragraphs 154-167, the GVS&DD denies it breached the PA or any duty of good faith or honest performance with respect to the Supervening Event Notice Acciona delivered on June 30, 2021 (the "**June 30 SEN**").
123. The GVS&DD denies Acciona was entitled to any relief for the claims advanced in the June 30 SEN, which was largely a compilation of supervening event notices previously delivered by Acciona, which the GVS&DD had considered in good faith and in accordance with its obligations in the PA, and to which the GVS&DD had responded. The delays and costs claimed by Acciona in the June 30 SEN were caused by Acciona's innumerable breaches of the PA, negligence, breaches of duties of good faith and honest performance, incompetence and poor management.
124. A number of the claims advanced in the June 30 SEN were admitted by Acciona to be caused by the alleged discovery in January 2020, 18 months earlier, of a new layer of liquefiable soils at the Project Site. The GVS&DD denies the claims are valid but, in any event, Acciona cannot seek any relief for these claims pursuant to sections 4.11 and 8.11 of the Project Agreement, and sections 3.1 and 3.2(a) of Schedule 2 of the PA.
125. In further response to paragraph 155, all of the representations and warranties given by the GVS&DD in the PA were true, and the GVS&DD denies any breach of any representation and warranty.
126. In further response to paragraph 165, the GVS&DD denies it used confidential information obtained during meetings in July, August and September 2021 to terminate the Project Agreement. The Project Agreement was terminated because of Acciona's Project Co Material Breaches.
127. In response to paragraphs 168-180, the GVS&DD denies it breached the PA, or any duty of good faith or honest performance, with respect to dual ventilation rates. The GVS&DD says:
- (a) Acciona's characterization of the GVS&DD's comments in RFI-00011 on January 15, 2021 is incomplete and misleading as, when read as a whole, it was clear the GVS&DD was not asking Acciona to revert to a dual ventilation rate design;
- (b) on January 20, 2021, Acciona confirmed fixed ventilation rates were being used in its design, and provided its proposed method of achieving one of the

requirements for the fixed ventilation rate design through the use of manual dampers;

- (c) on February 12, 2021, the GVS&DD rejected the use of manual dampers because it did not meet PA requirements applicable to the fixed ventilation rate design;
- (d) on March 3, 2021, Acciona confirmed to the GVS&DD it understood the parties were discussing fixed ventilation rate design, and confirmed its use of manual dampers;
- (e) there was no demand by the GVS&DD to revert to a dual ventilation rate design, and Acciona knew there was no such demand;
- (f) motorized dampers were necessary to achieve compliance with the PA;
- (g) the GVS&DD's agreement to abandon motorized dampers was made necessary by Acciona's failure to produce a design which complied with the PA, and again meant the GVS&DD would not get the Facility and functionality for which it had contracted; and
- (h) Acciona was not delayed and did not incur any additional costs.

128. In response to paragraphs 181-201, the GVS&DD denies it breached the PA or any duty of good faith or honest performance with respect to Ethernet cable requirements. The GVS&DD says:

- (a) under the PA, Ethernet CAT 6 cables are required to have insulation rated for 600V;
- (b) the GVS&DD agreed to the use of Ethernet CAT 6 armoured cables with insulation rated for 600V for the Treatment Buildings in place of Ethernet CAT 6A cables;
- (c) contrary to the PA, Acciona proposed to supply Ethernet CAT 6 cables with insulation rated for 300V, claiming it could not obtain Ethernet CAT 6 cables with insulation rated for 600V, which was not true;
- (d) Acciona's proposal to address its failure to provide Ethernet CAT 6 cables in accordance with PA requirements did not address the safety risks associated with cable insulation rated only for 300V; and
- (e) the GVS&DD properly rejected Acciona's motor control centre procurement package given Acciona's failure to comply with the PA.

129. In response to paragraphs 202-208, the GVS&DD denies it breached the PA or any duty of good faith or honest performance with respect to the cogeneration system shop drawings. The GVS&DD says:

- (a) Acciona misrepresents the circumstances relating to the cogeneration system shop drawings;
  - (b) as set out above, in exchange for not being precluded from receiving payment for Milestone 3 when it otherwise was not entitled to payment, Acciona agreed it would provide project-specific FAT plans and SAT plans which complied with the requirements in the PA for the cogeneration units and standby diesel generators as part of the criteria for Milestone 5;
  - (c) the FAT plans and SAT plans delivered by Acciona with the shop drawings for the cogeneration units and standby diesel generators as part of the Milestone 5 criteria were incomplete, not project-specific, did not comply with the requirements of the PA, and thus the GVS&DD did not give them a "Reviewed" comment.
130. In response to paragraphs 209-213, the GVS&DD denies it breached the PA or any duty of good faith or honest performance with respect to RFI-00913. Acciona was required under the PA to comply with the requirements of Governmental Authorities. BC Hydro is a Governmental Authority and the requirement in RFI-00913 is a requirement of BC Hydro, not a requirement under the PA. Acciona was required to comply with BC Hydro's requirements, and was responsible for all associated costs.
131. In response to paragraphs 214-215, the GVS&DD denies any conduct on its part amounted to constructive acceleration. The delays to the Project Schedule were caused entirely by Acciona's innumerable breaches of the PA, negligence, breaches of duties of good faith and honest performance, incompetence and poor management.
132. In response to paragraphs 216-238, the GVS&DD denies it breached the PA or any duty of good faith or honest performance with respect to Milestone 5. The GVS&DD says;
- (a) contrary to Acciona's assertion in paragraph 216, the payment structure in the PA is not based on the progress of the work – it is based on Acciona achieving specified criteria for each Milestone;
  - (b) a pre-requisite under the PA for receiving payment for a Milestone was certification by the Independent Certifier – Acciona never received certification for Milestone 5 from the Independent Certifier;
  - (c) Acciona agreed as part of Change Certificate 009 to provide project-specific FAT plans and SAT plans for the cogeneration units and the standby diesel generators with the shop drawings as part of the criteria for Milestone 5;
  - (d) the FAT plans and SAT plans delivered by Acciona with the shop drawings for the cogeneration system and the standby diesel generators as part of the Milestone 5 criteria were incomplete, not project-specific, did not comply with the requirements of the PA, and thus the GVS&DD did not give them a "Reviewed" comment;

- (e) the lamella shop drawings submitted by Acciona for Milestone 5 did not comply with other applicable PA requirements;
  - (f) after providing additional information as to how the lamella cleaning system Acciona proposed met the PA requirements, the GVS&DD gave the lamella shop drawings a "Reviewed" status.
  - (g) the FAT plans and SAT plans for the cogeneration system remained incomplete and non-compliant with the PA; and
  - (h) Acciona was not entitled to payment under the PA for Milestone 5.
133. In further answer to paragraph 235, the GVS&DD did not wrongfully withhold a "Reviewed" status on any shop drawings. The GVS&DD reviewed the shop drawings in accordance with the PA and in good faith. The shop drawings did not receive a "Reviewed" status because of Acciona's failure to meet its obligations under the PA.
134. In further answer to paragraphs 236-237, the GVS&DD did not instruct AECOM to withhold "Reviewed" comments on the shop drawings, and did not impose new criteria for Milestone 5. At all times, the GVS&DD acted in accordance with the PA and its duties of good faith and honest performance. Acciona wrongfully attempted to get out of its obligations under the PA and to receive payment for Milestone 5 when it was not entitled to such payment, in breach of Acciona's duty of good faith and honest performance.
135. In response to paragraphs 239-266, the GVS&DD denies it breached the PA or any duty of good faith or honest performance with respect to the termination of the PA. The GVS&DD says:
- (a) the termination of the PA was made necessary by Acciona's repeated breaches of the PA which culminated in the Project Co Material Breaches;
  - (b) Acciona could not, and did not, proceed with the Design and Construction in accordance with the Project Schedule because of its failure to understand the Design and Construction Specifications, Good Industry Practice and applicable Laws, which failures are the cause of the delays to the Project;
  - (c) Acciona demonstrated repeatedly, throughout the Project, that it could not meet the PA requirements with respect to Project Schedule Updates, consistently making scheduling errors and omissions, culminating in the Project Schedule Material Breaches;
  - (d) Acciona engaged in manipulative practices with respect to the Project Schedule in an effort to hide its breaches and failures, and in an effort to wrongfully place blame for delays on the GVS&DD;
  - (e) Acciona wrongfully and repeatedly submitted RFIs claiming conflicts and inconsistencies in the Design and Construction Specifications which it knew were

not conflicts and inconsistencies in an effort to hide its breaches and failures, and in an effort to wrongfully place blame for delays on the GVS&DD;

- (f) Acciona wrongfully and repeatedly claimed entitlement to Changes under the Project Agreement which it knew were not Changes in an effort to hide its breaches and failures, and in an effort to wrongfully place blame for delays on the GVS&DD;
- (g) Acciona wrongfully and repeatedly claimed Supervening Events which it knew were not Supervening Events under the Project Agreement in an effort to hide its breaches and failures, and in an effort to wrongfully place blame for delays on the GVS&DD;
- (h) Acciona's purported unilateral changes to the Project Target Dates, in the absence of any right or entitlement under the Project Agreement, caused the Material Liability Risk Breach and the Material Deprivation Breach;
- (i) Acciona would fail to complete the Project in accordance with the PA requirements by the Project Target Dates, entirely because of its breaches of the PA, negligence, breaches of the duty of good faith and honest performance, incompetence and poor management, resulting in the Project Co Schedule Breach;
- (j) the Project Co Material Breaches continued unremedied by Acciona and became Project Co Events of Default;
- (k) the GVS&DD, having made adjustments to the PA because of Acciona's incompetence, negligence and inability to comply with its contractual obligations, both in 2019 and after the Amended PA, had no confidence Acciona could complete the Project;
- (l) the GVS&DD was entitled to terminate the PA based on Acciona's Project Co Events of Default;
- (m) the subsequent steps taken by the GVS&DD under the related agreements were taken in accordance with the terms of those agreements; and
- (n) at all times the GVS&DD acted in accordance with its obligations under the PA and related agreements, and its duty of good faith and honest performance, in response to Acciona's complete and utter failure to meet its obligations under the Project Agreement.

136. In response to paragraphs 267-269, Acciona again misstates the obligations of the GVS&DD under the PA, omitting key phrases in relevant parts of the PA and in the Amendment to the PA, and omitting the circumstances in which certain obligations arise under the PA. At all times, the GVS&DD complied with its obligations under the PA, the Amendment to the PA, and its duty of good faith and honest performance.

137. The GVS&DD denies it was negligent as alleged or at all.
138. The GVS&DD denies its conduct constituted tortious interference with contractual relations as there was no intent to injure by unlawful means.
139. The GVS&DD denies Acciona took all reasonable steps to mitigate the delay and damages caused by its breaches of the PA, negligence, breaches of the duty of good faith and honest performance, incompetence and poor management. The GVS&DD further says:
- (a) Acciona repeatedly and wrongfully persisted in its wrongful efforts to achieve Changes which were not warranted or necessary under the PA, and to which it was not entitled under the PA, rather than progressing the Design in accordance with the PA, and caused further delay and additional costs;
  - (b) Acciona repeatedly and wrongfully submitted RFIs claiming conflicts and inconsistencies in the Design and Construction Specifications, which it knew were not conflicts and inconsistencies, rather than progressing the Design in accordance with the PA, and caused further delay and additional costs;
  - (c) Acciona repeatedly and wrongfully made claims for Supervening Events which it knew were not Supervening Events under the PA, rather than progressing the Design and Construction in accordance with the PA, and caused further delay and additional costs;
  - (d) Acciona continued to fail to undertake a coordinated and comprehensive approach to the Design and Construction even though it knew this approach caused innumerable errors and omissions in the Design, and caused delay and additional costs;
  - (e) Acciona advised suppliers and manufacturers of requirements it wanted for equipment rather than the requirements in the PA, or intentionally failed to include the PA requirements in RFP packages, and then advised the GVS&DD suppliers and manufacturers could not meet the PA requirements by way of intentionally misleading RFIs and Change requests, causing delay and additional costs; and
  - (f) if Acciona had to make changes to its resourcing, whether for Design or Construction, those changes were caused by Acciona's breaches of the PA, negligence, breaches of the duty of good faith and honest performance, incompetence and poor management.
140. The GVS&DD denies Acciona has suffered any loss and damage as a result of any breaches by the GVS&DD.
141. The GVS&DD denies it was mistaken about the feasibility of completing the Project at the Project Site in accordance with the PA. Further, as a matter of law, common mistake

is not available as Acciona expressly accepted all risks with respect to the conditions at the Project Site, and expressly agreed it was not relieved of its obligations under the PA as a result of any mistake it may make with respect to the conditions at the Project Site.

142. The GVS&DD also denies Acciona was mistaken about the feasibility of completing the Project at the Project Site in accordance with the PA. Acciona had full knowledge of the Project Site, its condition and the requirements in the Project Agreement, and agreed to design and build the Project in accordance with those requirements in 2017, and again in 2019 after specifically seeking and obtaining adjustments to the PA requirements, additional compensation and a lengthy extension of time.
143. The GVS&DD says and the fact is Acciona was incapable of meeting its obligations under the PA and was going to lose hundreds of millions of dollars if it had to comply with those obligations. Acciona wrongfully and intentionally tried to avoid the consequences of its failures, errors and omissions, breaches, negligence and incompetence by wrongly and falsely claiming conflicts, inconsistencies and "impossibilities" in the Project Agreement all for the purpose of forcing the GVS&DD to give Acciona additional compensation and yet further extensions of time to complete the Project, despite seeking and receiving both in 2019.
144. The GVS&DD denies Acciona is entitled to compensation on the basis of quantum meruit or unjust enrichment. Much of the work undertaken by Acciona was not at the request of the GVS&DD but was to correct its own failures, errors and omissions, breaches, negligence and incompetence for which it is not entitled to payment. The benefit of any design and construction the GVS&DD may have received from Acciona is offset by the costs the GVS&DD will incur from having to rectify numerous errors and omissions, construction defects and deficiencies, and the additional costs to complete the Project. The GVS&DD has not been enriched and there is no corresponding deprivation to Acciona.

### **Division 3 – Additional Facts**

1. See Division 2.

#### **Part 2: RESPONSE TO RELIEF SOUGHT**

1. GVS&DD consents to the granting of the relief sought in none of the paragraphs of Part 2 of the notice of civil claim.
2. GVS&DD opposes the granting of the relief sought in all of the paragraphs of Part 2 of the notice of civil claim.
3. GVS&DD takes no position on the granting of the relief sought in none of the paragraphs of Part 2 of the notice of civil claim.



### **Part 3: LEGAL BASIS**

1. At all times the GVS&DD acted in accordance with its obligations under the PA, and its duty of good faith and honest performance, and denies any breach of the PA, of any duty of good faith and honest performance, of any related agreements, and any negligence.
2. At all times the GVS&DD exercised its rights under the PA in accordance with the terms of the PA and its duty of good faith and honest performance.
3. Acciona breached the Project Agreement, breached its duty of good faith and honest performance, was negligent and incompetent.
4. Acciona is not entitled under the Project Agreement to payment of Milestone 5.
5. The GVS&DD did not breach any representation or warranty in the Project Agreement.
6. The GVS&DD did not tortiously interfere with Acciona's contractual relations with others.
7. The GVS&DD's conduct did not delay the Project, or cause Acciona to suffer loss and damage. The delays to the Project were caused solely by Acciona's breaches of the PA, breaches of the duty of good faith and honest performance, negligence and incompetence.
8. Acciona is not entitled under the PA to relief, compensation or adjustments to the Project Schedule.
9. Acciona has no right to claim any entitlement for relief or compensation pursuant to section 8.11 of the Project Agreement as it failed to comply with the notice requirements for Supervening Events.
10. Acciona is not entitled to compensation on a quantum meruit basis or on the basis of unjust enrichment. The GVS&DD has not been enriched by Acciona, and Acciona has not suffered a corresponding deprivation. To the contrary, Acciona's breaches will cause damages, loss and expense to the GVS&DD.
11. There was no common mistake in entering the Project Agreement. Acciona knew and accepted the risks associated with building the Project in accordance with the Project Agreement at the Project Site.
12. The GVS&DD pleads and relies on Part 14 of the *Supreme Court Civil Rules*, seeks costs, and seeks costs on a solicitor-client indemnity basis in relation to all allegations of intentional or deliberate wrong-doing against it.


Defendant's address for service:                             1800 – 510 West Georgia Street  
  Vancouver, British Columbia  
  V6B 0M3

Fax number address for service (if any): N/A

E-mail address for service (if any): N/A

Norton Rose Fulbright Canada LLP

Date: 15/JUN/2022

per:   
\_\_\_\_\_  
Signature of Beth Allard  
lawyer for defendant

Rule 7-1 (1) of the Supreme Court Civil Rules states:

1. Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
  - (a) prepare a list of documents in Form 22 that lists
    - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
    - (ii) all other documents to which the party intends to refer at trial, and
  - (b) serve the list on all parties of record.

No. S-222719  
Vancouver Registry

---

In the Supreme Court of British Columbia

Between

ACCIONA WASTEWATER SOLUTIONS LP by its  
general partner, AWS GENERAL PARTNER INC.

Plaintiff

and

GREATER VANCOUVER SEWERAGE AND  
DRAINAGE DISTRICT

Defendant

---

**RESPONSE TO CIVIL CLAIM**

---

**NORTON ROSE FULBRIGHT CANADA LLP**  
Barristers & Solicitors  
1800 – 510 West Georgia Street  
Vancouver, BC V6B 0M3  
Attention: Beth Allard

BA/SPC/KMB  
CAN\_DMS: \145905806

Matter# 1001187311