



Transport for NSW

Western Harbour Tunnel

Tendering Cost Contribution Deed

Confidential Information



Tendering Cost Contribution Deed

In relation to the delivery of the Package 2: WHT Driven Tunnels, Immersed Tube (IMT), and Mechanical and Electrical Fitout (**Package 2**)

Transport for NSW (ABN 18 804 239 602)

THIS DEED is made on 25 MAY 2022

BETWEEN:

Transport for NSW ABN 18 804 239 602 whose registered office is at 20 – 44 Ennis Road, Milsons Point, NSW 2061; and

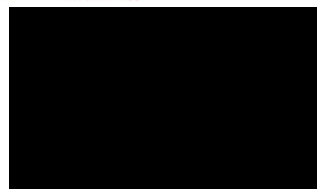
Bouygues Construction Australia Pty Ltd ABN 37 144 013 810 whose registered office is at Level 2, 77 Pacific Highway North Sydney NSW 2060; and

Vinci Construction Grands Projets Australia Pty Ltd ABN 24 629 645 754 whose registered office is at Brisbane Technology Park, 12 Electronics Street, Eight Mile Plains Queensland 4113

(each a **Participant** and together the **Relevant Tenderer**)

RECITALS:

- (A) Transport for NSW is responsible for delivering the Project on behalf of the NSW Government.
- (B) Transport for NSW is undertaking the Procurement Process to select the Contractor to undertake the delivery of the Project.
- (C) Following a pre-registration and expression of interest process, the Relevant Tenderer was invited to submit an Application.
- (D) The Relevant Tenderer submitted an Application and has been selected by Transport for NSW to participate in Stage 2 of the Procurement Process.
- (E) The Relevant Tenderer wishes to participate in Stage 2 of the Procurement Process and submit a Tender in accordance with this Deed.
- (F) This Deed sets out the terms on which Transport for NSW will pay the Relevant Tenderer if its Tender is unsuccessful.
- (G) The Relevant Tenderer is required to execute and return this Deed prior to continuing to Stage 2 of the Procurement Process.



THE PARTIES AGREE AS FOLLOWS:

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Deed, the following definitions apply unless the context requires otherwise.

Application means the documents which are required by the Invitation to be prepared, completed and executed, and submitted to Transport for NSW in relation to Package 2, in response to the Invitation.

Approved Tender means [REDACTED]

[REDACTED]

Associates means, in relation to a person, any Related Body Corporate (as defined in the *Corporations Act 2001* (Cth)) of that person and any officer, agent, contractor, consultant, nominee, licensee or advisor of that person or that Related Body Corporate.

Background Intellectual Property Rights means [REDACTED]

[REDACTED]

Business Day means any day other than a Saturday, Sunday or public holiday in Sydney, or 23, 24, 27, 30 or 31 December in Sydney.

Change in Control means, in respect of an entity, the occurrence of any event which results in a change in the Control of that entity.

Claim includes any claim, action, demand or proceeding of any nature whatsoever.

[REDACTED]

Claimant has the meaning given in clause 9.2.

Closing Date and Time means the date and time at which the RFT requires Tenders to be submitted by Tenderers to Transport for NSW.

Consequential Loss means:

- a) any loss of income, loss of revenue, loss of profit, loss of financial opportunity, loss of investment return, loss of business or loss of business opportunity, loss of contract, loss of goodwill, loss of use, loss of production, failure to realise anticipated savings or increase in financing costs (whether the loss is direct or indirect); or
- b) any loss, damage, cost, expense or liability that is:
 - i) not a loss, damage, cost, expense or liability that may fairly and reasonably be considered to arise naturally (being according to the usual course of things) from the breach or relevant matter; or
 - ii) not fairly and reasonably contemplated by both Transport for NSW and the Relevant Tenderer at the date of this Deed as the probable result of the breach or relevant matter,

whether present or future, fixed or unascertained, actual or contingent.

Contractor means the entity or entities selected and engaged by Transport for NSW as the 'Contractor' to design and construct the Package Works under the WHT Deed for Package 2.

Control has the meaning given in section 50AA of the *Corporations Act 2001* (Cth).

Data Room means any electronic data room containing documents, data and other information regarding the delivery of the Project created and maintained by, or on behalf of, Transport for NSW for the purposes of the Procurement Process.

Deed means this deed comprising clauses 1 to 13 (inclusive) and Schedule 1 to Schedule 4 (inclusive).

Dispute has the meaning given in clause 9.1.

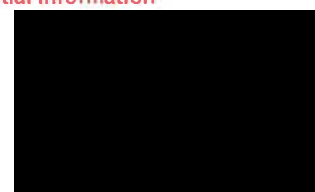
Individual Deed Poll means an individual deed poll executed by an individual in favour of Transport for NSW as required by the Stage 1 Confidentiality and Disclaimer Deed Poll or Stage 2 Procurement Process Deed Poll which form part of the Invitation and RFT respectively.

Intellectual Property Right means any copyright, patent or registered or unregistered rights including design, circuit layouts, trademarks or name or other protected right.

Interactive Process Protocol means the document set out in Schedule 1.

[REDACTED]

Invitation means the document titled "Western Harbour Tunnel - Invitation for Expression of Interest – Main Works Packages 1 and 2" issued by Transport for NSW and dated August



2021, and includes all parts, appendices and attachments to it, as well as any Addenda and amendments issued by Transport for NSW.

Key Personnel means the personnel specified in Schedule 2, as replaced in accordance with clauses 2.4b) or 2.4c).

Mandatory Criteria means the mandatory criteria set out in Attachment E (Mandatory Criteria) of the RFT.

Moral Rights means any moral rights arising under Part IX of the *Copyright Act 1968* (Cth).

Notice has the meaning given to it in clause 13.2a).

Package 2 means WHT Driven Tunnels, IMT, and Mechanical and Electrical Fitout as described in the Procurement Documents.

Participant means:

- a) where the Relevant Tenderer consists of a single entity, the Relevant Tenderer; and
- b) where the Relevant Tenderer consists of more than one entity, each of those entities.

Procurement Documents means:

- a) the document issued by Transport for NSW inviting submissions of interest titled "Pre-registration for the Western Harbour Tunnel" dated March 2021;
- b) the Stage 1 Confidentiality and Disclaimer Deed Poll;
- c) the Invitation;
- d) the Stage 2 Procurement Process Deed Poll;
- e) the Individual Deeds Poll;
- f) this Deed;
- g) the RFT; and
- h) any addenda or amendments to the documents listed above issued by Transport for NSW.

Procurement Process means the procurement processes relating to the selection of the Contractor for the delivery of Package 2, including Stage 1 and Stage 2 of the Procurement Process.

Project means the Western Harbour Tunnel project, as further described in the Procurement Documents.

Project Intellectual Property Rights means all Intellectual Property Rights which subsist in the Submission Documents excluding the Background Intellectual Property Rights.

Respondent has the meaning given in clause 9.2.

Returnable Schedules means Attachment C (Returnable Schedules) of the RFT.

RFT means a request for submission of a Tender for the delivery of Package 2 issued by Transport for NSW, and includes all parts, appendices and attachments to it, as well as any addenda and amendments issued by Transport for NSW.

Stage 1 means the stage of the Procurement Process:

- a) commencing on the release of the invitation by Transport for NSW to submit a pre-registration of interest;
- b) including the release of the Invitation by Transport for NSW, submission of Applications, evaluation of Applications by Transport for NSW and selection by Transport for NSW of the Tenderers; and
- c) ending immediately before the release of the RFT to one or more Tenderers by Transport for NSW.

Stage 2 means the stage of the Procurement Process:

- a) commencing on the release of the RFT to one or more Tenderers by Transport for NSW;
- b) including the Tender Period [REDACTED] submission of Tenders, evaluation of Tenders by Transport for NSW and selection by Transport for NSW of the Contractor; and
- c) ending upon the execution of the WHT Deed.

Stage 2 Procurement Process Deed Poll means the deed poll entitled “Stage 2 Procurement Process Deed Poll” executed by into by the Relevant Tenderer in favour of Transport for NSW in connection with Stage 2 of the Procurement Process.

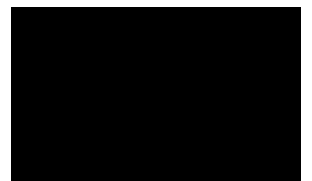
Submission Documents means all design, standards, reports, specifications, models, samples, calculations, drawings, documents and other information to be provided or provided by, or on behalf of, the Relevant Tenderer in its participation in Stage 2 of the Procurement Process (including as part of submitting its [REDACTED] Tender).

Tender means the documents which are required by the RFT to be prepared, completed and executed, and submitted by the Tenderer to Transport for NSW, in response to the RFT for Package 2.

Tender Period means the period between the issue of the RFT and the Closing Date and Time for submission of Tenders , during which Transport for NSW will conduct a series of interactive workshops for the purposes of assisting Tenderers to develop their Tenders.

Tenderer means each entity or entities selected by Transport for NSW to participate in Stage 2 of the Procurement Process for Package 2, including the Relevant Tenderer.

WHT Deed means a deed to be entered into by Transport for NSW or its nominee and the Contractor in a form acceptable to Transport for NSW for the delivery of Package 2.



1.2 Interpretation

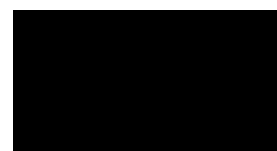
In this Deed unless the context otherwise requires:

- a) the expressions "including", "includes" and "include" have the meaning as if followed by "without limitation";
- b) a reference to any party includes that party's executors, administrators, successors, and permitted substitutes and assigns, including any person taking by way of novation;
- c) a reference to this Deed or to any other deed, agreement, document, instrument, guideline or code of practice includes, respectively, this Deed or such other deed, agreement, document, instrument, guideline or code of practice as amended, novated, supplemented, varied or replaced from time to time;
- d) words importing the singular include the plural (and vice versa) and words denoting a given gender include all other genders;
- e) headings are for convenience only and do not affect the interpretation of this Deed;
- f) a reference to a clause, party or schedule is a reference to a clause, party or schedule of or to this Deed;
- g) a reference to this Deed includes all schedules to this Deed;
- h) where any word or phrase is given a defined meaning, any other part of speech or other grammatical form of that word or phrase has a corresponding meaning;
- i) "day" means calendar day;
- j) a reference to "\$" is to Australian currency; and
- k) in the interpretation of this Deed, no rule of construction applies to the disadvantage of one party on the basis that the party put forward or drafted this Deed or any provision in it.

2. PARTICIPATION IN STAGE 2 OF PROCUREMENT PROCESS AND INTERACTIVE PROCESS

2.1 Process Objectives

- a) The key objective of the RFT is to receive Tenders that demonstrate value for money outcomes for the delivery of Package 2 and meet Transport for NSW's objectives and requirements for the delivery of Package 2.
- b) The objectives of the interactive process during Stage 2 of the Procurement Process include:
 - i) to inform Tenderers about the delivery of Package 2 including scope, risks and issues;



- ii) to transfer Transport for NSW knowledge and experience of the delivery of the Project efficiently and rapidly and utilise Tenderers' delivery expertise to optimise Tenders;
- iii) to discuss the optimal risk allocation and assist Tenderers to develop strategies to better manage risks; and
- iv) to encourage and enable innovation at an early stage of Package 2 when the potential benefits are greatest.

2.2 Behavioural commitments

In participating in Stage 2 of the Procurement Process, the Relevant Tenderer agrees to:

- a) participate in good faith;
- b) apply a design-thinking / customer-focussed mind-set;
- c) work collaboratively and constructively with Transport for NSW;
- d) share information and communicate with Transport for NSW promptly and openly; and
- e) seek to innovate and challenge existing thinking.

2.3 Participation requirements

- a) The Relevant Tenderer must participate in Stage 2 of the Procurement Process in accordance with the Procurement Documents (including the Interactive Process Protocol).
- b) The Relevant Tenderer must, as required by Transport for NSW and the Interactive Process Protocol:
 - i) prepare and provide to Transport for NSW the Submission Documents including [REDACTED] an Approved Tender; and
 - ii) attend and participate in meetings, workshops and interactive sessions organised by Transport for NSW as part of the Procurement Process.
- c) In performing its obligations under this Deed, the Relevant Tenderer must comply with all applicable laws and all applicable Transport for NSW and NSW Government policies and guidelines.
- d) The Relevant Tenderer must ensure appropriate and adequate resources are applied to its participation in Stage 2 of the Procurement Process and, in particular, in addition to the requirements in clause 2.4, must ensure adequate commitment and participation by senior personnel.

2.4 Key Personnel

- a) The Relevant Tenderer must ensure that the Key Personnel are the personnel performing the roles described in Schedule 2 and allocate a sufficient amount of time to enable the Key Personnel to properly perform those roles.

- b) The Relevant Tenderer may only replace a member of the Key Personnel with Transport for NSW's prior written approval (not to be unreasonably withheld or delayed).
- c) If a member of the Key Personnel retires, resigns or is otherwise unable to work for reasons beyond the Relevant Tenderer's reasonable control, the Relevant Tenderer must appoint a replacement approved by Transport for NSW as soon as practicable (noting that such approval must not be unreasonably withheld or delayed).
- d) To the extent the roles described in Schedule 2 are relevant to the delivery of the Project, the Relevant Tenderer must ensure that:
 - i) it genuinely intends that the relevant Key Personnel perform those roles during the performance of the delivery of Package 2; and
 - ii) it is not aware of any circumstance that would prevent the relevant Key Personnel performing those roles during the delivery of Package 2,

in the event Transport for NSW selects the Relevant Tenderer as the Contractor.

2.5 Relevant Tenderer not relieved

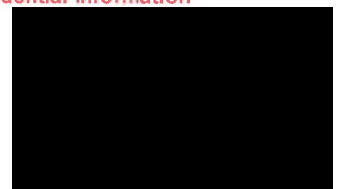
In the event Transport for NSW selects the Relevant Tenderer as the Contractor and the Relevant Tenderer enters into the WHT Deed with Transport for NSW or its nominee, the parties' rights and obligations under the WHT Deed are not extinguished or reduced as a result of:

- a) the Procurement Documents or the parties' performance of them; or
- b) any participation, review, failure to review, recommendation, guidance, advice, opinion, feedback, comment, endorsement, approval or silence by or on behalf of Transport for NSW in connection with the Procurement Process, including during meetings, discussions and workshops held as part of the Tender Period.

3. PAYMENT FOR TENDER COSTS

3.1 Transport for NSW to pay

- a) Subject to clauses 3.1b), 3.3, 3.4, 3.6, 3.7 and 3.8 the Relevant Tenderer is solely responsible for and will bear all costs and expenses incurred by it in participating in the Procurement Process, including the interactive dialogue process and preparing and submitting its [REDACTED] Tender and any subsequent clarification, negotiation and contract execution processes.
- b) Notwithstanding any other provision of this clause 3, the Relevant Tenderer will have no entitlement to claim payment of, and Transport for NSW will have no obligation to pay to the Relevant Tenderer, any amount under this clause 3 where:
 - i) the Relevant Tenderer breaches this Deed, or any other Procurement Document; or
 - ii) the Relevant Tenderer fails to participate in the interactive process and make the required submissions in accordance with this Deed and the RFT.



3.2 [Redacted]

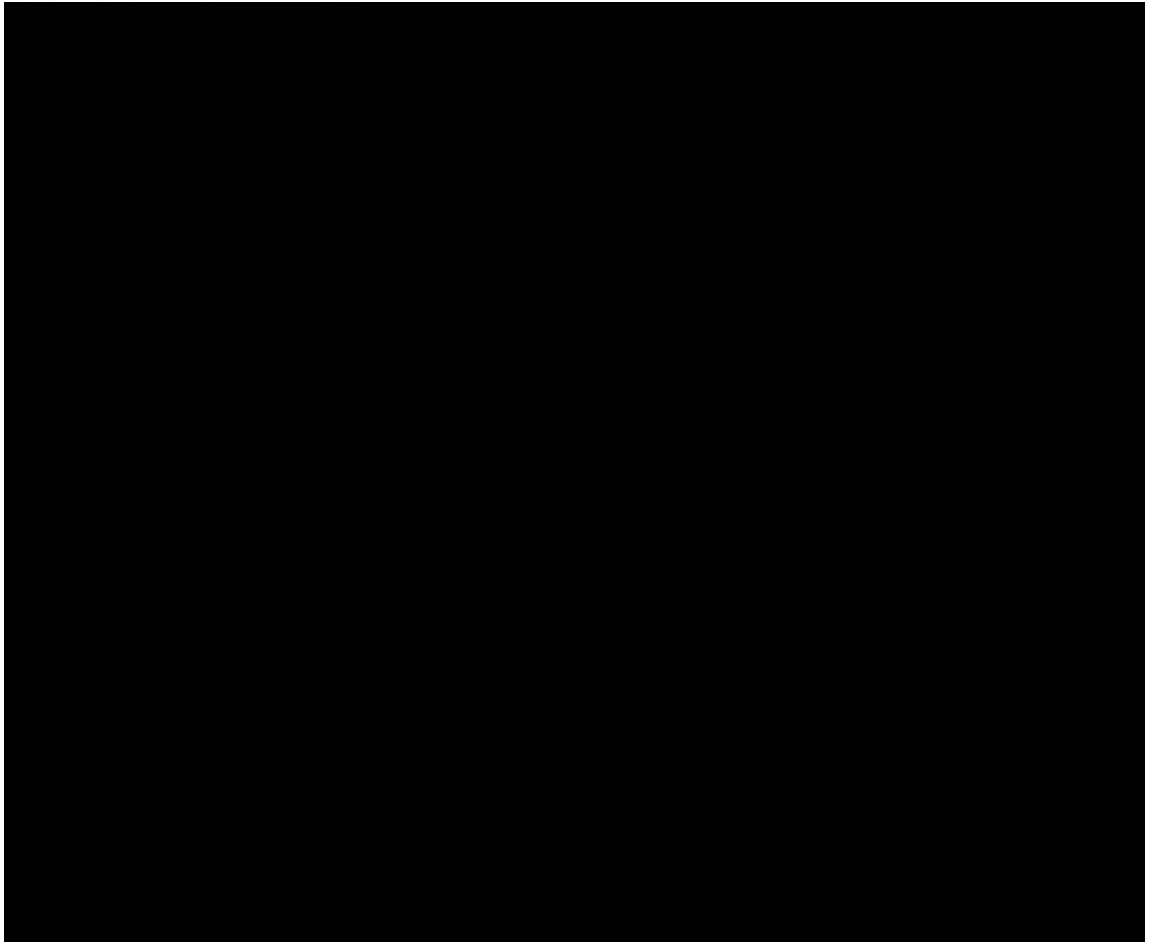
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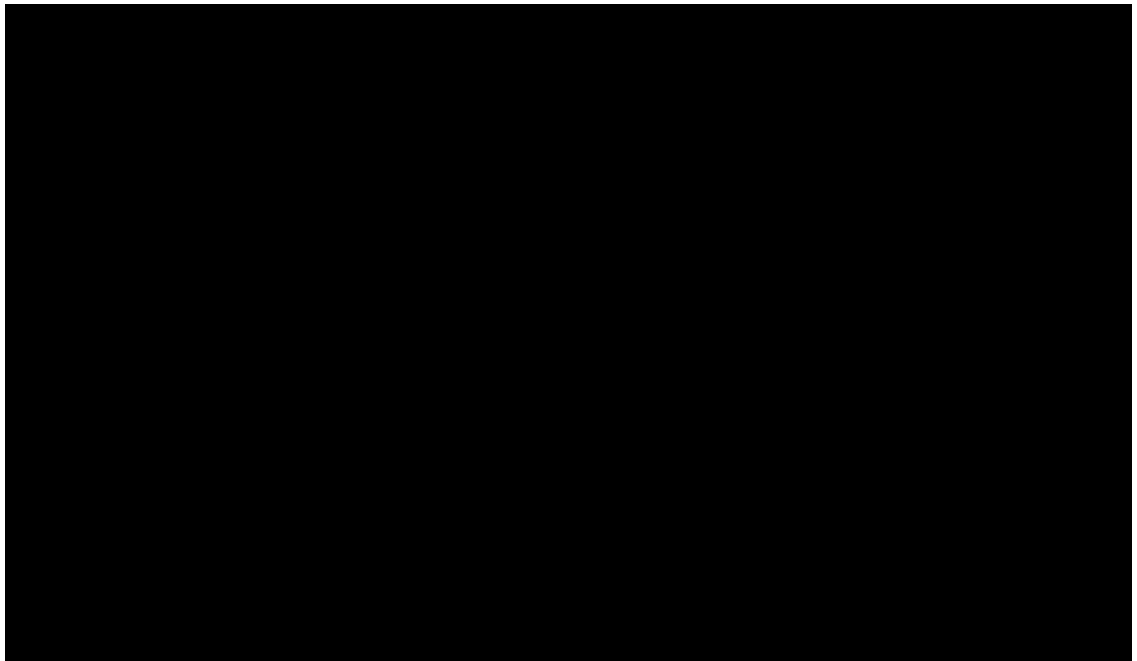
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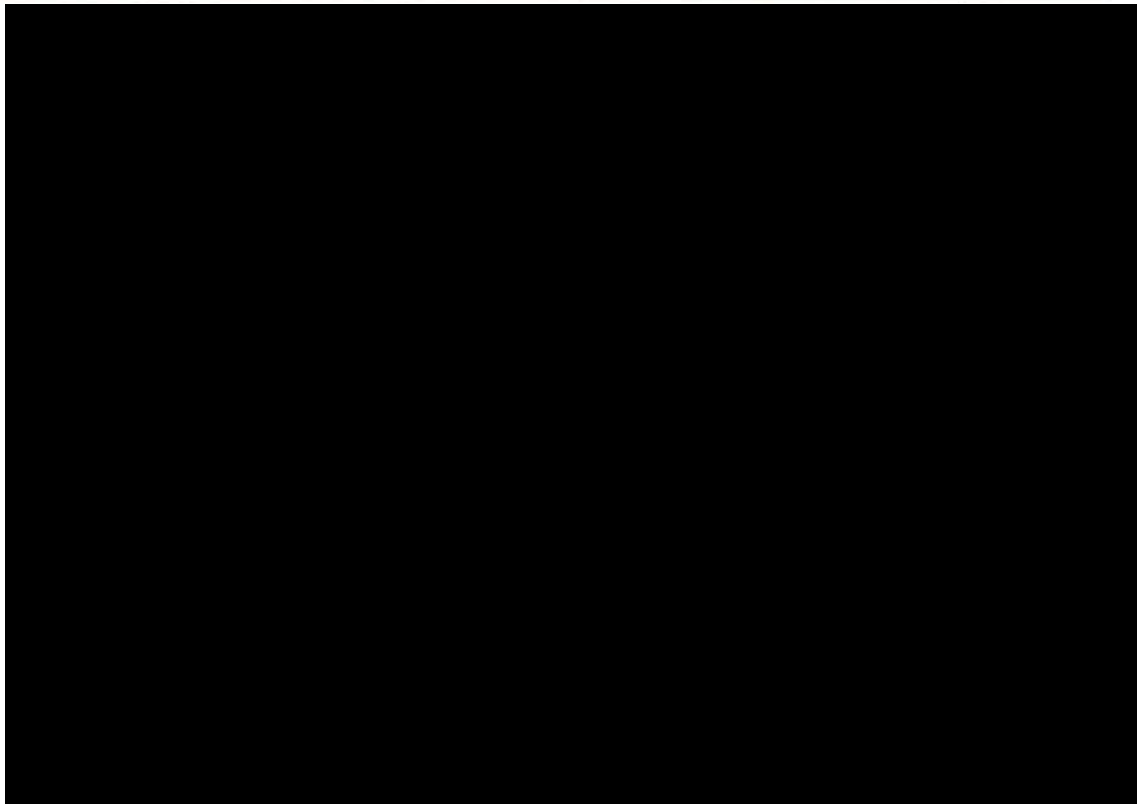
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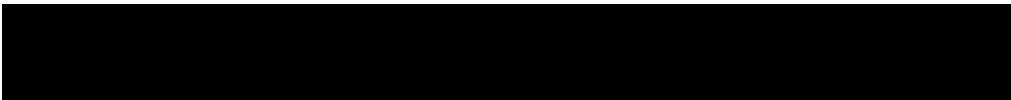
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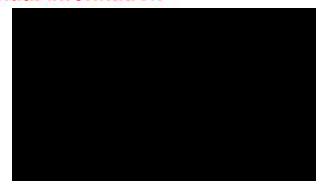
3.5 Entry into the WHT Deed

If Transport for NSW or its nominee enters into the WHT Deed or alternative type of agreement acceptable to Transport for NSW with the Relevant Tenderer:

- a) 
- b) 
 - i) within 20 Business Days of the date the WHT Deed; or
 - ii) as otherwise agreed to with Transport of NSW; and
- c) 

3.6 Remaining Tender Costs

- a) Subject to clauses 3.1b), 3.7 and 3.9, where Transport for NSW enters into the WHT Deed or alternative type of agreement acceptable to Transport for NSW with a Contractor other than the Relevant Tenderer, then Transport for NSW undertakes to pay the Relevant Tenderer the actual costs incurred by the Relevant Tenderer in preparing its Approved Tender up to a total aggregate limit of \$  (exclusive of



GST) [REDACTED]

b) [REDACTED]

- c) Transport for NSW must advise the Relevant Tenderer by written notice if it enters into the WHT Deed or alternative type of agreement acceptable to Transport for NSW with a Tenderer other than the Relevant Tenderer.

3.7 Early termination of the Procurement Process

- a) Subject to clauses 3.1b) and 3.9 if:
- i) Transport for NSW decides to not proceed with Package 2, or terminates the Procurement Process, without entering into the WHT Deed or alternative type of agreement acceptable to Transport for NSW with a Contractor;
 - ii) prior to the event described in clause 3.7a)i) occurring, the Relevant Tenderer participated in the interactive process in accordance with this Deed and the RFT; and
 - iii) where the event described in clause 3.7a)i) occurs after the Closing Date and Time, the Relevant Tenderer submitted an Approved Tender to Transport for NSW by the Closing Date and Time,

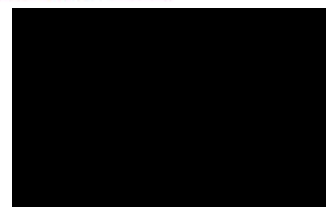
then, Transport for NSW undertakes to pay the Relevant Tenderer, its actual costs incurred in undertaking the activities under clause 3.7a)ii) or 3.7a)iii) (as applicable) up to a total aggregate limit of \$ [REDACTED] (exclusive of GST) [REDACTED]

b) [REDACTED]

- c) Transport for NSW must advise the Relevant Tenderer by written notice if an event described in clause 3.7a) occurs.

3.8 Remaining Tender Cost Payment process

- a) Within 15 Business Days of the date of Transport for NSW's notice under clause 3.6c) or 3.7c), the Relevant Tenderer must notify Transport for NSW in writing of the total aggregate amount of the actual costs incurred by the Relevant Tenderer in preparing its Approved Tender (including participating in the interactive process) which must be [REDACTED] provided by the Relevant Tenderer in accordance with clause 3.2a).



- b) Within 10 Business Days of the Relevant Tenderer notifying Transport for NSW in accordance with clause 3.8a), Transport for NSW will notify the Relevant Tenderer in writing of Transport for NSW's determination of the Relevant Tenderer's entitlement under clause 3.6a) or 3.7c) (as applicable).
- c) Subject to clause 3.8d), Transport for NSW will pay the amount determined by Transport for NSW under clause 3.8b) within 20 Business Days of the later of the following:
 - i) provision of a valid tax invoice by the Relevant Tenderer; and
 - ii) provision of a statutory declaration by the Relevant Tenderer confirming that amounts due and payable to subcontractors and suppliers in respect of the amounts claimed under this Deed have been paid which is:
 - (A) signed by a representative of the Relevant Tenderer who is in a position to know the facts attested to; and
 - (B) in the form of Schedule 4 (*Form of Statutory Declaration – Subcontractor and supplier payments*).

d)

3.9

3.10 Acknowledgment

The Relevant Tenderer acknowledges and agrees that Transport for NSW may provide the [REDACTED] and statutory declarations provided by the Relevant Tenderer in

accordance with this deed to NSW Treasury and other relevant NSW government agencies for information purposes to benchmark tendering costs for future procurements.

3A. RELEASE AND INDEMNITY

3A.1 Release

Without limiting clause 8.1, upon payment by Transport for NSW in accordance with clause 3.8, the Relevant Tenderer releases and discharges Transport for NSW and any person acting on behalf of, or associated with Transport for NSW, from all Claims and all liabilities of any nature (whether or not the parties were or could have been aware of them at the date of this Deed and whether arising before or after the date of this Deed) which the Relevant Tenderer:

- a) now has;
- b) at any time has;
- c) may in the future have; or
- d) but for this Deed, could or might have had,

against Transport for NSW or any person acting on behalf of, or associated with, Transport for NSW:

- e) under, arising out of or in any way in connection with the Procurement Process or the circumstances contemplated by this Deed; or
- f) arising out of, or in any way in connection with any conduct, representation, task, thing or relationship connected with the Project.

3A.2 Release by Associates

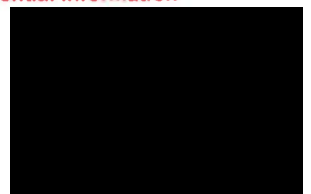
The Relevant Tenderer undertakes to procure releases on the terms set out in this clause 3A (other than this clause 3A.2) in favour of Transport for NSW from each of the Relevant Tenderer's Associates if required to do so by Transport for NSW by notice in writing.

3A.3 Indemnity

Upon payment by Transport for NSW in accordance with clause 3.8, the Relevant Tenderer indemnifies Transport for NSW and any person acting on behalf of, or associated with Transport for NSW, on demand against all Claims by or on behalf of the Relevant Tenderer or any of its Associates which have arisen or may arise in relation to the matters the subject of the release in this clause 3A.

3A.4 Bar to further proceedings

This Deed may be pleaded as a full and complete defence by Transport for NSW or any person acting on behalf of or associated with Transport for NSW, to any action, suit or proceedings commenced, continued or taken by the Relevant Tenderer or any of its Associates, or on behalf of any of them, in relation to any of the matters referred to in this clause 3A.




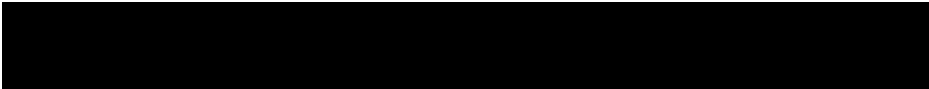

3A.5 Warranties

The Relevant Tenderer warrants that:

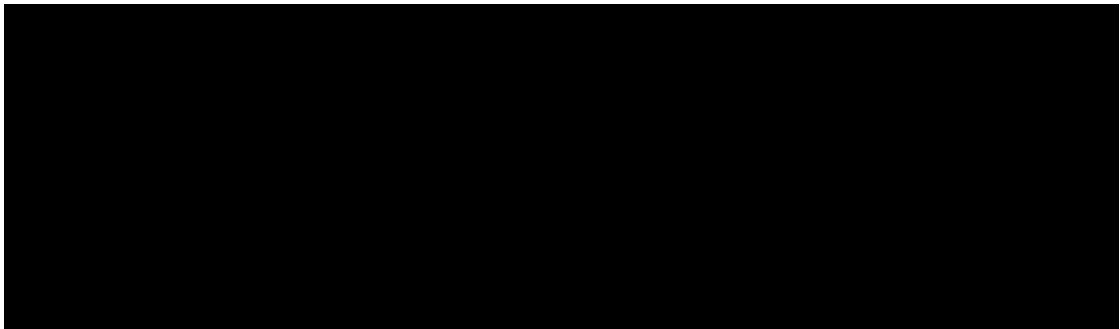
- a) the Relevant Tenderer has taken independent legal advice as to the nature, effect and extent of this Deed;
- b) the Relevant Tenderer has not relied upon any conduct of or representation made by Transport for NSW or any person acting on behalf of or associated with Transport for NSW in connection with any of the matters referred to in clause 3A; and
- c) the Relevant Tenderer is aware that Transport for NSW is relying on the warranties in this clause 3A.5 in making the payment referred to in clause 3.8c).

4. INTELLECTUAL PROPERTY RIGHTS

4.1 Project Intellectual Property Rights

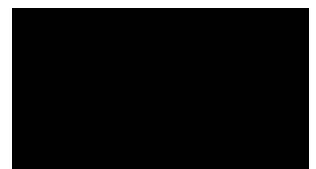
- a) Subject to clause 4.2, the Relevant Tenderer agrees, and must ensure, that all Project Intellectual Property Rights vest in or are assigned or transferred to Transport for NSW on the date they are created or developed 
 - i) 
 - ii) 
- b) The Relevant Tenderer agrees to do anything necessary to give effect to the transfer of Project Intellectual Property Rights contemplated by this clause 4.1.
- c) On and from the date Transport for NSW receives Project Intellectual Property Rights under clause 4.1a), Transport for NSW grants to the Relevant Tenderer a non-exclusive, royalty free licence (including the right to sublicense, subject to the Relevant Tenderer's confidentiality obligations) to use and exercise those Project Intellectual Property Rights for the purposes of participating in the Procurement Process, including preparing and submitting a Tender.

4.2



4.3 Moral rights

The Relevant Tenderer must ensure that it obtains and gives to Transport for NSW an irrevocable written consent from each author of any artistic work to be incorporated into the Submission Documents to:



- a) any non-attribution or false attribution of authorship of the artistic work;
- b) any use, addition, omission, change, adaption or destruction of the artistic work or works created from it; and
- c) take any other action that would infringe that author's Moral Rights,

for the benefit of Transport for NSW and those authorised by Transport for NSW. In this clause 4.3, the terms "artistic work" and "attribution" have the meanings in the *Copyright Act 1968* (Cth).

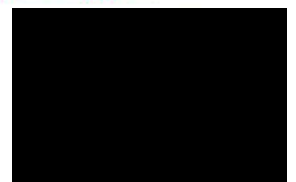
4.4 Warranties and indemnities

- a) The Relevant Tenderer warrants to Transport for NSW that:
 - i) the Submission Documents and the Relevant Tenderer's participation in the Procurement Process will not infringe any Intellectual Property Right or Moral Right of a third party; and
 - ii) the Relevant Tenderer is entitled to assign, transfer or licence (as applicable) Intellectual Property Rights to Transport for NSW in accordance with clauses 4.1 and 4.2.
- b) The Relevant Tenderer must indemnify Transport for NSW from and against:
 - i) any Claim that the Submission Documents or the Relevant Tenderer's participation in the Procurement Process infringes any Intellectual Property Right or Moral Right of a third party;
 - ii) any Claim that the use or exercise of any Project Intellectual Property Rights, or any Background Intellectual Property Rights in accordance with the licence granted under clause 4.2, infringes or allegedly infringes the Intellectual Property Rights of a third party; and
 - iii) any Claim that an act or omission described in clause 4.3a), 4.3b) or 4.3c) infringes or allegedly infringes any Moral Rights of a third party,

except to the extent that a Claim arises from an infringement or alleged infringement in connection with the initial provision of information by or on behalf of Transport for NSW in the Data Room.

4.5 No disclosure

- a) Subject to clauses 4.5b) and 4.5c), Transport for NSW will not disclose to any other Tenderer:
 - i) any information set out in the Relevant Tenderer's Submission Documents; or
 - ii) any design, methodology or pricing developed by the Relevant Tenderer for the purposes of the delivery of the Project.
- b) If the Relevant Tenderer withdraws from Stage 2 of the Procurement Process, Transport for NSW may disclose to another Tenderer any technical information and



supplier lists included in the Submission Documents (which does not include any Background Intellectual Property Rights which the Relevant Tenderer specifically identifies as such, pricing or financial information).

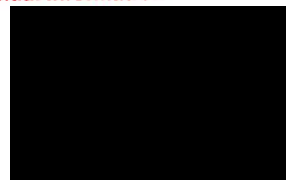
- c) Clause 4.5a) does not prevent Transport for NSW making generic updates to its concept design and technical requirements for the delivery of the Project or Package 2.

5. NO COMMITMENT

- a) Other than any Procurement Documents entered into by the Relevant Tenderer as an agreement, deed or deed poll, no obligations arise from the Procurement Documents as between the Relevant Tenderer and Transport for NSW or any officers, employees or advisers of Transport for NSW.
- b) Except as referred to in clause 5.a), no binding contract (including a process contract) or other understanding (including, any form of contractual, quasi-contractual, restitutionary or promissory estoppel rights, or rights based upon similar legal or equitable grounds) will exist between Transport for NSW and the Relevant Tenderer unless and until the WHT Deed is executed by Transport for NSW or its nominee and the Relevant Tenderer.
- c) The Relevant Tenderer acknowledges and agrees that Transport for NSW is under no obligation to (and Transport for NSW has made no representation that it will):
 - i) proceed with the Project at all or in any particular form;
 - ii) proceed with the Procurement Process at all or in any particular form; or
 - iii) enter into the WHT Deed or other contractual arrangement with the Relevant Tenderer in respect of the delivery of Package 2, or any other arrangement or scope of works similar to the delivery of Package 2.

6. INTERACTION WITH OTHER PROCUREMENT DOCUMENTS

- a) Transport for NSW's rights under the Procurement Documents will not be extinguished or affected as a result of the parties entering into this Deed.
- b) The Procurement Documents are intended to operate and must be read together. The Relevant Tenderer must comply with Procurement Documents, including its obligations relating to:
 - i) disclosure and use of confidential information;
 - ii) the Data Room conditions of access; and
 - iii) privacy and personal information.
- c) This Deed is the "Tendering Cost Contribution Deed" referred to in the Invitation.



7. TERMINATION

7.1 Termination by Transport for NSW

Transport for NSW may, at any time, terminate this Deed by giving the Relevant Tenderer 5 Business Days' written notice. Transport for NSW may decide to exercise its right to terminate under this clause 7.1 for any reason, without considering the interests of the Relevant Tenderer and regardless of whether a party is in breach of this Deed.

7.2 Termination on award

This Deed will terminate if Transport for NSW or its nominee enters into the WHT Deed with the Relevant Tenderer.

7.3 Termination where Relevant Tenderer withdraws

The Deed will terminate automatically if the Relevant Tenderer withdraws from the Procurement Process prior to submitting a Tender.

7.4 Rights on termination

Except as expressly set out in clause 3, if this Deed is terminated for any reason, including in accordance with clause 7.1 or 7.2, the Relevant Tenderer is not entitled to make any Claim against Transport for NSW or any personal acting on behalf of or associated with Transport for NSW as a result of that termination, including for payment of or any contribution towards the cost of participating in the Procurement Process.

7.5 Provision of Submission Documents

If requested by Transport for NSW where:

- a) this Deed has been terminated before the Relevant Tenderer submitted a Tender; or
- b) the Relevant Tenderer has withdrawn from the Procurement Process prior to submitting a Tender,

subject to clause 3.7, the Relevant Tenderer must promptly deliver to Transport for NSW copies of:

- c) all Submission Documents; and
- d) all designs, specifications, supplier lists and other technical information prepared for the purposes of the Relevant Tenderer's participation in the Procurement Process,

then in the possession or control of the Relevant Tenderer, its consultants, contractors or agents, whether complete or not.

7.6 Accrued rights and obligations unaffected

The termination of this Deed does not affect the parties' rights or obligations under this Deed which accrued prior to the date of termination.

7.7 Provisions surviving termination

- a) Clauses 1, 2.5, 3, 3A, 4, 5, 6, 7.3, 7.5, 7.6, 7.7, 8, 9, 10, 11.a) and 13 and any other obligations which are expressed to or, by their nature, survive expiry or termination of this Deed, survive expiry or termination of this Deed and are enforceable at any time at law or in equity.
- b) The provisions of this Deed survive expiry or termination of this Deed to the extent necessary to give effect to clause 7.7a).

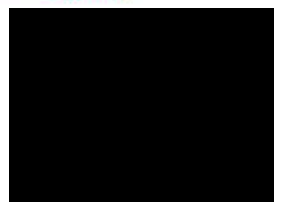
8. LIABILITY**8.1 No liability of Transport for NSW to Relevant Tenderer**

Other than for payment under clause 3, Transport for NSW has no liability to the Relevant Tenderer arising out of or in connection with this Deed, whether in contract, tort (including negligence) or otherwise at law or in equity, including in connection with any meetings, workshops, correspondence, discussions, negotiations and documentation in relation to the Procurement Process.

The Relevant Tenderer irrevocably waives and releases Transport for NSW from all Claims against Transport for NSW in respect of liability that is excluded under this clause 8.1, whether present or future, fixed or unascertained, actual or contingent.

8.2 No liability for Consequential Loss

- a) Subject to clause 8.2b), neither party will have any liability to the other party arising out of or in connection with this Deed, whether in contract, tort (including negligence) or otherwise at law or in equity, for any Consequential Loss.
- b) Clause 8.2a) does not exclude a party's liability:
 - i) to the extent such liability cannot be limited at law;
 - ii) in the case of the Relevant Tenderer, arising out of or in connection with the Relevant Tenderer's wilful or reckless act or omission, gross negligence, fraud or criminal conduct;
 - iii) in respect of personal injury (including death) or illness of any person or for loss of, loss of use of or destruction of or damage to any third party property;
 - iv) for breach of confidence or privacy or misuse of personal information;
 - v) for breach of the party's obligations under this Deed relating to Intellectual Property Rights;
 - vi) in the case of Transport for NSW, for payment of any amount expressly required under clause 3; or
 - vii) in the case of the Relevant Tenderer, arising under any other Procurement Document.



9. DISPUTE RESOLUTION

9.1 Procedure

If a dispute arises under or in connection with this Deed (**Dispute**), neither party may commence action without first endeavouring to resolve the Dispute in good faith in accordance with the procedure in this clause 9.

9.2 Notice

If a Dispute arises, either party (**Claimant**) may, by written notice to the other party (**Respondent**), refer the Dispute to the parties' senior representative for resolution. The notice must set out reasonable particulars of the Dispute and specify the senior representatives nominated by the Claimant to resolve the Dispute.

9.3 Negotiation

- a) Within 5 Business Days after a Dispute is referred to senior representatives under clause 9.2, the Respondent must give the Claimant written notice specifying the senior representatives nominated by the Respondent to resolve the Dispute.
- b) The parties must ensure their nominated senior representatives:
 - i) meet to discuss the Dispute in good faith within 10 Business Days after the Respondent gives notice under clause 9.3a); and
 - ii) use all reasonable endeavours to settle or resolve the Dispute within 15 Business Days after their first meeting.

9.4 Expert Determination

- a) If a Dispute is not resolved within 30 Business Days after it is referred to senior representatives under clause 9.2, either party may, by written notice to the other party, refer the Dispute to expert determination in accordance with this clause 9.4. Unless the parties otherwise agree, any notice under this clause 9.4a) must be given within 60 Business Days after the Dispute is referred to senior representatives under clause 9.2.
- b) The parties must, within 15 Business Days after a Dispute is referred to expert determination under clause 9.4a), arrange for the Dispute to be determined by an expert. The expert must be:
 - i) agreed by the parties; or
 - ii) if the parties cannot agree on an expert within 15 Business Days after the Dispute is referred to expert determination under clause 9.4a), appointed by the Chair of the Resolution Institute on the application of either party.
- c) The expert must determine the Dispute in accordance with Transport for NSW's Rules for the Expert Determination Process and the Code of Conduct for an Expert, a copy of which Transport for NSW will make available to the Relevant Tenderer on request.
- d) Each party must do all things necessary on its part for the proper conduct of the expert determination.

- e) The expert's determination will be final and binding on the parties except where the difference between the amount asserted by a party during the expert determination and the expert's decision is more than \$ [REDACTED] (excl GST).

9.5 Litigation

- a) Where the expert's decision is not final and binding under clause 9.4e), either party may give the other party written notice that it intends to commence legal proceedings in relation to the Dispute. Unless the parties otherwise agree, any notice under this clause 9.5a) must be given within 20 Business Days after the date of the expert's determination.
- b) After giving notice in accordance with clause 9.5a), a party may commence legal proceedings to resolve the Dispute.

9.6 Urgent relief

Nothing in this clause 9 prejudices either party's right to seek injunctive or urgent declaratory relief in relation to a Dispute.

9.7 Continued performance

Each party must continue to perform its obligations in accordance with this Deed notwithstanding the existence of any Dispute.

9.8 Discussions without prejudice

The discussions contemplated by clause 9.3, and any documents provided in connection with such discussions, will be on a 'without prejudice basis' (regardless of whether this is expressly stated).

10. GST

- a) Words or expressions used in this clause 10 which are defined in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) have the same meaning in this clause, unless the context otherwise requires.
- b) Unless expressly stated otherwise, any amounts payable, and consideration to be provided, under or in connection with this Deed includes GST.
- c) If GST is payable on a supply made under this Deed, the recipient must pay the supplier an amount equal to the GST payable on that supply at the time the recipient pays or provides consideration for the supply.
- d) If an adjustment event arises in connection with a supply made by a supplier under this Deed, the GST payable by the recipient will be recalculated to reflect the adjustment event and, if necessary, a payment will be made by the recipient to the supplier or by the supplier to the recipient as the case requires, but in neither alternative until an adjustment note has been issued by the supplier to the recipient.
- e) If a payment to a party under this Deed is a reimbursement or indemnification, calculated by reference to a loss, cost or expense incurred by that party, then the payment will be reduced by the amount of any input tax credit to which that party is

entitled for that loss, cost or expense. For the purposes of this clause 10.e), the Relevant Tenderer will be deemed to be entitled to a full input tax credit in respect of such losses, costs or expenses, unless it can demonstrate to Transport for NSW's reasonable satisfaction that it is not so entitled.

- f) The recipient need not make a payment of a GST amount in respect of a taxable supply made under or in connection with this Deed unless the supplier has given the recipient a tax invoice for the supply to which the payment relates.

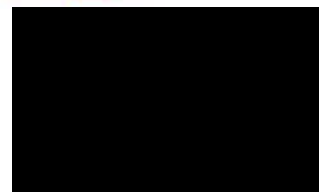
11. ASSIGNMENT AND CHANGE OF CONTROL

- a) The Relevant Tenderer must not assign, novate or otherwise deal with any of its rights, interests or obligations under this Deed without the prior written consent of Transport for NSW.
- b) The Relevant Tenderer must promptly notify Transport for NSW in writing of any Change in Control that occurs in relation to the Relevant Tenderer and provide any details reasonably required by Transport for NSW.
- c) If a Change in Control occurs in relation to the Relevant Tenderer without the prior written consent of Transport for NSW, Transport for NSW may terminate this Deed under clause 7.1.
- d) Transport for NSW may, for its sole convenience and at its absolute discretion, assign, novate or otherwise transfer its rights and obligations under this Deed to any government department, agency, authority or state owned corporation without the Relevant Tenderer's consent and the Relevant Tenderer must promptly execute any document reasonably required by Transport for NSW to give effect to the assignment, novation or transfer.

12. ENFORCEABILITY

The Relevant Tenderer represents and warrants to Transport for NSW that each Participant:

- a) is a company duly incorporated and validly existing under the laws of its place of incorporation;
- b) has taken all necessary action to authorise the execution, delivery and performance of this Deed in accordance with its terms;
- c) the execution, delivery and performance of this Deed and the transactions contemplated by it do not:
 - i) breach its constitution or other constituent documents;
 - ii) breach any law or decree of any court or official directive which is binding on it;
 - iii) violate any other document or agreement to which it is expressed to be a party or which is binding on it or any of its assets; or
 - iv) exceed a limit on its powers or the powers of its directors or other officers;



- d) its obligations under this Deed are valid and binding and are enforceable against it in accordance with their terms, subject to any necessary stamping and registration, the availability of equitable remedies and law relating to the enforcement of creditor's rights; and
- e) it enters into this Deed in its own right and not as trustee of any trust or as an agent on behalf of any other person.

13. GENERAL

13.1 Transport for NSW as authority

- a) This Deed will not in any way unlawfully restrict or otherwise unlawfully affect the unfettered discretion of Transport for NSW to exercise any of its functions and powers pursuant to any law.
- b) The Relevant Tenderer acknowledges and agrees that, without limiting clause 13.1a), anything which Transport for NSW does, fails to do or purports to do pursuant to its functions and powers under any law will be deemed not to be an act or omission by Transport for NSW under this Deed and will not entitle the Relevant Tenderer to make any Claim (other than as expressly set out in clause 3 of this deed) against Transport for NSW.

13.2 Notices

- a) Any notice, demand, consent or other communication (**Notice**) given or made under this Deed must be in writing and signed by the sender or a person duly authorised by the sender and must be addressed and delivered to the recipient party at the address or email address below, or the address or email address last notified by the recipient party to the sender party:

Transport for NSW

Attention:

Address:

Email:

Relevant Tenderer

Attention:

Address:

Email:

- b) Any Notice issued under clause 13.2a) will be conclusively taken to be duly given or made when delivered or received at the above address or email address. If delivery or receipt occurs on a day that is not a Business Day in the place to which the Notice is sent or is later than 4 pm (local time) at that place, it will be conclusively taken to have been duly given or made at 9 am on the next Business Day in that place.

13.3 Audit right

- a) Notwithstanding any provision of this Deed, the Relevant Tenderer's right to reimbursement of costs under this Deed is subject to Transport for NSW's right to audit such costs at any time prior to the date that is 24 months following the date of Transport for NSW's payment under clause 3.8c)).
- b) The Relevant Tenderer must cooperate in facilitating an audit as may be required by Transport for NSW under clause 13.3a) and must upon request make available to Transport for NSW all necessary records and documents to enable the audit to be conducted.

13.4 Indemnities to survive

- a) Each indemnity in this Deed is a continuing obligation, separate and independent from the other obligations of the parties, and survives termination, completion or expiration of this Deed.
- b) It is not necessary for a party to incur expense or make any payment before enforcing a right of indemnity conferred by this Deed.
- c) Transport for NSW holds on trust for any person acting on behalf of, or associated with Transport for NSW each right in any Procurement Document to the extent that such right is expressly stated to be for the benefit of any person acting on behalf of, or associated with, Transport for NSW.

13.5 Variations

This Deed may only be varied by a deed duly executed by both Transport for NSW and the Relevant Tenderer.

13.6 Entire agreement

The Procurement Documents embody the entire understanding of the parties and constitute the entire terms agreed upon between the parties and supersede any prior agreement (whether in writing or not in writing) between the parties, in relation to their subject matter.

13.7 No partnership, joint venture or other fiduciary relationship

Nothing in this Deed will be construed or interpreted as constituting the relationship between Transport for NSW on one hand and the Relevant Tenderer on the other hand as that of partners, joint venturers or any other fiduciary relationship.

13.8 Waiver

- a) Failure to exercise or enforce or a delay in exercising or enforcing or the partial exercise or enforcement of any right, power or remedy provided by law or under this Deed by Transport for NSW will not in any way preclude, or operate as a waiver of, any exercise or enforcement, or further exercise or enforcement of that or any other right, power or remedy provided by law or under this Deed.

- b) Any waiver or consent given by Transport for NSW under this Deed will only be effective and binding on Transport for NSW if it is given or confirmed in writing by Transport for NSW.
- c) No waiver by Transport for NSW of a breach of any term of this Deed will operate as a waiver of another breach of that term or of a breach of any other term of this Deed.

13.9 Provisions limiting or excluding liability

Any provision of this Deed which seeks to limit or exclude a liability of Transport for NSW or the Relevant Tenderer, is to be construed as doing so only to the extent permitted by law.

13.10 Joint and several liability

Where the Relevant Tenderer consists of more than one Participant:

- a) the obligations of the Relevant Tenderer under this Deed are joint and several and each Participant constituting the Relevant Tenderer acknowledges and agrees that it will be responsible for the acts and omissions (including breaches of this Deed) of each other Relevant Tenderer as if those acts or omissions were its own; and
- b) a reference to the Relevant Tenderer in this Deed is a reference to each Participant separately and any 2 or more of them together, for example:
 - i) a representation, warranty or undertaking given by the Relevant Tenderer relates to each Participant separately and any 2 or more of them together; and
 - ii) an act or omission of the Relevant Tenderer includes an act or omission taken or made by each Participant separately and any 2 or more of them together.

13.11 Severability

If at any time any provision of this Deed is or becomes illegal, invalid or unenforceable in any respect under the law of any jurisdiction, that will not affect or impair:

- a) the legality, validity or enforceability in that jurisdiction of any other provision of this Deed; or
- b) the legality, validity or enforceability under the law of any other jurisdiction of that or any other provision of this Deed.

13.12 Governing law and jurisdiction

This Deed is governed by and will be construed according to the laws of New South Wales. The parties irrevocably submit to the non-exclusive jurisdiction of courts exercising jurisdiction in New South Wales, and courts of appeal from them, in respect of any proceedings arising out of or in connection with this Deed.

13.13 Further action

Each party must, at its own expense, do all things and execute all documents necessary to give full effect to this Deed and the transactions contemplated by it.

13.14 Counterparts

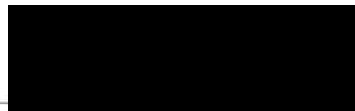
This Deed may be executed in any number of counterparts. All counterparts together will be taken to constitute one instrument.

Executed as a deed.

SIGNED, SEALED and DELIVERED by
Transport for NSW ABN 18 804 239 602 by
its authorised delegate in the presence of:



Signature of witness



Signature of delegate

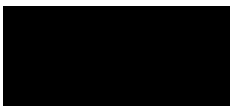


Full Name (block letters)

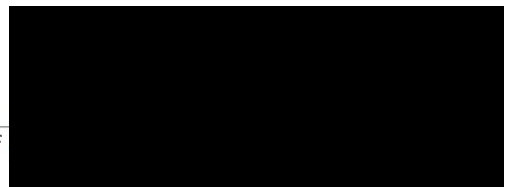


Full Name (block letters)

SIGNED, SEALED and DELIVERED
by Bouygues Construction Australia Pty
Ltd ABN 37 144 013 810 in accordance
with section 127 of the *Corporations*
Act 2001 (Cth):



Signature of director



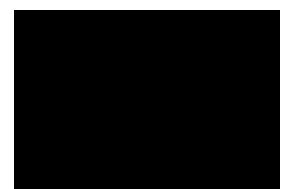
Signature of



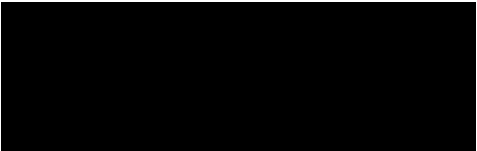
Full name (block letters)



Full name (block letters)



SIGNED, SEALED and DELIVERED
by Vinci Construction Grands Projets
Australia Pty Ltd ABN 24 629 645 754
in accordance with section 127 of the
Corporations Act 2001 (Cth):



Signature of director



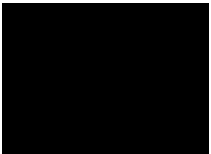
Signature of director/secretary



Full name (block letters)



Full name (block letters)



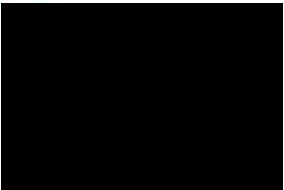
Schedule 1

Interactive Process Protocol

The Interactive Process Protocol requires:

- a) appropriate attendance and participation of the Relevant Tenderer's Key Personnel at interactive sessions during the Tender Period;
- b) the Relevant Tenderer's productive interactions with Transport for NSW and its advisors during the Tender Period (for example interactions to be constructive, collaborative, transparent, cooperative and in good faith);
- c) the Relevant Tenderer making all reasonable efforts to efficiently use the time allocated to it for interaction sessions and meetings during the Tender Period, including through the provision of detailed agendas and pre-reading (as necessary) to allow Transport for NSW representatives to prepare for interactive sessions, and through proactively planning, organising and participating in interactive sessions and meetings during the Tender Period; and
- d) the Relevant Tenderer to proactively plan, organise and participate in interactive sessions and meetings during the Tender Period, ensuring efficient use of Transport for NSW.

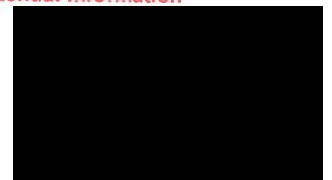
Schedule 2
Key Personnel



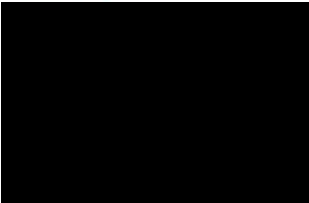
Schedule 3

Form of Statutory Declaration – Actual costs incurred

<p>Statutory Declaration</p>	<p>Oaths Act (NSW) Ninth Schedule</p>
<p>I,</p> <p>of</p> <p>do solemnly and sincerely declare that:</p>	
<p>1. I am the representative of:</p> <p>.....</p> <p>("the Relevant Tenderer")</p> <p>in the Office Bearer capacity of:</p> <p>.....</p>	
<p>2. The Relevant Tenderer has a contract with the [.....]:</p> <p>..... ("the Contract")</p>	
<p>3. I personally know the facts and the truth of the matters which are contained in this declaration.</p>	
<p>4. The provisions of the Contract relating to the submission of [.....] [.....] have been complied with by the Relevant Tenderer.</p>	
<p>5. The value of the actual costs incurred by the Relevant Tenderer in preparing its [.....] Approved Tender] at the date of this declaration are set out as follows:</p>	
<p>[Note: The Relevant Tenderer is to set out an itemised account of the actual costs it is seeking to claim a contribution towards.]</p>	
<p>I make this solemn declaration conscientiously believing the same to be true and by virtue of the Oaths Act 1900 (NSW). I am aware that I may be subject to punishment by law if I wilfully make a false statement in this declaration.</p>	
<p>Declared at on</p>	



<p>(place) (day) (month) (year)</p> <p>.....</p> <p>(Signature of Declarant)</p> <p>Before me:</p> <p>.....</p> <p>(Signature of person before whom the declaration is made)</p> <p>.....</p> <p>(Name of the person before whom the declaration is made)</p> <p>.....</p> <p>(Title* of the person before whom the declaration is made)</p>	
<p>And as a witness, I certify the following matters concerning the person who made this declaration (declarant):</p> <p>[*strike out the text that does not apply]</p> <p>1. *I saw the face of the declarant. OR *I did not see the face of the declarant because the declarant was wearing a face covering, but I am satisfied that the declarant had a special justification for not removing the covering.</p> <p>2. *I have known the declarant for at least 12 months. OR *I confirmed the declarant's identity using the following identification document:</p> <p>.....</p> <p>Identification document relied on (may be original or certified copy)</p> <p>.....</p> <p>Signature of person before whom the declaration is made</p> <p>Before me:</p> <p>.....</p> <p>(Signature of person before whom the declaration is made)</p> <p>.....</p> <p>(Name of the person before whom the declaration is made)</p>	



.....
(Title of the person before whom the declaration is made)*

**The declaration must be made before one of the following persons:*

- where the declaration is sworn within the State of New South Wales:

- (i) a justice of the peace of the State of New South Wales;*
- (ii) a solicitor of the Supreme Court of New South Wales with a current practising certificate; or*
- (iii) a notary public.*

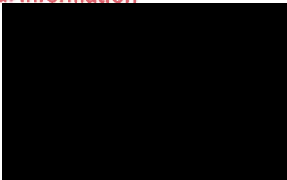
- where the declaration is sworn in a place outside the State of New South Wales:

- (i) a notary public; or*
- (ii) any person having authority to administer an oath in that place.*

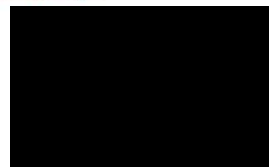
Schedule 4

Form of Statutory Declaration – Subcontractor and supplier payments

Statutory Declaration	<i>Oaths Act (NSW) Ninth Schedule</i>
<p>I,</p> <p>of.....</p> <p>do solemnly and sincerely declare that:</p> <p>1. I am the representative of:</p> <p>.....</p> <p>("the Relevant Tenderer")</p> <p>in the Office Bearer capacity of:</p> <p>.....</p> <p>2. The Relevant Tenderer has a contract with the [.....]:</p> <p>..... ("the Contract")</p> <p>3. I personally know the facts and the truth of the matters which are contained in this declaration.</p> <p>4. Where a subcontractor or supplier to the Relevant Tenderer has provided services or goods to the Relevant Tenderer, the Relevant Tenderer has paid such amounts due and payable to the subcontractor or supplier as at the date of this statutory declaration.</p> <p>5. In all cases where a subcontractor or supplier to the Relevant Tenderer has provided services or goods to the Relevant Tenderer and has submitted a claim to the Relevant Tenderer for these services or good which as at the date of this statutory declaration would have been due and payable but which the Relevant Tenderer disputes, the reasons for such dispute have been notified in writing to the subcontractor or supplier by the Relevant Tenderer prior to the date of this statutory declaration. Where such dispute relates to part only of the subcontractor or supplier's claim, that part of the claim not in dispute has been paid by the relevant Tenderer to the subcontractor or supplier as at the date of this statutory declaration.</p>	



<p>4.</p> <p><i>I make this solemn declaration conscientiously believing the same to be true and by virtue of the Oaths Act 1900 (NSW). I am aware that I may be subject to punishment by law if I wilfully make a false statement in this declaration.</i></p> <p>Declared at on</p> <p>.....</p> <p> (place) (day) (month) (year)</p> <p>.....</p> <p>(Signature of Declarant)</p> <p>Before me:</p> <p>.....</p> <p>(Signature of person before whom the declaration is made)</p> <p>.....</p> <p>(Name of the person before whom the declaration is made)</p> <p>.....</p> <p>(Title* of the person before whom the declaration is made)</p>	
<p>And as a witness, I certify the following matters concerning the person who made this declaration (declarant):</p> <p>[*strike out the text that does not apply]</p> <p>1. *I saw the face of the declarant.</p> <p>OR</p> <p> *I did not see the face of the declarant because the declarant was wearing a face covering, but I am satisfied that the declarant had a special justification for not removing the covering.</p> <p>2. *I have known the declarant for at least 12 months.</p> <p>OR</p> <p> *I confirmed the declarant's identity using the following identification document:</p> <p>.....</p> <p>Identification document relied on</p> <p>(may be original or certified copy)</p>	



Signature of person before whom the declaration is made

Before me:

.....
(Signature of person before whom the declaration is made)

.....
(Name of the person before whom the declaration is made)

.....
(Title of the person before whom the declaration is made)*

**The declaration must be made before one of the following persons:*

- where the declaration is sworn within the State of New South Wales:

- (i) a justice of the peace of the State of New South Wales;*
- (ii) a solicitor of the Supreme Court of New South Wales with a current practising certificate; or*
- (iii) a notary public.*

- where the declaration is sworn in a place outside the State of New South Wales:

- (i) a notary public; or*
- (ii) any person having authority to administer an oath in that place.*

