



Transport
for NSW

INCENTIVISED DELIVERY AGREEMENT

Contract Number: IPD-19-8198

**MORE TRAINS MORE SERVICES PROGRAM
NORTH WORKS**

Between

Transport for NSW

[TfNSW]

ABN 18 804 239 602

and

John Holland Pty Ltd

[NOP1]

ACN 004 282 268

and

Jacobs Group (Australia) Pty Ltd

[NOP2]

ACN 001 024 095

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More Trains, More Services Incentivised Delivery Agreement made at TfNSW, Zenith,
on 6th May 2020

Parties

Transport for NSW ABN 18 804 239 602 a NSW Government agency constituted by section 3C(1) of the *Transport Administration Act 1988* (NSW) of Level 5, Tower A, Zenith Centre, 821 Pacific Highway Chatswood NSW 2067 ("TfNSW")

The other parties to this Agreement are set out in the Agreement Particulars (each a "Non Owner Participant" or "NOP" and collectively the "Non Owner Participants" or "NOPs"),

(and all together referred to as the "Participants").

The Participants will generally be referred to as "we" or "us" or the "IDE" (with references to "our" having a corresponding meaning), unless the context requires otherwise.

Background

- A. TfNSW is a NSW Government agency constituted under the *Transport Administration Act 1988*, and is responsible for developing certain major railway systems and other major transport projects, including facilitating their development by other persons. TfNSW enters into this Agreement in two capacities:
 - (a) as client for the performance of the IDE Activities; and
 - (b) as the owner Participant in the IDE.
- B. RailCorp is constituted under the *Transport Administration Act 1988* and its functions include to hold, manage, operate and maintain transport assets owned by it and to establish, finance, acquire, construct and develop those transport assets.
- C. Sydney Trains is a NSW Government agency constituted under the *Transport Administration Act 1988* and is responsible for the delivery of safe and reliable railway passenger services on the Sydney metropolitan rail network.
- D. NSW Trains is a NSW Government agency constituted under the *Transport Administration Act 1988* and is responsible for the operation of particular railway passenger services in New South Wales.
- E. Sydney Metro is a NSW Government agency constituted under the *Transport Administration Act 1988* and is responsible for the operation of particular railway passenger services in New South Wales.
- F. The MTMS Program involves a series of staged investments by TfNSW designed to progressively deliver service improvements across the rail network, as part of a broader transformation from a complex, constrained rail network, to a modern, simplified operation utilising world-class technology.
- G. The NOPs were selected to enter into this Agreement following their participation in a selection process carried out pursuant to the Proposal Development Deed, the RFP and the preceding expression of interest process, culminating in the development of a proposal submitted by the NOPs and accepted by TfNSW.
- H. This Agreement sets out the basis on which:

- (a) we will complete the IDE Activities for the Initial Project; and
 - (b) TfNSW may (in its absolute discretion) add Additional Projects and other work, services, activities and tasks (which may or may not form part of the MTMS Program) to the IDE Activities.
- I. Capitalised words and acronyms are defined in Schedule 1. The rules regarding the interpretation of this Agreement are also set out in Schedule 1.

Operative provisions

1. Behavioural commitments

1.1 Objectives and Principles

We will:

- (a) adopt all reasonable measures to ensure that the Objectives are achieved;
- (b) conduct the IDE Activities in a way which is consistent with the Principles and will take all reasonable steps to ensure that our Associates involved in carrying out the IDE Activities do likewise; and
- (c) exhibit behaviours consistent with the Principles so as to achieve the Objectives within an ethical, positive, dynamic and results-oriented culture amongst those associated with carrying out the IDE Activities.

The Gainshare/Painshare Regime set out in the Compensation Framework is intended to reflect and reinforce the Objectives.

1.2 Co-operation and innovation

We will work together in a co-operative and innovative manner for the purpose of:

- (a) meeting or exceeding the Objectives and fully complying with the Principles;
- (b) producing outstanding results for each Project;
- (c) ensuring that the IDE Activities are carried out in a co-ordinated and efficient manner;
- (d) creating a win-win position for each of the Participants;
- (e) ensuring the successful performance of the IDE Activities in accordance with this Agreement; and
- (f) without limiting clause 1.2(e), ensuring the successful completion of the Works in accordance with this Agreement.

This clause 1.2 does not apply to TfNSW where TfNSW exercises any TfNSW Reserved Powers.

1.3 Commitment to act in good faith

- (a) We will act in good faith in carrying out the IDE Activities and will:
 - (i) be fair, reasonable and honest;

- (ii) do all things reasonably expected of us by the others to give effect to the spirit and intent of this Agreement; and
 - (iii) not impede or restrict each other's performance of the IDE Activities.
- (b) If a Participant believes this Agreement is operating unfairly or unreasonably with respect to a Participant we will use our best endeavours to achieve an agreement amongst all Participants on such action as may be necessary to remove the cause or causes of such unfairness or unreasonableness.
- (c) In respect of the TfNSW Reserved Powers, TfNSW or the Principal's Representative (as applicable) will not be subject to the obligation to act in good faith or to the other requirements of clause 1.3(a).

1.4 Promote interests of the Projects

We will promote the interests of each Project and make decisions on a Best For Project basis, giving as much weight to the interests of each Project as to our own self interest.

1.5 Sharing of information

We will share all information relevant to the IDE Activities in an honest, open and timely manner.

1.6 Avoid disputation

We will use our best endeavours to avoid disputation, notify each other of perceived or real differences of opinion as soon as they arise, and attempt to promptly resolve those differences.

1.7 Conflicts of interest

We will:

- (a) disclose to each other the full particulars of any real or apparent conflict of interest which arises or may arise in connection with this Agreement or the performance of the IDE Activities, immediately upon becoming aware of the conflict of interest whether that conflict concerns us or any person employed or retained by us for or in connection with the performance of the IDE Activities;
- (b) not allow ourselves to be placed in a position of conflict of interest or duty in regard to any of our rights or obligations under this Agreement (without the prior consent of each other) before we participate in any decision in respect of that matter; and
- (c) ensure that our LT Members and our other Associates also comply with the requirements of clauses 1.7(a) and 1.7(b) when acting in connection with this Agreement or the performance of the IDE Activities.

1.8 Collective sharing of risk and opportunities

We will share all risks and opportunities associated with the delivery of each Project except for risks or opportunities that we have specifically agreed will be retained solely by a particular Participant under this Agreement.

1.9 Future addition of Participants

If appropriate to achieve a Best For Project outcome, the LT may recommend to the Principal's Representative that an additional participant be included in the IDE. If the Principal's Representative (in its absolute discretion) agrees on such a course (in writing):

- (a) we will cooperate to enter into the necessary documentation; and
- (b) the LT will seek to agree with the additional participant on any necessary amendments to any Compensation Framework (subject to the Principal's Representative's approval (in its absolute discretion)).

2. Primary performance obligations

2.1 Primary performance obligations of Participants

We will collectively perform the IDE Activities:

- (a) in accordance with the Works Brief, the TSRs, Reference Documents, Statutory Requirements and the governance obligations as set out in Schedule 8;
- (b) in accordance with the Design Documentation;
- (c) in a careful, diligent, skilful and workmanlike manner;
- (d) where an Election Notice has not been issued, so that the Works completed in the carrying out of Project Definition Services or Early Execution Works:
 - (i) will, upon completion, be and be capable of remaining at all relevant times, fit for their intended purposes as stated in, or reasonably inferred from, the Works Brief, the RFP and this Agreement; and
 - (ii) are capable of complying with the requirements of the Works Brief, relevant codes and standards, the RFP and this Agreement;
- (e) so that the Works:
 - (i) will, upon Completion, be and be capable of remaining at all relevant times, fit for their intended purposes as stated in, or reasonably inferred from, the Works Brief and this Agreement; and
 - (ii) comply with the requirements of the Works Brief, relevant codes and standards and this Agreement; and
- (f) with the aim of achieving optimal value for money and satisfying the Objectives.

We acknowledge that parts of the IDE Activities and the Works, including Additional Projects and Ad Hoc Works, may or may not form part of, or relate to, the MTMS Program.

2.2 Primary performance obligations of TfNSW

TfNSW will:

- (a) subject to the terms of this Agreement, provide access to the Project Site to enable the Participants to carry out the IDE Activities; and
- (b) pay the NOPs in accordance with the terms of this Agreement.

2.3 Parent Company Guarantee

- (a) NOP1 must provide TfNSW with a deed of guarantee and indemnity from the entity named in the Agreement Particulars in the form of Schedule 12 within 15 Business Days after the Commencement Date.
- (b) NOP2 must provide TfNSW with a deed of guarantee and indemnity from the entity named in the Agreement Particulars in the form of Schedule 12 within 15 Business Days after the Commencement Date.

2.4 NOP Arrangements

- (a) The NOPs confirm that they have entered (or will, within 5 Business Days of the Commencement Date or such other period agreed by TfNSW in writing (in its absolute discretion), enter) into an arrangement with each other for the purposes of performing the IDE Activities (which may include a partnership, special purpose vehicle, a corporation or an incorporated or unincorporated entity of another kind) pursuant to an agreement or memorandum of understanding (Partnership Agreement) in the form set out in Exhibit K.
- (b) Nothing in the Partnership Agreement will in any way affect the rights and obligations of the parties under this Agreement and any duty or obligation, if any, created by the Partnership Agreement will be subordinate to the NOPs obligations under this Agreement.
- (c) The NOPs must not amend the Partnership Agreement without TfNSW's consent (which will not be unreasonably withheld but which may be withheld where the proposed amendment will have any effect on this Agreement, the performance of the Works or the compensation payable to the NOPs under this Agreement).
- (d) Any costs or expenses incurred by any of the NOPs in the administration, operation or conduct of the Partnership Agreement, other than procurement obligations or liabilities entered into by the NOPs on behalf of the Participants, must be paid for by the NOPs and will not be Reimbursable Costs.

2.5 Foreign Legal Opinions

Within 15 Business Days after the Commencement Date, each NOP must provide to TfNSW:

- (a) where the NOP is an entity that is incorporated outside of Australia, a Foreign Legal Opinion which confirms that this Agreement and each deed poll required under clause 27.10 has been duly executed by, and is binding and enforceable against, the relevant NOP; and
- (b) where the deed of guarantee and indemnity provided by the NOP in accordance with clause 2.3 was executed by a guarantor that is incorporated outside of Australia, a Foreign Legal Opinion which confirms that the deed of guarantee and indemnity has been duly executed by, and is binding and enforceable against, that guarantor.

3. Governance and management

3.1 Leadership Team

The Leadership Team ("LT") has been established in accordance with clause 4 to administer this Agreement and provide strategic guidance and leadership to the Participants.

3.2 Management Team

A Management Team ("MT") will be established in accordance with clause 5 to manage and co-ordinate the day to day IDE Activities.

3.3 General Manager

A General Manager will be appointed in accordance with clause 5.2 to lead the MT and report to the LT.

3.4 Principal's Representative

- (a) The Principal's Representative appointed by TfNSW at the Commencement Date is set out in the Agreement Particulars.
- (b) The Principal's Representative will give directions and carry out all its other functions under this Agreement as the agent of TfNSW (and not as an independent certifier, assessor or valuer) and is subject to the directions of TfNSW.
- (c) TfNSW may (in its absolute discretion) at any time:
 - (i) replace the Principal's Representative by notifying the NOPs; or
 - (ii) appoint additional persons to exercise any functions of the Principal's Representative in accordance with clause 3.4(d).
- (d) TfNSW may:
 - (i) (in its absolute discretion) by written notice to the NOPs appoint additional persons to exercise any of TfNSW's functions under this Agreement;
 - (ii) not appoint more than one person to exercise a specific function under this Agreement; and
 - (iii) (in its absolute discretion) revoke any appointment under clause 3.4(d)(i) by notice in writing to the NOPs.
- (e) All references in this Agreement to TfNSW include a reference to the Principal's Representative and any other representatives appointed under this clause 3.4.

3.5 Project Control Group

- (a) This clause 3.5 will apply in respect of a Project if the Agreement Particulars specifies that the Project is partially funded by the Commonwealth. Otherwise, this clause 3.5 will have no application in respect of a Project.
- (b) In respect of a Project, pursuant to the Project MOU, one or more Project Control Groups (PCG) may be formed by the Project Steering Committee to exercise week-to-week oversight over the Project.
- (c) The membership, role and function of a particular PCG will be agreed and documented by the Project Steering Committee at the time of the PCG's formation.
- (d) The Participants must provide all reasonable assistance necessary to enable each PCG to carry out its role and functions in relation to the Project as agreed in writing by the Project Steering Committee in accordance with clause 3.5(c).

4. Leadership Team

4.1 Establishment and functions of LT

We have established the LT to administer this Agreement and to provide strategic guidance and leadership to the Participants. The functions of the LT are more fully described in Part 1 of Schedule 6.

4.2 LT Members

- (a) Each Participant must appoint at least one person to be a member of the LT and may appoint two persons as members of the LT at any one time.
- (b) The LT Members appointed by each Participant at the Commencement Date are set out in the Agreement Particulars.
- (c) A Participant may only appoint persons as LT Members who are in a position to be able to fully participate as a member of the LT and who have the necessary authority and delegation to make decisions in relation to the rights and liabilities of their respective organisation. Each Participant must inform each other Participant of the availability times of its LT Members.
- (d) Each Participant may, with the consent of the other members of the LT (which will not be unreasonably withheld), appoint one or more Alternative LT Members to act in place of its LT Members during absences caused by normal planned leave or emergencies for each LT Member.
- (e) A Participant may only appoint persons as Alternative LT Members who fulfil the requirements set out in clause 4.2(c).
- (f) Each Participant may replace its LT Members or Alternative LT Members with the consent of the other members of the LT (which will not be unreasonably withheld).
- (g) The General Manager may not act as an LT Member or Alternative LT Member.
- (h) Within 3 months after the date of being appointed an LT Member, each LT Member must obtain, and thereafter maintain until completion of the IDE Activities, a:
 - (i) Rail Safety Worker Competency;
 - (ii) current RISI Qualification;
 - (iii) current rail industry worker (RIW) card; and
 - (iv) construction white card.

4.3 LT Chairperson

- (a) At the Commencement Date, the LT Chairperson is the LT Member identified in the Agreement Particulars as the LT Chairperson.
- (b) The LT Chairperson will convene and chair the meetings of the LT.
- (c) The LT will appoint another LT Member as LT Chairperson or reappoint the existing LT Chairperson every six months. The existing LT Chairperson will remain the LT Chairperson until such time as the LT appoints another LT Member as LT Chairperson.

4.4 Meetings of the LT

- (a) The LT will:
 - (i) hold a meeting as soon as practicable after the Commencement Date;
 - (ii) hold meetings at least once every calendar month and otherwise when considered necessary by a majority of the LT Members;
 - (iii) not hold a meeting unless at least one LT Member appointed by each Participant is present at that meeting; and
 - (iv) determine the procedures and rules for those meetings.
- (b) Each LT Member present at a meeting of the LT will be entitled to cast one vote. Wherever possible, all votes must be cast at meetings of the LT.
- (c) The LT may conduct a meeting even though the LT Members are not at the same location, provided that all LT Members who wish to participate in that meeting are linked by an agreed method of instant voice recognition.
- (d) Within 30 days of signing this Agreement, TfNSW will provide to the LT a briefing on the strengths and weaknesses of the MT. The LT will agree on an action plan with TfNSW to address any matters raised.

4.5 Decisions of LT

- (a) Every decision of the LT must be a unanimous decision of all LT Members entitled to vote. No decision will have been made by the LT unless it is unanimous. Accordingly, each LT Member present at a meeting of the LT holds a power of "veto".
- (b) We will comply with all decisions of the LT made in accordance with clause 4.5(a).
- (c) If the LT is unable to achieve unanimity in respect of a decision to be made by the LT in respect of a Material LT Issue within 5 Business Days of the issue being referred to the LT, and a Participant wishes to pursue the issue, clause 28.1(d) will apply.

4.6 Minutes of LT meetings

- (a) The LT will nominate a secretary to attend all LT meetings and record the resolutions and actions arising out of each LT meeting.
- (b) The secretary will issue a copy of the minutes of the meeting to each LT Member who attended the meeting within 5 Business Days after the relevant meeting.
- (c) Each LT Member who attended the meeting will notify the secretary whether he or she accepts the minutes as accurate as soon as practicable after receiving the minutes. If an LT Member does not accept the minutes as accurate, the LT Member must promptly provide any amendments to the minutes to the secretary and the secretary must promptly issue amended minutes to each LT Member who attended the meeting for approval. The procedures set out in this clause 4.6 will apply to the amended minutes.
- (d) Following acceptance of the minutes by each LT Member who attended the meeting, the minutes will be deemed to be the official record of the relevant

meeting and the secretary will issue a copy of the minutes to any LT Member who did not attend the meeting.

5. Management Team and General Manager

5.1 Establishment, structure and functions of MT

- (a) As soon as practicable after the Commencement Date, the LT must establish the MT to carry out the day to day IDE Activities. The functions of the MT are more fully described in Part 3 of Schedule 6.
- (b) The MT will consist of the best available people from the Participants, and people recruited from outside the resources of the Participants if necessary, to ensure the successful completion of the IDE Activities.
- (c) We will use our best endeavours to ensure that our personnel who are members of the MT remain (subject to satisfactory performance by the personnel) members of the MT until the LT decides that those personnel are no longer required.

5.2 Appointment of General Manager

- (a) Subject to clause 5.2(b), the General Manager will be the person nominated in the Agreement Particulars. If no person is nominated in the Agreement Particulars, the General Manager will be appointed by the LT as soon as practicable after the Commencement Date.
- (b) The LT may:
 - (i) replace the General Manager at any time;
 - (ii) appoint a person to act as Acting General Manager on a temporary basis during any period in which the General Manager is unavailable; and
 - (iii) appoint different persons to the position of General Manager for different Projects and different stages of Projects.

5.3 Functions of the General Manager

The General Manager will lead and be a member of the MT. The functions of the General Manager are more fully described in Part 2 of Schedule 6.

5.4 Interface between General Manager and LT

The General Manager will report to the LT and attend LT meetings as required by the LT but is not a member of the LT and has no voting rights at LT meetings.

The General Manager is subject to the control and direction of the LT.

5.5 Approaches to Employees

Until the Last Date of Final Completion, none of us will directly or indirectly approach an employee of:

- (a) one of the other Participants involved in the IDE Activities; or
- (b) one of the participants comprising any Other IDE,

with the intention of encouraging or persuading them to change employers without the prior written consent of that Participant or the relevant participant comprising any Other IDE.

6. Joint Coordination Team

6.1 Establishment and functions of JCT

We have established a joint coordination team to consider and make recommendations in respect of particular issues from a Best for Program perspective. The particular issues for consideration and recommendation by the JCT are specified in Part 4 of Schedule 6.

6.2 JCT Members

The members of the JCT will be as set out in Part 4 of Schedule 6.

6.3 Recommendations of JCT

The JCT will not have decision making authority and no recommendation or any other action by or on behalf of the JCT will be binding on TfNSW or the IDE or otherwise operate to amend, alter, limit or otherwise affect the rights and obligations of the parties under this Agreement, but the NOPs acknowledge that participation in, and the performance of, the JCT may be considered in respect of the Gainshare/Painshare Regime.

7. Term

7.1 Initial Term

The initial Term is 5 years, commencing on the Commencement Date.

7.2 Extension of the Term

TfNSW may, by notice in writing to the NOPs, extend the Term (including more than once) by a period of up to 5 years, provided that:

- (a) TfNSW may not extend the Term beyond the date that is 10 years after the Commencement Date; and
- (b) such notice is given to the NOPs no later than 3 months prior to the expiry of the then current Term.

7.3 Effect of the Term

We acknowledge that the Term is only relevant for the purposes of clause 8 and the expiry of the Term will not limit or otherwise affect the rights and obligations of the parties under this Agreement, including our obligation to perform the IDE Activities following the expiry of the Term in respect of incomplete Projects or to perform or satisfy any other obligations or liabilities that have not been performed or satisfied as at the expiry of the Term or which remain to be performed or satisfied after the expiry of the Term.

8. Additional Projects

8.1 Application of clauses 8 to 12

Clauses 8 to 12 (inclusive):

- (a) apply in respect of Proposed Additional Projects; and

- (b) unless the context indicates a contrary intention, do not apply to an existing Project.

8.2 Request for Proposals

- (a) Without limiting clause 8.4, from time to time prior to the expiry of the Term, TfNSW may (in its absolute discretion) provide us with a document entitled "Request for Proposals" in respect of a proposed Additional Project which will set out, amongst other things (each in TfNSW's absolute discretion):
 - (i) further details of the Proposed Additional Project, including proposed Project-Specific Schedules and Project-Specific Exhibits;
 - (ii) detailed requirements for the Project Definition Services and the PDS Documentation in respect of the Proposed Additional Project;
 - (iii) further process requirements regarding the submission of the PDS Documentation in respect of the Proposed Additional Project;
 - (iv) further process requirements regarding our participation in various workshops;
 - (v) further details of the probity procedures that will apply during (and potentially after) the Project Proposal Phase in respect of the Proposed Additional Project;
 - (vi) whether a Single TOC Process or Dual TOC Process applies; and
 - (vii) if a Dual TOC Process applies, whether we will be entitled to payment in respect of the Project Definition Services and, if we will be entitled to such payment:
 - A. the details regarding such entitlement, including the PDS Expenditure Limit; and
 - B. the extent to which amounts payable by TfNSW for the Project Definition Services will be included in the TOC and the AOC for the Proposed Additional Project the subject of the Project Definition Services.
- (b) If TfNSW decides to provide an RFP to us, TfNSW may:
 - (i) provide the RFP solely to us (**Single TOC Process**); or
 - (ii) provide the RFP to us, and also provide the RFP (or an equivalent document) to other parties (**Dual TOC Process**).

8.3 Project Definition Services

We must:

- (a) perform the Project Definition Services in a diligent manner and to the degree of professional skill, care and diligence expected of a person experienced in the provision of services similar to the Project Definition Services; and
- (b) ensure that the Project Definition Services and the PDS Documentation is fit for its intended purpose as stated in, or reasonably inferred from, the RFP and this Agreement.

8.4 Additional documents and information

In addition to any addenda issued pursuant to an RFP, at any time prior to the relevant Closing Date and Time (or, if it is not clear which is the relevant Closing Date and Time, the last relevant Closing Date and Time), TfNSW may advise us in writing of any additional documents or further information that TfNSW reasonably requires to be:

- (a) taken into account in performing the Project Definition Services; or
- (b) incorporated into the PDS Documentation,

and we must take such additional documents or further information into account in performing the Project Definition Services or incorporate the additional documents or further information into the PDS Documentation (as applicable). If TfNSW advises us of any such additional documents or further information after the date that is 5 Business Days prior to the relevant Closing Date and Time, the LT will (within 2 Business Days) advise TfNSW of the reasonable extension to the relevant Closing Date and Time that is necessary for us to comply with this clause 8.4, and TfNSW will issue (or procure the issue of) such addenda pursuant to the relevant RFP as TfNSW may consider necessary to give effect to that extension.

8.5 PDS Documentation

- (a) The PDS Documentation must incorporate the information, details and documentation required by the RFP or pursuant to clause 8.4.
- (b) The PDS Documentation must comply with, and be submitted in accordance with, the requirements of this Agreement and the RFP.
- (c) We must submit the PDS Documentation to TfNSW:
 - (i) by no later than the date specified in the RFP (or, if no date is specified in the RFP, the last Closing Date and Time); and
 - (ii) by delivering the number and format of copies and to the location specified in the RFP.

8.6 No guarantee of Additional Projects

We acknowledge that TfNSW:

- (a) is not under any obligation to:
 - (i) issue any number or value of RFPs or Election Notices to us; or
 - (ii) engage us to perform any quantity or value of work in respect of Proposed Additional Projects,during the Term (or otherwise); and
- (b) does not warrant or guarantee, or make (and has not made) any representation or other assurance, that it will:
 - (i) issue any, or any minimum or maximum number of, RFPs or Election Notices to us; or
 - (ii) engage us to perform any quantity or value of work in respect of Proposed Additional Projects,

during the Term (or otherwise).

8.7 No guarantee of exclusivity

TfNSW is not, by executing this Agreement, or issuing an RFP, restricted in any way from engaging any person to carry out work:

- (a) of any type, including work similar to the IDE Activities or any activities contemplated by any Proposed Additional Project; or
- (b) at any location.

8.8 No representation

Clauses 8.6 and 8.7 apply even though TfNSW may have provided us with a forecast or estimate of the Proposed Additional Projects that TfNSW may require at any time and we acknowledge that any forecasts or estimates do not constitute a representation of the work TfNSW may require in any period.

8.9 Performance of TfNSW

The NOPs:

- (a) acknowledge that:
 - (i) the decision of TfNSW (as client) as to the number or value of RFPs or Election Notices issued to us; and
 - (ii) the ability of us to satisfy the conditions set out in clause 11.2(a),
may be affected by:
 - (iii) the performance of the IDE, including the performance of TfNSW as a Participant; and
 - (iv) in respect of clause 8.9(a)(i), the performance of any competing Other IDE, including the performance of TfNSW as a participant in any competing Other IDE; and
- (b) each release and discharge TfNSW from all Claims, costs, expenses and losses which they may have against TfNSW or otherwise suffer or incur arising out of, or in any way in connection with, the matters referred to in clause 8.9(a).

9. Project Proposal

9.1 Development of Project Proposal

- (a) The Project Proposal must be developed by us in accordance with this clause 9.
- (b) In developing the Project Proposal, we must have regard to the requirements of, and the obligations and liabilities of us under, this Agreement (as would be added to by the proposed Project-Specific Schedules and Project-Specific Exhibits set out or referred to in the RFP if an Election Notice is issued).
- (c) The Project Proposal must:

- (i) comply with, and be submitted in accordance with, the requirements of this Agreement and the RFP, including any requirement for the staged submission of components of the Project Proposal; and
 - (ii) not include any information or details which TfNSW directs us is not to be included in the Project Proposal, which may include assumptions and exclusions.
- (d) The Project Proposal in its entirety must incorporate the information, details and documentation required by the RFP and this Agreement which may include, amongst other things, the following:
- (i) a proposed TOC;
 - (ii) a project delivery program;
 - (iii) a resourcing plan;
 - (iv) an organisational structure;
 - (v) a procurement strategy;
 - (vi) construction methodology and staging diagrams;
 - (vii) a risks and opportunities register; and
 - (viii) proposed Project-Specific Target Adjustment Guidelines (if any).
- (e) We will ensure that all required assistance is provided to the Independent Estimator and the Financial Auditor to enable them to check, review and validate each component of the proposed TOC for each Proposed Additional Project.
- (f) Without limiting clause 9.1(c)(ii) and unless otherwise agreed by TfNSW in writing, if a Project Proposal includes assumptions or exclusions, those assumptions and exclusions are included for information only and, if TfNSW issues an Election Notice in respect of the Project Proposal, those assumptions and exclusions will not be grounds for a Target Adjustment Event unless the Target Adjustment Guidelines expressly provide that they will be grounds for a Target Adjustment Event.

9.2 IDE warranties

We warrant that we will:

- (a) exercise the degree of professional skill, care and diligence expected of a person experienced in the provision of services similar to the Project Definition Services in the development of all aspects of the Project Proposal, and that we will ensure that our respective Associates exercise such proper professional skill, care and diligence;
- (b) examine the VfM Statement to the extent necessary for the preparation and submission of the Project Proposal;
- (c) prepare a Project Proposal that we honestly and genuinely believe, if the Project Proposal is accepted by TfNSW, will achieve the objectives outlined in the VfM Statement, the RFP and this Agreement (as would be added to by the proposed Project-Specific Schedules and Project-Specific Exhibits set out or referred to in the RFP if an Election Notice is issued);

- (d) use best endeavours to develop the Project Proposal on the basis that:
- (i) the TOC will be developed applying first principles elemental estimating procedures utilising the cost breakdown structure included in the RFP;
 - (ii) the TOC will represent the point on the outturn cost probability S-curve that matches a confidence level of 50% (meaning that there is a 50% probability that the actual outturn cost will be less than or equal to the TOC);
 - (iii) all efforts by us will be open, transparent and collaborative;
 - (iv) all technical solutions will be robust and fit for their intended purposes as stated in, or reasonably inferred from, the RFP and this Agreement and will satisfy the requirements of the proposed Works Brief, the VFM Statement, the RFP and this Agreement;
 - (v) all estimates of production rates, plant, equipment, materials and subcontract procurement costs will be validated by competitive market testing and will otherwise be established by benchmarking to current industry best practice and provide all such information to TfNSW upon request;
 - (vi) all innovations and technical solutions identified by us in developing the Project Proposal will be incorporated into the Project Proposal and considered in determining the provision for all possible Reimbursable Costs associated with risks and contingencies that may arise in performing the IDE Activities in relation to the Proposed Additional Project, which will be included in the TOC;
 - (vii) there will be a genuine commitment to innovation and continuous improvement in the development of the Project Proposal and to achieving the objectives outlined in the VFM Statement;
 - (viii) the information contained in the Project Proposal will be accurate and complete on the date on which it is submitted and may be relied upon by TfNSW in determining whether or not to accept the Project Proposal; and
 - (ix) the same key personnel nominated in the Project Proposal to undertake the delivery of the Proposed Additional Project are also involved in the preparation of the PDS Documentation and the performance of the Project Definition Services; and
- (e) promptly notify TfNSW of any changes in circumstances that may cause the information:
- (i) contained in the Project Proposal; or
 - (ii) provided to TfNSW prior to or during the Project Proposal Phase in relation to a Participant or the Proposed Additional Project,
- to become inaccurate or incomplete in a material respect.

9.3 Validity of Project Proposal

The Project Proposal will remain valid and capable of acceptance by TfNSW until the date that is 60 Business Days after the last Closing Date and Time, or such other date as TfNSW advises in the RFP or during the Project Proposal Phase.

9.4 Jointly required information

- (a) If:
- (i) a Dual TOC Process applies; and
 - (ii) we intend to incur costs in obtaining any information (including any geotechnical, contamination, services or survey information) in the performance of the Project Definition Services which:
 - A. is also likely to be required by the relevant Other IDE; and
 - B. it is reasonable for us and the Other IDE to share the information to avoid the duplication of costs,

we may request TfNSW to procure (or TfNSW may notify us that it will procure) the relevant information on behalf of us and the Other IDE.

- (b) TfNSW may (in its absolute discretion):
- (i) refuse or agree to a request made under clause 9.4(a) (and if it agrees, impose any conditions it sees fit) and, if it agrees, procure the information and provide it to us and the Other IDE, at TfNSW's cost and expense (and any such cost and expense incurred by TfNSW will not constitute TfNSW IDA Costs); and
 - (ii) in the case of a refusal, agree with us under clause 23.1 that the relevant information is to be procured by us on behalf of TfNSW as Ad Hoc Works, in which case we will procure the information and, on the day it is obtained, provide it to TfNSW for TfNSW to provide to the Other IDE.

9.5 Statutory Requirements

- (a) Without limiting clause 31, we must comply, and ensure that the Project Proposal and all work done in connection with the Project Definition Services complies, with the requirements of all applicable Statutory Requirements and the NSW Government Code of Practice for Procurement.
- (b) Without limiting clause 9.5(a), we must not:
- (i) collude with, accept any commission from, or offer any commission to, any proponent, any prospective proponent, or any member of any such proponent or prospective proponent, in respect of any procurement process in respect of any Other IDE or any proposed Other IDE;
 - (ii) disclose any part of the Project Proposal (or any draft thereof) to any person referred to in clause 9.5(b)(i);
 - (iii) enter into any contract, arrangement or understanding with any person referred to in clause 9.5(b)(i) or any trade, industry or other association

with the effect that if we are successful in respect of the Project Proposal a benefit will be conferred on any other party;

- (iv) enter into any improper or anti-competitive contract, arrangement or understanding with any other person in connection this Agreement, any Proposed Additional Project or any project the subject of any procurement process in respect of any Other IDE or proposed Other IDE; or
- (v) offer any incentives, gifts or other favours to any person who is in any way involved with, or in a position to influence, or capable of providing technical or other advice to, those who are involved in any way with the review and evaluation of the Project Proposal.

10. Status of design work

We acknowledge that:

- (a) we will be provided with a proposed Principal's Design in the RFP;
- (b) TfNSW may (via addenda issued in accordance with the RFP or otherwise) provide amendments or additions to the whole or any part of the proposed Principal's Design following the issue of the RFP; and
- (c) the Project Proposal (including the TOC) must be based on:
 - (i) subject to clause 10(c)(ii), the RFP and this Agreement (as would be added to by the proposed Project-Specific Schedules and Project-Specific Exhibits set out or referred to in the RFP if an Election Notice is issued); and
 - (ii) the proposed Principal's Design provided as part of the RFP, as may be amended or added to by TfNSW as contemplated under clause 10(b).

11. Payment for Project Definition Services

11.1 PDS Expenditure Limit

- (a) Where a Single TOC Process applies:
 - (i) within 10 Business Days after receipt of the RFP (or such longer period notified by TfNSW in writing), we must (at our own cost) prepare, taking into account TfNSW's reasonable comments, and submit to TfNSW a proposed budget (covering proposed likely or anticipated Reimbursable Costs and associated Fee) and schedule for the carrying out of the Project Definition Services in respect of the relevant Proposed Additional Project; and
 - (ii) TfNSW will, following receipt of a proposed budget and schedule:
 - A. accept the proposed budget and schedule, in which case:
 - I) the proposed budget will be the PDS Expenditure Limit for the Proposed Additional Project; and

- 2) we must proceed with the carrying out of the Project Definition Services in respect of the relevant Proposed Additional Project; or
- B. reject the proposed budget and schedule, in which case TfNSW may either:
- 1) withdraw the relevant RFP and we must cease the performance of the Project Definition Services relating to that RFP and TfNSW may (in its absolute discretion), either by itself or by third parties, undertake the proposed Project Definition Services and the Proposed Additional Project; or
 - 2) provide us with a proposed budget, in which case:
 - a) the proposed budget provided by TfNSW will be the PDS Expenditure Limit for the Proposed Additional Project; and
 - b) we must proceed with the carrying out of the Project Definition Services in respect of the relevant Proposed Additional Project.
- (b) Where a Dual TOC Process applies:
- (i) we acknowledge that TfNSW will, if TfNSW specifies in the RFP that we will be entitled to payment in respect of the Project Definition Services, provide a PDS Expenditure Limit in the RFP;
 - (ii) if we do not want to participate in the Dual TOC Process on the grounds that the details provided by TfNSW in the RFP for the purposes of clause 8.2(a)(vii)A (including the PDS Expenditure Limit) are unacceptable to us, notify TfNSW in writing within 5 Business Days of receipt of the RFP, in which case:
 - A. TfNSW will be deemed to have withdrawn the relevant RFP (without limiting TfNSW's ability to issue a revised RFP to us for the same Proposed Additional Project);
 - B. we must not perform the Project Definition Services; and
 - C. TfNSW may (in its absolute discretion), either by itself or by third parties, undertake the proposed Project Definition Services and the Proposed Additional Project; and
 - (iii) except to the extent provided by clause 11.1(b)(ii), we must proceed with the carrying out of the Project Definition Services in respect of the relevant Proposed Additional Project.

11.2 Payment for Project Definition Services

- (a) The NOPs will only be entitled to payment in respect of the Project Definition Services where a Dual TOC Process applies if each of the following conditions (to the extent relevant) have been satisfied:

- (i) the RFP sets out for the purposes of clause 8.2(a)(vii) that we will be entitled to payment in respect of the Project Definition Services;
 - (ii) we have submitted each part of the PDS Documentation on or before the date required under clause 8.5(c)(i); and
 - (iii) TfNSW is satisfied, acting reasonably, that:
 - A. the PDS Documentation have been submitted in accordance with this Agreement and the RFP; and
 - B. we have otherwise complied with the requirements of this Agreement and the RFP in relation to the Project Definition Services.
- (b) If a Single TOC Process applies:
- (i) amounts paid to the NOPs, and our forecast of amounts that have not been paid but will become payable to the NOPs, in respect of the Project Definition Services will be included in the TOC for the purposes of the relevant Project Proposal;
 - (ii) the NOPs will (subject to clause 21.8) be entitled to claim payment of all amounts payable by TfNSW for the Project Definition Services progressively in accordance with clause 21.2; and
 - (iii) if the relevant Project Proposal is later accepted by TfNSW under clause 12.1(a)(i), all amounts paid or payable by TfNSW for the Project Definition Services will be included in the TOC and the AOC for the Additional Project the subject of the Project Definition Services.
- (c) If a Dual TOC Process applies and we are entitled to payment in respect of the Project Definition Services:
- (i) to the extent specified in the RFP for the purposes of clause 8.2(a)(vii)B, our forecast of amounts that will become payable to the NOPs in respect of the Project Definition Services (up to the relevant PDS Expenditure Limit) will be included in the TOC for the purposes of the relevant Project Proposal;
 - (ii) if the relevant Project Proposal is later accepted by TfNSW under clause 12.1(a)(i):
 - A. to the extent specified in the RFP for the purposes of clause 8.2(a)(vii)B, amounts payable by TfNSW for the Project Definition Services will be included in the TOC and the AOC for the Additional Project the subject of the Project Definition Services; and
 - B. the NOPs will, following receipt of the relevant Election Notice, be entitled to claim payment of all amounts payable by TfNSW for the Project Definition Services in accordance with clause 21.2; and
 - (iii) if the relevant Project Proposal is rejected by TfNSW under clause 12.1(a)(ii), the NOPs will, following receipt of the notice of rejection under clause 12.1(a)(ii), be entitled to claim payment of all amounts

payable by TfNSW for the Project Definition Services in accordance with clause 21.2.

(d) We agree that the exercise by TfNSW of any of its rights under this clause 11 or clause 12, or the performance of any work, services, activities or tasks required by clauses 8 to 12, including:

- (i) the issue of a RFP;
- (ii) the carrying out of any Project Definition Services;
- (iii) the preparation and submission of a Project Proposal;
- (iv) any request by TfNSW to submit an amended Project Proposal; and
- (v) the acceptance or rejection by TfNSW of any Project Proposal,

will not:

- (vi) constitute a Target Adjustment Event;
- (vii) give rise to any increase in any Fee; or
- (viii) give rise to any increase in any TOC,

but nothing in this clause 11.2(d) will limit or otherwise affect the rights and entitlements of a Participant, or the operation of any other provision of this Agreement, in respect of events or circumstances the occurrence of which this Agreement otherwise expressly provides will:

- (ix) constitute a Target Adjustment Event;
- (x) give rise to any increase in a Fee; or
- (xi) give rise to any increase in a TOC.

11.3 PDS Expenditure Limits not to be exceeded

- (a) In respect of each package of Project Definition Services the subject of a PDS Expenditure Limit, TfNSW will not be under any obligation to pay a NOP any amount which will result in the Total PDS Costs exceeding the PDS Expenditure Limit, including if TfNSW issues an Election Notice in respect of the Proposed Additional Project to which the Project Definition Services relate.
- (b) The PDS Expenditure Limits may be revised as follows:
 - (i) the Principal's Representative may (in its absolute discretion) in writing authorise increases in PDS Expenditure Limits; or
 - (ii) PDS Expenditure Limits may be reduced by written agreement from all Participants.
- (c) Each PDS Expenditure Limit is:
 - (i) inclusive of all amounts referred to in the definition of "Total PDS Costs" in Schedule 1 in relation to the relevant package of Project Definition Services; and

- (ii) exclusive of GST.
- (d) In respect of a Single TOC Process only, we will not be under any obligation to continue to provide Project Definition Services to the extent the Total PDS Costs exceed (or will exceed, if the Project Definition Services are continued) the PDS Expenditure Limit.
- (e) In respect of a Dual TOC Process, we must continue to provide Project Definition Services even if the Total PDS Costs exceed (or will exceed, if the Project Definition Services are continued) the PDS Expenditure Limit.

11.4 Scope of Project Definition Services

- (a) We agree that the Project Definition Services include (in addition to any other work, services, activities or tasks required by the RFP) each of the following (unless otherwise specified in the RFP):
 - (i) preparation of the Project Proposal (including all amended or further Project Proposals referred to in clause 12.1(c)(ii));
 - (ii) preparation and finalisation of the PDS Documentation;
 - (iii) securing all Approvals (including configuration approvals) required to be obtained for the purposes of completing the Project Definition Services;
 - (iv) liaising with key Stakeholders to address their requirements and secure their support for the Proposed Additional Project as described in the PDS Documentation;
 - (v) preparation and finalisation of the TOC for the Proposed Additional Project based on the PDS Documentation;
 - (vi) conducting workshops and preparing proposed Project-Specific Target Adjustment Guidelines (if any) for the Proposed Additional Project;
 - (vii) providing assistance as required for any early procurement arrangements;
 - (viii) conducting relevant investigations (including additional site investigations as required), engineering, design, statutory planning, cost planning, construction staging and methodology, human resource planning and possessions planning, procurement and other planning activities associated with the Proposed Additional Project;
 - (ix) identifying and securing suitable resources as required to deliver the Proposed Additional Project;
 - (x) if not already in place, putting in place and maintaining insurances as contemplated by clause 26;
 - (xi) preparation by the proposed Principal Contractor of a draft Work Health and Safety Management Plan for the Proposed Additional Project which complies with the requirements of the TSRs and the WHS Legislation; and
 - (xii) any other work which the Principal's Representative directs us to carry out in writing.

- (b) Subject to clause 11.3, TfNSW may give directions to us during the Project Definition Services which may require us to carry out additional work and we must comply with those directions.

12. Consideration of Project Proposals

12.1 Election Notice

- (a) As soon as practicable after receiving a Project Proposal from us, but subject to clause 12.1(d) and the RFP, TfNSW will, by written notice to us, elect to (in its absolute discretion):
- (i) accept the Project Proposal;
 - (ii) reject the Project Proposal; or
 - (iii) request us to submit an amended Project Proposal.
- (b) Any Election Notice issued by TfNSW will specify the date upon which the performance of the Project Definition Services will cease and the Project Execution Phase will commence.
- (c) If TfNSW:
- (i) issues a notice under clause 12.1(a)(ii):
 - A. the Project Execution Phase will not proceed; and
 - B. TfNSW may (in its absolute discretion), either by itself or by third parties, undertake the Proposed Additional Project; or
 - (ii) issues a notice under clause 12.1(a)(iii), we will prepare an amended Project Proposal which will then be dealt with by TfNSW pursuant to clause 12.1(a).
- (d) We will not proceed to the Project Execution Phase unless and until TfNSW has accepted a Project Proposal by issuing an Election Notice.
- (e) For the avoidance of doubt, the parties acknowledge and agree that TfNSW may (in its absolute direction) elect whether or not to direct the Financial Auditor to carry out establishment audits for the purposes of any Proposed Additional Project.

12.2 Consequences of Election Notice

If TfNSW issues an Election Notice, we agree that, on and from the date of issue of the Election Notice:

- (a) the Proposed Additional Project the subject of the Election Notice will be an Additional Project for the purposes of this Agreement; and
- (b) each Project-Specific Schedule and Project-Specific Exhibit in respect of that Proposed Additional Project will be deemed to form part of this Agreement.

12.3 No commitments

Subject to clause 13, and except as otherwise provided in this clause 12.3, no commitments to subcontractors or suppliers will be entered into in respect of any Proposed Additional Project

prior to the commencement of the Project Execution Phase. Nothing in this clause 12.3 will prevent or prohibit a Participant from making or entering into commitments with:

- (a) a Subcontractor for the purposes of carrying out any Early Execution Works; or
- (b) a Designer for the purposes of carrying out any Project Definition Services or other obligations under this Agreement that may arise in respect of a Proposed Additional Project prior to the commencement of the relevant Project Execution Phase, provided that such commitments do not extend to, or require or involve, the engagement of the Designer during the relevant Project Execution Phase.

13. Early Execution Works

13.1 Early Execution Works and EEW Expenditure Limits

- (a) If we consider that it is necessary to commence carrying out work, services, activities or tasks (in addition to Project Definition Services) in respect of a Proposed Additional Project prior to the issue of an Election Notice, we will notify TfNSW in writing, setting out details of the relevant work, services, activities or tasks.
- (b) TfNSW may (in its absolute discretion), from time to time, notify us in writing of:
 - (i) work, services, activities and tasks (whether or not the subject of a notice under clause 13.1(a)) that TfNSW proposes that we carry out under, and in accordance with, this Agreement, despite an Election Notice not having been issued in respect of the Proposed Additional Project to which those work, services, activities and tasks relate; and
 - (ii) a proposed budget for costs relating to the performance of the proposed Early Execution Works.
- (c) Within 5 Business Days of receipt of a notice under clause 13.1(b), we will notify TfNSW in writing whether we agree with the proposed Early Execution Works and proposed EEW Expenditure Limit.
- (d) If Early Execution Works and an associated EEW Expenditure Limit have been agreed in writing in accordance with clause 13.1(c), we must carry out the Early Execution Works in accordance with this Agreement and the RFP. For the avoidance of doubt, we must not carry out any work, services, activities or tasks notified by TfNSW to us under clause 13.1(b)(i) in respect of which an EEW Expenditure Limit has not been agreed in writing.
- (e) If Early Execution Works and an associated EEW Expenditure Limit have not been agreed in writing in accordance with clause 13.1(c), TfNSW may (in its absolute discretion):
 - (i) either by itself or by third parties, undertake the Early Execution Works;
 - (ii) elect not to proceed with the Early Execution Works; or
 - (iii) issue a revised notice under clause 13.1(b).

13.2 Payment for Early Execution Works

- (a) If an Election Notice is issued in respect of a Proposed Additional Project in circumstances where we have been performing Early Execution Works in respect

of, or relating to, that Proposed Additional Project, all amounts payable by TfNSW for those Early Execution Works will be included in the TOC and the AOC for the Project the subject of the Early Execution Works.

- (b) We agree that the exercise by TfNSW of any of its rights under this clause 13, or the performance of any work, services, activities or tasks required by this clause 13, including:
- (i) the carrying out of any Early Execution Works; and
 - (ii) participation in any discussions with a view to agreeing any Early Execution Works, any EEW Expenditure Limit or any adjustment to any EEW Expenditure Limit,

will not:

- (iii) constitute a Target Adjustment Event;
- (iv) give rise to any increase in any Fee; or
- (v) give rise to any increase in any TOC,

but nothing in this clause 13.2(b) will limit or otherwise affect the rights and entitlements of a Participant, or the operation of any other provision of this Agreement, in respect of events or circumstances the occurrence of which this Agreement otherwise expressly provides will:

- (vi) constitute a Target Adjustment Event;
- (vii) give rise to any increase in a Fee; or
- (viii) give rise to any increase in a TOC.

13.3 EEW Expenditure Limits

- (a) In respect of each package of Early Execution Works the subject of an EEW Expenditure Limit, TfNSW will not be under any obligation to pay a NOP any amount which will result in the Total EEW Costs exceeding the EEW Expenditure Limit. Without limiting clause 13.2(a) or any other provision of this Agreement, nothing in this clause 13.3(a) will limit the entitlement of the NOPs to claim Reimbursable Costs under this Agreement if an Election Notice is issued in respect of the Proposed Additional Project to which the Early Execution Works relate.
- (b) An EEW Expenditure Limit may be revised as follows:
- (i) the Principal's Representative may (in its absolute discretion) in writing authorise increases in an EEW Expenditure Limit; or
 - (ii) an EEW Expenditure Limit may be reduced by written agreement from all Participants.
- (c) Each EEW Expenditure Limit is:
- (i) inclusive of all amounts referred to in the definition of "Total EEW Costs" in Schedule 1 in relation to the relevant package of Early Execution Works; and
 - (ii) exclusive of GST.

- (d) We will not be under any obligation to continue to carry out Early Execution Works to the extent the Total EEW Costs exceed (or will exceed, if the Early Execution Works are continued) the EEW Expenditure Limit.

14. Environmental Management

14.1 Environment Protection Licence

- (a) In this clause 14.1:

EPL means an Environment Protection Licence;

EPL NOP means the NOP specified in Schedule 2.0 or, if in respect of a particular Project another NOP is specified in Schedule 2.n, that other NOP, who will obtain and hold an EPL in respect of the IDE Activities;

NOP's EPL means the EPL described in clause 14.1(b); and

POEO Act means the *Protection of the Environment Operations Act 1997* (NSW).

- (b) In respect of each Project and parts of the IDE Activities for which an EPL is required to be obtained, the EPL NOP is responsible for obtaining and holding each EPL required, in time to enable the Project and the IDE Activities to be carried out in accordance with this Agreement.
- (c) The EPL NOP must keep TfNSW informed of:
- (i) the progress of the EPL NOP's application for the NOP's EPL; and
 - (ii) without limiting clause 14.1(c)(i), the date on which it is likely the NOP's EPL will come into force.
- (d) We must provide TfNSW with any assistance required by TfNSW (in its absolute discretion) for the purposes of implementing any EPL arrangements regarding the operation and maintenance of the Project Works, including in relation to:
- (i) the transfer by the EPL NOP of the NOP's EPL to TfNSW or its nominee;
 - (ii) the surrender by the EPL NOP of the NOP's EPL;
 - (iii) any amendment to any existing EPL of TfNSW or any other Rail Transport Agency; and
 - (iv) any application for a new EPL.

14.2 Environmental Representative

We acknowledge and agree that:

- (a) TfNSW may appoint the party named in the Agreement Particulars to be the Environmental Representative;
- (b) the Environmental Representative (if any):
 - (i) will be independent of the parties;

- (ii) shall oversee the implementation of all environmental management plans and monitoring programs required under the Planning Approval;
- (iii) shall advise us upon achievement of the outcomes contemplated in the Planning Approval;
- (iv) shall advise TfNSW and the Principal's Representative on the Participants' compliance with the Planning Approval; and
- (v) shall have the authority and independence to:
 - A. direct the Participants as to; or
 - B. advise the Principal's Representative to direct the Participants as to,
 - reasonable steps the Participants must take to avoid or minimise unintended or adverse environmental impacts; and
- (c) the Participants must comply with the directions of the Environmental Representative (if any) or the Principal's Representative as contemplated by clause 14.2(b)(v).

15. Commencement and access and care of the Site

15.1 Commencement

We will commence performing the IDE Activities on the Commencement Date. However, the commencement of any IDE Activities on the Project Site is subject to:

- (a) any restriction or direction of TfNSW pursuant to clause 15.2(d)(i); and
- (b) provision by the NOPs of the deed poll in favour of TfNSW and the persons named in the Agreement Particulars, as referred to in clause 15.2(f).

15.2 Site access for the Participants

- (a) We acknowledge that:
 - (i) access to the Project Site will be provided progressively to the Participants as set out in the Site Access Schedule; and
 - (ii) in respect of each Project, the Project Site Drawings contain drawings of the Project Site identified as at the Reference Date.
- (b) Subject to clause 15.2(c) and any other provision of this Agreement affecting access, TfNSW must:
 - (i) give, or ensure the Participants have, access to the Project Site in accordance with the Site Access Schedule and by the dates set out in, or determined in accordance with, the Site Access Schedule (and if a period is specified in relation to access to a part of the Project Site, then by the last day of that period); and
 - (ii) once access to a part of the Project Site is provided to the Participants, thereafter continue to allow, or ensure that the Participants are continued

to be allowed, access to that part of the Project Site in accordance with the Site Access Schedule.

(c) We acknowledge and agree that:

(i) TfNSW is not obliged to give the Participants access to any part of the Project Site until:

A. the Principal Contractor has submitted the Work Health and Safety Management Plan to the Principal's Representative for review under clause 17.10 and:

- 1) the Principal's Representative has issued the notice referred to in clause 17.10(b)(iii) in respect of it; or
- 2) the relevant period of time in clause 17.10(b) has expired and the Principal's Representative has not rejected it, made comments on it or made a request referred to in clause 17.10(b)(ii) in respect of it (except, in the case of comments or a request, where the Principal Contractor has responded to the comments or the request (as applicable) within the required time period and in a manner satisfactory to the Principal's Representative as referred to in clause 17.10(c)); and

B. the Participants have:

- 1) submitted the Construction Environmental Management Plan and the Construction and Site Management Plan, as required by the TSRs, to the Principal's Representative for review under clause 16.3 and:
 - a) the Principal's Representative has issued the notice referred to in clause 16.3(d)(ii)C in respect of each of them; or
 - b) the relevant period of time in clause 16.3(d)(ii) has expired and the Principal's Representative has not rejected any of them, made comments on any of them or made a request referred to in clause 16.3(d)(ii)B in respect of any of them (except, in the case of comments or a request, where the Participants have responded to the comments or the request (as applicable) within the required time period and in a manner satisfactory to the Principal's Representative as referred to in clause 16.3(e)); and
- 2) effected the insurance policies to be effected by each Participant under clause 26;

- (ii) access to the Site or any part thereof may be subject to restrictions that:
 - A. exist under any Third Party Agreement or any Statement of Principles;
 - B. exist under the terms of any easement, right of way or other dealing or interest in favour of any Authority or other person; or
 - C. are (or will be) specified in the Site Access Schedule;
 - (iii) without limiting clause 15.10(a), TfNSW is not obliged to carry out any work or provide any facilities to the Participants which may be necessary to enable the Participants to obtain access to the Site or carry out the IDE Activities; and
 - (iv) TfNSW and others will engage Other Contractors to work upon or in the vicinity of the Site at the same time as the Participants.
- (d) We must:
- (i) comply with all reasonable restrictions and directions of TfNSW in relation to access to the Project Site or any part of the Project Site by the Participants, Subcontractors or other parties, such as service providers;
 - (ii) comply with the terms of any construction leases or construction licences procured by TfNSW or the NOPs;
 - (iii) without limiting Schedule 11.n, comply with all Third Party Agreements and the Interface Agreement;
 - (iv) maintain the Site in a safe, clean and tidy condition; and
 - (v) on completing work at the Site and as a condition precedent to Completion:
 - A. remove all Construction Plant, Temporary Works and all surplus materials and rubbish from the Site; and
 - B. leave the whole of the Site in a safe, clean and tidy condition.
- (e) TfNSW's obligations under clause 15.2(a) and clause 15.2(b) in respect of the Project Site will cease upon the issue of the Certificate of Final Completion, except to the extent specified otherwise in the Site Access Schedule.
- (f) The NOPs must:
- (i) within 5 Business Days of the Commencement Date; and
 - (ii) as a condition precedent to any obligation of TfNSW to pay the NOPs any amount under clause 21.2,

provide to TfNSW two copies of the deed poll in the form of Schedule 34 in favour of TfNSW and the persons named in the Agreement Particulars, executed by the NOPs.

- (g) Without limiting clause 15.2(d)(iii), TfNSW agrees that it will comply with those obligations under the Interface Agreement that Schedule 11.n provides are to be performed by TfNSW and not by the Participants.

15.3 IDE to acquire access

We will, subject to clause 15.9(a)(ii) and clause 15.10, obtain all necessary access to the Remote Sites and Extra Land.

15.4 Site access for TfNSW

- (a) TfNSW, RailCorp, Sydney Trains, NSW Trains, Sydney Metro, their respective Associates and any other person nominated by TfNSW may at any time have access to any part of the Site for any purpose.
- (b) At all reasonable times we will give TfNSW and any other persons authorised in writing by TfNSW, access to the Works at any place where the work is being carried out or materials are being prepared or stored.

15.5 Access protocols

Any person who is given access pursuant to clauses 15.2, 15.3 or 15.4 must be required to fully comply with:

- (a) all access protocols established by the Participants; and
- (b) any Site safety regulations, Site rules and directions of the Principal Contractor with respect to work health and safety.

15.6 Care of the Works

- (a) From the Reference Date until the Date of Completion, we will be responsible for the care of the Works, the Construction Plant and any unfixed goods and materials (whether on or off Site) used or to be used in carrying out the IDE Activities.
- (b) After the Date of Completion, we will remain responsible for the care of such parts of the Works, any Construction Plant or unfixed goods or materials (whether on or off Site) used or to be used in carrying out the IDE Activities as are necessary to carry out our obligations under clause 18.3 until the date of issue of the Certificate of Final Completion.

15.7 Reinstatement

We will promptly make good any loss or damage to the Works, the Construction Plant or any unfixed goods or materials that occurs during any period in which we are responsible for their care under clause 15.6.

15.8 Temporary Works

- (a) The Participants must carry out all Temporary Works required to execute the IDE Activities so that the Project Works are fit for their intended purposes as stated in, or reasonably inferred from, the Works Brief or this Agreement.
- (b) Where any Temporary Works are to be carried out on any property, the Participants must give written notice to the Principal's Representative identifying such property and describing the Temporary Works to be performed on such property. Such notice must:

- (i) be given prior to the date on which the Participants intend to commence the Temporary Works; and
 - (ii) specify the intended commencement and completion dates.
- (c) The Participants must keep a register of all notices under clause 15.8(b) and make this register available to the Principal's Representative and TfNSW's Group Property for inspection and copying at all reasonable times.
- (d) Upon being given access to any property for the purpose of carrying out any Temporary Works, the Participants must promptly carry out those Temporary Works in a manner which:
- (i) minimises inconvenience and disruption to the owners, occupiers and users of the property; and
 - (ii) complies with the requirements set out in the TSRs.
- (e) The Participants must:
- (i) reinstate any property upon which any Temporary Works have been carried out to a state that is equivalent to the state it was in immediately prior to the Participants obtaining access; and
 - (ii) otherwise repair any damage or degradation to any part of any property arising out of or in any way in connection with the performance of its obligations under this clause 15.8.
- (f) The completion of all Temporary Works under this clause 15.8 is a condition precedent to Completion of the Project Works or any Portion.

15.9 Remote Sites and Extra Land

- (a) We acknowledge and agree that:
- (i) the Remote Works form part of the Project Works or the Temporary Works;
 - (ii) the location of the Remote Sites may not be fixed and, in such cases, must be determined by the Participants in consultation with TfNSW and any relevant entity who is to take the benefit of the Remote Works; and
 - (iii) we will comply with all directions of the owners, occupiers or persons providing access to the respective Remote Sites or Extra Land, including in respect of any Service connection points.
- (b) We must:
- (i) subject to clause 15.10, procure the occupation or use of or relevant rights over any land or buildings in addition to the Project Site, including any land owned by RailCorp, which is necessary or which may be required for the purposes of carrying out the IDE Activities;
 - (ii) carry out all activities and procure all Services necessary to make the Remote Sites and Extra Land suitable for use by the Participants; and
 - (iii) as a condition precedent to Completion of the Project Works or each Portion:

- A. rehabilitate any Remote Sites and Extra Land in accordance with the requirements of all relevant Authorities and other relevant persons; and
- B. unless not required by the Principal's Representative (acting reasonably), provide to the Principal's Representative a properly executed certificate in the form of Schedule 21 or a release on terms otherwise satisfactory to the Principal's Representative from all claims or demands (whether for damages or otherwise howsoever arising) from the owner or occupier of, and from other persons having interest in, any Remote Sites or Extra Land.

15.10 Property Acquisition

- (a) TfNSW will procure access to the Project Site for us in accordance with the Site Access Schedule.
- (b) Any permanent property rights required in relation to the Project Site must be acquired by TfNSW's Group Property (on behalf of TfNSW). We must involve the Principal's Representative as early as possible in the process of planning any IDE Activities that involve such rights. The Principal's Representative will then involve TfNSW's Group Property as required.
- (c) We must identify in the IDE's Program milestone dates by which we must notify the Principal's Representative of required property acquisitions in connection with the Project Site (including leases and licences).
- (d) The milestone dates identified in the IDE's Program must be no less than 12 months prior to the dates by which the applicable property acquisition is required.
- (e) We may also request the Principal's Representative's assistance in obtaining access to Extra Land and Remote Sites, in which case:
 - (i) we must provide notice to the Principal's Representative in writing containing the details of any such request;
 - (ii) the Principal's Representative will then notify TfNSW's Group Property; and
 - (iii) TfNSW's Group Property may, in its absolute discretion, provide such assistance or decline to do so.
- (f) Upon:
 - (i) receiving written notice from us requesting the Principal's Representative's and TfNSW's Group Property's involvement in any matters referred to in clause 15.10(b); or
 - (ii) agreeing to assist us in relation to a request made under clause 15.10(e),
 TfNSW's Group Property will allocate appropriate resources to manage such matters on behalf of and in collaboration with us.
- (g) Any costs incurred by TfNSW or TfNSW's Group Property:

- (i) in relation to the procurement of temporary access to the Project Site or permanent property rights required in relation to the Project Site in accordance with this Agreement, will be borne by TfNSW and will not be taken into account in calculating the Actual Outturn Cost (as that term is defined in the Compensation Framework) for the purposes of the Compensation Framework; and
 - (ii) in relation to any Remote Sites or Extra Lands, will be TfNSW IDA Costs.
- (h) In carrying out the IDE Activities we will ensure that we, the Principal's Representative and TfNSW's Group Property comply with all applicable requirements of the TSRs.

15.11 Condition Surveys

- (a) Subject to clause 15.8(d), we must identify and prepare a condition survey (**Condition Survey**) of all property that could be affected or damaged by the IDE Activities (including any condition surveys required by the Planning Approval).
- (b) The Condition Survey referred to in clause 15.11(a):
 - (i) must be undertaken in accordance with the property management plan described in the TSRs (**Property Management Plan**) and the Planning Approval;
 - (ii) may only be undertaken after the Property Management Plan has been approved by the Principal's Representative (which approval will not be unreasonably withheld);
 - (iii) must be undertaken by suitably skilled, qualified and experienced personnel or Subcontractors approved by the MT;
 - (iv) must be repeated immediately prior to the Completion of the Project Works or a Portion by the same personnel or Subcontractors referred to in clause 15.11(b)(iii), or such other as the MT may reasonably approve; and
 - (v) is subject to any conditions of access and use in the Site Access Schedule.
- (c) We must prepare the Condition Survey referred to in clause 15.11(a) a minimum of two weeks prior to commencing any work on the Project Site, or on any other land which is necessary for performing the IDE Activities or undertaking the Works, where that work could damage property on or off the Site.

15.12 Third Party Agreements

- (a) We:
 - (i) acknowledge that TfNSW has entered or will enter into the Third Party Agreements;
 - (ii) must:
 - A. unless otherwise expressly specified in Schedule 11.n, comply with, satisfy, carry out and fulfil the conditions and

requirements of all Third Party Agreements, including those conditions and requirements that TfNSW is required, under the terms of the Third Party Agreements, to comply with, satisfy, carry out and fulfil; and

- B. comply with and fulfil any conditions, obligations or requirements allocated to us in Schedule 11.n that are additional to or more stringent or onerous than the conditions and requirements described in clause 15.12(a)(ii)A;
 - (iii) must comply with the terms of each Statement of Principles until such time as a copy of the executed version of a New Third Party Agreement is provided by TfNSW to the Participants under clause 15.12(b)(iii)A (which is confirmed by TfNSW as superseding the Statement of Principles), in which case clause 15.12(b)(iii)B will apply;
 - (iv) must assist TfNSW in any way that TfNSW reasonably requires to enable TfNSW to perform the obligations identified for TfNSW to perform in Schedule 11.n;
 - (v) must comply with any reasonable directions of the Principal's Representative (who will have regard to any reasonable submissions made by the Participants to the Principal's Representative) in relation to compliance with the relevant conditions and requirements of each Third Party Agreement and each Statement of Principles;
 - (vi) must, where a Third Party Agreement provides for TfNSW to provide a document, notice or information to the Third Party, provide such document, notice or information to TfNSW (and not to the Third Party) within a reasonable time sufficient for TfNSW to review and comment on the document, notice or information and provide it to the Third Party within the time period required by a Third Party Agreement;
 - (vii) must, in carrying out the IDE Activities:
 - A. ensure that no act or omission of the Participants constitutes, causes or contributes to any breach by TfNSW of its obligations to the Third Party under the Third Party Agreement; and
 - B. otherwise act consistently with the terms of the Third Party Agreements and the Statements of Principles; and
 - (viii) acknowledge that to the extent that a Third Party Agreement contains a provision pursuant to which the Third Party is stated to make no representation as to a state of affairs, the Participants agree that TfNSW similarly makes no representation to them in respect of that state of affairs in the same way as if the relevant terms of the Third Party Agreement were set out fully in this Agreement.
- (b) We acknowledge that:
- (i) in respect of:
 - A. the Initial Project, as at the Commencement Date, the terms and conditions of the Third Party Agreements identified in the

Agreement Particulars as "Draft" have not been finalised between TfNSW and the relevant Third Party; and

- B. each Additional Project, as at the Reference Date, the terms and conditions of the Third Party Agreements that will be identified in the Agreement Particulars as "Draft" will not have been finalised between TfNSW and the relevant Third Party as at the Reference Date,

(each a **Draft Third Party Agreement**);

- (ii) certain additional Third Party Agreements may be entered into by TfNSW after the Reference Date, including in connection with the subject matter of any Statement of Principles or to replace any existing Third Party Agreement (each a **New Third Party Agreement**); and

- (iii) following finalisation of any Draft Third Party Agreement or any New Third Party Agreement after the Reference Date:

- A. TfNSW must promptly give the Participants a copy (which may be a redacted copy) of the executed version of the Draft Third Party Agreement or New Third Party Agreement and amendments (if any) to Schedule 11.n arising out of the execution of the Draft Third Party Agreement or New Third Party Agreement (**Revised Allocation**); and

- B. we must comply with the final terms of each Third Party Agreement (subject to the obligations to be performed by TfNSW in accordance with the Revised Allocation).

15.13 Co-operation with Other Contractors

- (a) Without limiting clause 15.14, the Participants must:
- (i) permit Other Contractors to carry out their work;
 - (ii) fully co-operate with Other Contractors;
 - (iii) carefully coordinate and interface the IDE Activities with the work carried out or to be carried out by Other Contractors; and
 - (iv) carry out the IDE Activities so as to minimise any interfering with, disrupting or delaying the work of Other Contractors.
- (b) We will use best endeavours to ensure that each of the Other Contractors that undertakes Other Contractor Work executes a deed poll in favour of the Principal Contractor and TfNSW in the form set out in Schedule 33.

15.14 Co-operation with Interface Contractors

We:

- (a) acknowledge that:
- (i) in respect of each Project, the Interface Work and the Project Works may form part of the same broader project being procured by TfNSW;
 - (ii) the IDE Activities interface with the Interface Work;

- (iii) Interface Contractors will be executing work on parts of the Site or adjacent to the Site, at the same time as we are performing the IDE Activities;
 - (iv) the timing of the Interface Contractors' activities is not yet known, and, in respect of each Additional Project, may not be known at the Reference Date;
 - (v) it will require certain design and work methodology input from Interface Contractors to coordinate the design of the Works with the Interface Work; and
 - (vi) Interface Contractors will require us to provide design and work methodology information to them to coordinate the design of the Interface Work with the Works and we must provide this in a timely manner;
- (b) must at all times:
- (i) permit Interface Contractors to execute the Interface Work on the applicable parts of the Site or on any adjacent property to the Site:
 - A. at the same time as we are performing the IDE Activities; and
 - B. at the times agreed with the Interface Contractor,
 and for this purpose ensure they have safe, clean and clear access to those parts of the Site or property adjacent to the Site required by them for the purpose of carrying out their work;
 - (ii) protect the Works and other improvements on the Site from accidental damage by Interface Contractors and provide means of receiving, storing and protecting goods and equipment supplied by Interface Contractors;
 - (iii) fully co-operate with Interface Contractors, and do everything necessary to:
 - A. facilitate the execution of work by Interface Contractors, including providing Interface Contractors with such assistance as may be reasonably required; and
 - B. ensure the effective coordination of the design and construction of the Works with the design and construction of the Interface Work;
 - (iv) carefully coordinate and interface the IDE Activities with the Interface Work, and for this purpose:
 - A. make proper allowance in all programs (including the IDE's Program) for Interface Work;
 - B. review all programs provided by Interface Contractors and confirm that they adequately allow for the IDE Activities and the interfaces of the Interface Work with the IDE Activities;
 - C. monitor the progress of the Interface Work;

- D. notify the Principal's Representative of any interface or sequence of activities that may affect the commencement or progress of the IDE Activities, or Completion of the Works or any Portion;
 - E. provide the Interface Contractors with sufficient information about the current and expected IDE Activities to assist them to coordinate their Interface Work with the IDE Activities; and
 - F. must cooperate, meet with, liaise, and share information so that we and the Interface Contractor each comply with the provisions of the relevant Environment Protection Licence and other Approvals;
- (v) perform the IDE Activities so as to minimise any interference with or disruption or delay to the Interface Work;
 - (vi) be responsible for coordinating the IDE Activities, including work sequencing, construction methods, safety and industrial relations matters with those affecting, and influenced by, Interface Contractors' personnel and work, including providing to the Principal's Representative work method statements for those parts of the Works which are adjacent to or interface with any Interface Work, at least 15 Business Days prior to commencing the work described in the work method statement;
 - (vii) work directly with Interface Contractors in performing design work forming part of the IDE Activities and otherwise to complete the design of the Works (to the extent the IDE Activities involve or require the completion of the design of the Works) and provide all necessary information to the Interface Contractor in respect of the Works to permit the Interface Contractor to complete the design of the Interface Work;
 - (viii) attend interface coordination meetings with Interface Contractors and others each 14 days, or at other times to be advised by the Principal's Representative, to review current and future issues, including the exchange of information, status, problems, solutions, and newly identified interfaces;
 - (ix) when information is required from an Interface Contractor, give at least 10 days (except in special circumstances), and at all times reasonable, written notice to that Interface Contractor requesting such information and specifying the date by which such information is required, with a copy to the Principal's Representative;
 - (x) ensure that any written notice given under clause 15.14(b)(ix) provides the Interface Contractor with the longest possible time for the provision of the information;
 - (xi) when any information is requested by Interface Contractors, including confirming the compatibility of the design of, work methods to be used in, or any other aspect of, the Interface Work with the Works or the IDE Activities or information required to enable the Interface Contractor to confirm the suitability of the design of, work methods to be used in, or any other aspect of, the Interface Work:

- A. provide the information to the Interface Contractor, with a copy to the Principal's Representative, within the time requested by the Interface Contractor provided that this time is reasonable;
 - B. ensure that such information is provided to Interface Contractors by the requested dates; and
 - C. ensure and warrant that the information provided is accurate; and
- (xii) use our best endeavours to resolve any problems, and work closely and iteratively, with Interface Contractors, including providing design options, iterations, and work methodologies, to achieve the best solution to such problems, related to:
- A. the provision of information;
 - B. the obtaining of information;
 - C. the adequacy of information provided to, or received from, Interface Contractors;
 - D. the compatibility of the Works with the Interface Work;
 - E. coordination in accordance with this clause 15.14; and
 - F. technical issues with the information provided to, or received from, Interface Contractors;
- (c) must, in the event that despite using our best endeavours, and working closely and iteratively with the Interface Contractors, the Participants and any Interface Contractor fail to resolve a problem between them:
- (i) give written notice to the Principal's Representative with a copy to the Interface Contractor describing the problem; and
 - (ii) attend any coordination meetings as requested by the Principal's Representative, and in good faith work with those present to attempt to resolve the problem;
- (d) must promptly advise the Principal's Representative of all matters arising out of the liaison with Interface Contractors that may involve a change to design or construction work under this Agreement or otherwise have an adverse effect upon the IDE Activities; and
- (e) acknowledge that conditions similar to those in this clause 15.14 applying to us will apply to all Interface Contractors engaged by TfNSW, whether working on the Site or any other site.

15.15 Interface Disputes

- (a) Where we have complied with all of our obligations in clause 15.14, we must promptly give the Principal's Representative written notice of any interface issue or dispute with any Interface Contractor.
- (b) Upon receipt of our notice under clause 15.15(a), the Principal's Representative may:

- (i) within 5 Business Days convene a meeting between us, the relevant Interface Contractor and any other relevant person; and
- (ii) work in good faith with us and the Interface Contractor to resolve the issues or dispute.

15.16 Track Possessions and Power Isolations

- (a) The table in the Track Possessions Schedule identifies the Track Possessions and power isolations available at the Reference Date.
- (b) TfNSW will liaise with the relevant Track Possession Authority to procure the Track Possessions and power isolations set out in the Track Possessions Schedule.
- (c) We acknowledge that we will not have exclusive access to any track the subject of a Track Possession or power isolation and must:
 - (i) without limiting clauses 15.13 or 15.14, coordinate our activities with whoever else is sharing the relevant Track Possession or power isolation; and
 - (ii) allow the relevant Track Possession Authority and Other Contractors to pass through any track the subject of the relevant Track Possession or power isolation.
- (d) If we require a Track Possession or power isolation in addition to the Track Possessions and power isolations identified in clause 15.16(a) for the performance of the IDE Activities (**Additional Track Possession or Power Isolation**) and require TfNSW to liaise with the relevant Track Possession Authority in this regard, we must provide no less than:
 - (i) 26 weeks prior written notice in respect of each Additional Track Possession or Power Isolation that falls on a weekend; or
 - (ii) 20 weeks prior written notice in respect of each Additional Track Possession or Power Isolation that falls on a weeknight or which requires a power isolation only,

and identify whether a power isolation is required during the requested Additional Track Possession or Power Isolation.
- (e) Following receipt of a request for an Additional Track Possession or Power Isolation under clause 15.16(d), TfNSW may assist us to obtain the requested Additional Track Possession or Power Isolation, but is under no obligation to do so and in no way guarantees that the requested Additional Track Possession or Power Isolation will be granted by the relevant Track Possession Authority.
- (f) If an Additional Track Possession or Power Isolation is granted by the relevant Track Possession Authority, we:
 - (i) must make the necessary arrangements for the Additional Track Possession or Power Isolation in accordance with the TSRs; and
 - (ii) acknowledge that we must pay for any costs payable for the relevant Additional Track Possession or Power Isolation and that these costs will be taken into account in calculating the Actual Outturn Cost for the purposes of the Compensation Framework.

- (g) We must effectively and efficiently utilise each Track Possession and power isolation.
- (h) We acknowledge and agree that a Track Possession Authority may alter or cancel any Track Possession, power isolation or Additional Track Possession or Power Isolation at any time.

15.17 TfNSW Supplied Items

TfNSW will make available the TfNSW Supplied Items.

16. Design, documents and auditing

16.1 Supply of design and documents by TfNSW

- (a) TfNSW may provide the Participants with design, documentation and specifications from time to time.
- (b) The NOPS will not (and will ensure that their Subcontractors do not) use, copy or reproduce the design, documentation or specifications provided by TfNSW for any purpose other than for the Works.
- (c) The design, documentation and specifications provided by TfNSW will remain the property of TfNSW and will be returned by the NOPS to TfNSW if requested in writing by TfNSW.

16.2 Supply of design and other documents

We will:

- (a) in respect of:
 - (i) the Initial Project, from the Commencement Date, further develop the Principal's Design and prepare all Design Documentation and other documentation as is necessary to enable the Participants to construct the Works and otherwise carry out the IDE Activities; and
 - (ii) each Additional Project, from the Reference Date, further develop the Principal's Design and prepare all Design Documentation and other documentation as is necessary to enable the Participants to construct the Works and otherwise carry out the IDE Activities; and
- (b) provide TfNSW with:
 - (i) copies of all such Design Documentation and other documentation as it may require from time to time;
 - (ii) a complete set of Asset Management Information for the completed Project Works; and
 - (iii) any certificates, designs, documentation, surveys, approvals, programs or notices so that TfNSW is able to fulfil its responsibilities and obligations under all applicable Approvals with respect to the Works.

16.3 Submission for review by Principal's Representative

- (a) The Participants must submit the Design Documentation, the Management Plan, all other management plans and any other document (each of which in this clause 16.3, will be referred to as a **Document**) which is required to be submitted for the review of TfNSW or the Principal's Representative under a provision of this Agreement or the TSRs:
- (i) progressively and in a timely manner to ensure that the IDE Activities are commenced, progressed and completed by the times required under this Agreement, and by the times or within the periods:
 - A. required by this Agreement or the TSRs;
 - B. in the absence of a time or period in this Agreement or the TSRs, identified in the Current Program; or
 - C. in the absence of a time or period in the Current Program, required by the Principal's Representative; and
 - (ii) under cover of a written notice entitled "Submit for Review", which identifies:
 - A. the Document; and
 - B. the provision of this Agreement under which the Document is submitted.
- (b) Where the Document being submitted under clause 16.3(a) is Design Documentation, it must:
- (i) be accompanied by:
 - A. the IDE Certificate of Design Compliance;
 - B. in respect of the Detailed Designer, the Detailed Designer's Certificate of Design Compliance;
 - C. in respect of the Signalling Detailed Designer, the Signalling Designer's Certificate of Design Compliance;
 - D. in respect of any other Designers, the Designers' Certificates of Design Compliance; and
 - E. any other documentation required to be submitted under the Configuration Management Plan referred to in Exhibit B.0; and
 - (ii) where the design the subject of the Design Documentation is required to have an Approval prior to being implemented, then the Participants must with the Document submit evidence (to the reasonable satisfaction of the Principal's Representative) of the relevant Approval.
- (c) A Document will be deemed not to have been submitted to the Principal's Representative unless and until:
- (i) the Document covers, fully details and co-ordinates the whole of discrete areas of work so as to allow the area of work to be fully understood; and

- (ii) the Participants have otherwise complied with this clause 16.3, in addition to any other requirement of this Agreement relating to the submission of that Document.
- (d) The Principal's Representative may:
- (i) direct that any Document the Participants:
 - A. previously submitted is a Document that is to be reviewed under the provisions of this clause 16.3; and
 - B. is obliged to submit will be reviewed under the provisions of this clause 16.3;
 - (ii) after the submission of a Document that satisfies the requirements of clause 16.3(b) and 16.3(c) (where applicable), review the Document, or any resubmitted Document, prepared and submitted by the Participants and:
 - A. reject the Document (and state reasons) if in its opinion the Document (or any part) does not comply with the requirements of this Agreement;
 - B. make comments on the Document, or request clarification or additional information; or
 - C. notify the Participants that it has no (or has no further) comments to make,

within relevantly, the later of:

 - D. where a time or period is stated in the TSRs for a specific Document, that time or the expiry of that period; and
 - E. for all other Documents, 15 Business Days from submission.
- (e) If any Document is:
- (i) rejected or deemed to be rejected, the Participants must submit an amended Document to the Principal's Representative within 10 Business Days after the date of such rejection or deemed rejection and this clause 16.3 will re-apply; or
 - (ii) not rejected and the Principal's Representative responds to the submission with comments, or requests clarification or additional information, the Participants must respond to the comments or request within 5 Business Days or such other period as may be directed by the Principal's Representative.

If the Participants:

- (iii) respond to the Principal's Representative's comments or request within the period referred to in clause 16.3(e)(ii) in a manner satisfactory to the Principal's Representative, the Principal's Representative will notify the Participants that it has no (or no further) comments to make within 5 Business Days of that response; or

- (iv) fails to respond to the Principal's Representative's comments or request within the period referred to in clause 16.3(e)(ii) in a manner satisfactory to the Principal's Representative, or the Principal's Representative does not give a notice under clause 16.3(e)(iii):
 - A. the Document will be deemed to be rejected;
 - B. the Principal's Representative shall, by notice in writing, confirm that the Document has been rejected; and
 - C. clause 16.3(e)(i) will apply.
- (f) The Participants must not commence construction of any part of the Works to which any Document applies unless:
 - (i) the Principal's Representative has notified the Participants under clause 16.3(d)(ii)C that it has no (or has no further) comments to make; or
 - (ii) the relevant period of time in clause 16.3(d)(ii) has expired and the Principal's Representative has not rejected the Document, made any comments on the Document or made a request referred to in clause 16.3(d)(ii)B in respect of the Document (except, in the case of comments or a request, where the Participants have responded to the Principal's Representative's comments or the request (as applicable) within the required time period and in a manner satisfactory to the Principal's Representative as referred to in clause 16.3(e)),and the AFC Design Documentation exists for that element of the Works.
- (g) The Participants must not amend for construction purposes any Document that has been submitted to the Principal's Representative and, in respect of which:
 - (i) the Principal's Representative has given the Participants the notice referred to in clause 16.3(d)(ii)C; or
 - (ii) the relevant period of time in clause 16.3(d)(ii) has expired and the Principal's Representative has not rejected it, made any comments on it or made a request referred to in clause 16.3(d)(ii)B in respect of it (except, in the case of comments or a request, where the Participants have responded to the comments or the request (as applicable) within the required time period and in a manner satisfactory to the Principal's Representative as referred to in clause 16.3(e)),unless the Participants submit the proposed amendments to the Principal's Representative, in which case this clause 16.3 will re-apply.
- (h) In considering, reviewing, commenting upon, or rejecting any Document, the Principal's Representative may:
 - (i) consult with;
 - (ii) take into account any views or requirements of; and
 - (iii) direct the Participants to comply with the lawful requirements of, any relevant Authority.

- (i) The Participants acknowledge and agree that they have made allowances in the IDE's Program (as at the Reference Date), the Date for Operational Readiness and the Date for Completion for the time required for:
 - (i) the requirements of this clause 16.3;
 - (ii) all relevant Authorities to review its design;
 - (iii) any review process of the IP Configuration Control Board;
 - (iv) the submission, review, comment, rejection and all other design development processes contemplated by the Third Party Agreements and the Statements of Principles; and
 - (v) the issue of CCB Minutes during development of the design.
- (j) The restrictions on the commencement of any part of the Works in this clause 16.3 are in addition to any restrictions that exist elsewhere in this Agreement, including under any Third Party Agreement or any Statement of Principles.
- (k) For the purposes of calculating time under this clause 16.3, the days between 24 December and 7 January shall not be counted as Business Days.

16.4 MP and TSR Implementation

We will:

- (a) prepare and finalise the Management Plan and all remaining plans listed in the TSRs as required by the TSRs;
- (b) implement the Management Plan (including all sub-plans) and comply with its requirements in performing the IDE Activities; and
- (c) comply with the requirements of the TSRs and Schedule 8.

16.5 Exchange of Information Between Government Agencies

The Participants acknowledge that TfNSW is required to provide information about the IDE to the NSW Government. The NOPs authorise TfNSW, its employees and agents to make information concerning the NOPs available to NSW Government departments or agencies.

Such information may include any information provided by the NOPs to TfNSW and any information relating to the NOP's performance under this Agreement.

The NOPs acknowledge that any information about the NOPs from any source, including but not limited to substantiated reports of unsatisfactory performance, may be taken into account by TfNSW and NSW Government departments and agencies in considering whether to offer the NOPs future opportunities for NSW Government work.

16.6 NOP Performance Reports

The NOPs acknowledge that TfNSW has in place processes for assessing the performance of its contractors, and that these processes will apply to the NOPs performance under this Agreement, and the NOPs agree that they will participate in TfNSW's "Contractor Performance Reporting" process.

16.7 IDE Intellectual Property Rights

- (a) All IDE Intellectual Property Rights will become our joint property immediately upon being developed, created, produced, discovered or first reduced to practice.
- (b) Each of us (as well as RailCorp, Sydney Trains, NSW Trains and Sydney Metro) will have an irrevocable, royalty-free licence to use or licence all IDE Intellectual Property Rights for any purpose.
- (c) None of us (and none of RailCorp, Sydney Trains, NSW Trains or Sydney Metro) will be required to account to any Participant in relation to the proceeds derived from the exercise of the rights granted under this clause 16.7.
- (d) If requested to do so by a Participant, we will make available to all other Participants, all Records relating to IDE Intellectual Property Rights within 7 Business Days of being requested to by another Participant.
- (e) If a Participant uses any IDE Intellectual Property Right for any purposes other than for or in connection with a Project or the IDE Activities, it may only do so on these terms:
 - (i) the Participant acknowledges that the risk associated with the use of the IDE Intellectual Property Right is entirely theirs and they release the other Participants from any liability or claim in relation to such use;
 - (ii) the Participant indemnifies the other Participants against any liability the other Participants may have to a third party to the extent arising from such use;
 - (iii) no fee or royalty will be payable to the other Participants; and
 - (iv) the Participant must use its best endeavours to disclose to third parties which receive, use, or benefit from, the IDE Intellectual Property Right, that the other Participants disclaim responsibility from and deny any right to rely on the IDE Intellectual Property Right.
- (f) If a Participant licences its right in any IDE Intellectual Property Right, it may only do so on the basis that the licensee acknowledges that the risk associated with the use of the IDE Intellectual Property Right is borne entirely by the licensee.

16.8 Background Intellectual Property Rights

- (a) Each of us grants to each other Participant, RailCorp, Sydney Trains, NSW Trains and Sydney Metro a non-exclusive irrevocable royalty-free licence to use our Background Intellectual Property Rights for the purpose of carrying out the IDE Activities.
- (b) Where TfNSW issues a notice under clause 12.1(a)(ii), each NOP grants to TfNSW, RailCorp, Sydney Trains, NSW Trains and Sydney Metro a non-exclusive irrevocable royalty-free licence to use that NOP's Background Intellectual Property Rights for the purpose of carrying out the Proposed Additional Project the subject of the notice, or a project substantially similar to that Proposed Additional Project, including by:
 - (i) directly carrying out all or any part of that Proposed Additional Project, or a project substantially similar to that Proposed Additional Project; or

- (ii) procuring others to carry out all or any part of that Proposed Additional Project, or a project substantially similar to that Proposed Additional Project.
- (c) We will make available to all Participants all Records relating to our Background Intellectual Property Rights to the extent necessary to enable that knowledge to be used effectively for the IDE Activities, or as contemplated by clause 16.8(b), within 7 Business Days of being requested to by another Participant.
- (d) We will not use the Background Intellectual Property Rights of any other Participant for any other purpose than for carrying out the IDE Activities and the subsequent use of the Project Works, or as referred to in clause 16.8(b).

16.9 Third parties' Intellectual Property Rights

- (a) In carrying out the IDE Activities we will not infringe the Intellectual Property Rights of any third party.
- (b) Each Participant (the "**Indemnifier**") will indemnify each other Participant (an "**Indemnified Participant**"), RailCorp, Sydney Trains, NSW Trains and Sydney Metro against all Claims, losses or expenses each Indemnified Participant, RailCorp, Sydney Trains, NSW Trains or Sydney Metro incurs as a result of a breach by the Indemnifier of clause 16.9(a).
- (c) Where we need to use the Intellectual Property Rights of a third party in carrying out the IDE Activities, we will make every reasonable effort to procure licences for those rights for the Participants, RailCorp, Sydney Trains, NSW Trains and Sydney Metro on reasonable commercial terms as approved by the LT.

16.10 Moral rights

- (a) Each NOP must use its best endeavours to:
 - (i) obtain in writing from its Associates and licensors all necessary, unconditional and irrevocable:
 - A. consents permitted by applicable law, to any alterations to, or use of any Work Product that would otherwise infringe their Moral Rights in the Work Product, whether occurring before or after the consent is given; or
 - B. to the extent a consent is not permitted by applicable law, waivers permitted by applicable law of Moral Rights in the Work Product,

for the benefit of TfNSW, RailCorp, Sydney Trains, NSW Trains and Sydney Metro;
 - (ii) provide TfNSW with copies of each written consent and waiver obtained under this clause 16.10, at TfNSW's request; and
 - (iii) ensure that none of its Associates or licensors institutes, maintains or supports any claim or proceedings for infringement by TfNSW or any other Rail Transport Agency of any of the NOP's Associates', or licensors' Moral Rights in the Work Product.

- (b) Each Participant (the "**Indemnifier**") must indemnify each other Participant (an "**Indemnified Participant**"), RailCorp, Sydney Trains, NSW Trains and Sydney Metro against all cost, loss, expense or damage (including legal costs on a solicitor and own client basis and whether incurred by or awarded against an Indemnified Participant, RailCorp, Sydney Trains, NSW Trains or Sydney Metro) or any claim or proceedings, that an Indemnified Participant, RailCorp, Sydney Trains, NSW Trains or Sydney Metro may sustain or incur as a result of a breach of this clause 16.10 by the Indemnifier.

16.11 Claims

We must:

- (a) provide, at no cost to the other Participants, all reasonable assistance required by a Participant, RailCorp, Sydney Trains, NSW Trains or Sydney Metro to defend a claim or any proceedings arising from defending any claim for the infringement of:
 - (i) Intellectual Property Rights vested in a Participant under clause 16.7(a);
 - (ii) any Intellectual Property Rights of third parties; or
 - (iii) a person's Moral Rights; and
- (b) keep the Participants fully informed of all suspected or actual infringements and claims by any person that the Work Product, or its use, infringes the Intellectual Property Rights or Moral Rights of any person.

16.12 Confidentiality

- (a) Except for the efficient performance of the IDE Activities, the NOPs will not, and will ensure that those for whom they are responsible do not:
 - (i) disclose to any person any information; or
 - (ii) publish any photographs, texts, documents, articles, advertisements or other information,

relating to this Agreement, the IDE Activities, the Works or any Project or which was communicated in the course of negotiation and development of this Agreement, without obtaining TfNSW's prior written consent (which consent can be withheld in the absolute discretion of TfNSW).

- (b) Each NOP must:
 - (i) execute and submit to TfNSW within 14 days of this Agreement a Confidentiality Undertaking; and
 - (ii) ensure that all employees of the NOP that have access to the information described in the Confidentiality Undertaking are aware of their obligations under the terms of the Confidentiality Undertaking.
- (c) The NOPs must take all reasonable steps to protect the confidentiality of all information relating to the Agreement, the IDE Activities, the Works and each Project.
- (d) Clause 16.12(a) does not apply to any information that is:

- (i) in or enters the public domain, except through disclosure contrary to this Agreement; or
 - (ii) made available to the NOP by a person who is or was not under any obligation of confidence in relation to that information.
- (e) The obligations of confidentiality set out in this clause 16.12 do not apply to the extent that a NOP is required by law or the rules of any stock exchange to disclose any information, provided the NOP:
- (i) promptly gives notice to TfNSW of that requirement;
 - (ii) takes all lawful measures available, and allows TfNSW to take all lawful measures available, to restrict disclosure of information; and
 - (iii) discloses only that portion of information which it is legally required to disclose.
- (f) We acknowledge that:
- (i) subject to clause 16.12(f)(iii), TfNSW may publish or otherwise disclose parts of this Agreement and information concerning the terms of this Agreement to NSW Government departments or agencies or as otherwise required by law; and
 - (ii) TfNSW may be required to publish information concerning this Agreement:
 - A. in accordance with the GIPA Act in response to an access application under Part 4 of that Act or as part of its disclosure obligations for government contracts in the government contracts register under Part 3, Division 5 of that Act;
 - B. under any similar or replacement legislation to the GIPA Act; or
 - C. by the Auditor-General or Parliament;
 - (iii) the Compensation Framework is commercial-in-confidence (as defined in Part 3, Division 5 of the GIPA Act) and will not be disclosed except:
 - A. to RailCorp, Sydney Trains, NSW Trains, Sydney Metro or the employees, contractors or advisors of TfNSW, RailCorp, Sydney Trains, NSW Trains or Sydney Metro upon those persons undertaking to keep strictly confidential any information disclosed to them;
 - B. as required by law or any requirement of any regulatory body or government agency;
 - C. to the Minister responsible for TfNSW; or
 - D. with the written consent of the NOPs.
- (g) The disclosure of information as contemplated by this clause does not relieve the NOPs of any of their confidentiality obligations under this Agreement or otherwise.
- (h) Each NOP must provide to TfNSW:

- (i) details of any related body corporate or any other private sector entity in which the NOP has an interest, that will be involved in carrying out any of the NOP's obligations or will receive a benefit under this Agreement; and
 - (ii) any other information which TfNSW reasonably requires to comply with its obligations under the GIPA Act.
- (i) Within three Business Days of receiving a written request by TfNSW, each NOP must give TfNSW:
- (i) full and immediate access to information contained in records held by the NOP that:
 - A. relate to the NOP carrying out the IDE Activities;
 - B. has been collected by the NOP from members of the public to whom the NOP provides or offers to provide services in carrying out the IDE Activities; or
 - C. the NOP has received from TfNSW to enable the NOP to carry out the IDE Activities; and
 - (ii) such other assistance as TfNSW may reasonably require in order to meet its obligations under the GIPA Act.

16.13 Public Disclosure

- (a) The NOPs must not, and must ensure that their Related Parties and Subcontractors do not, make any public disclosures, announcements or statements in relation to any Project or TfNSW's involvement in any Project without the prior written consent of the Principal's Representative. If such disclosure, announcement or statement is required as a matter of law, such consent will not be unreasonably withheld.
- (b) The terms of any Subcontract must contain a public disclosure clause substantially the same as clause 16.13(a).

16.14 Transparency

We acknowledge that it is of paramount importance to TfNSW that all commercial aspects of this Agreement are administered in a transparent and accountable manner that demonstrates to all Participants and relevant Stakeholders that all payments made under this Agreement are in accordance with the terms of this Agreement. We agree to do all things necessary or appropriate to ensure these outcomes are achieved.

16.15 Financial Auditor

- (a) TfNSW will appoint and pay a Financial Auditor ("FA") for the IDE (and any such payment by TfNSW will not constitute TfNSW IDA Costs, except to the extent otherwise provided in clause 16.19(g)(ii)).
- (b) The FA's overriding brief from TfNSW is, or will be, to check, review and validate each component of the proposed TOC included in a Project Proposal, audit and verify the Reimbursable Costs and to ensure that in respect of all payments made pursuant to this Agreement, the Participants receive their entitlement in accordance with clause 21.

- (c) The General Manager must ensure that any reports or advice from the FA that raise concerns about amounts claimed by or paid to any Participant are promptly brought to the attention of the LT.
- (d) Provided it has given prior notice in writing to and consulted with the Participants, TfNSW may appoint a different or additional person or company to be the FA.
- (e) References in this Agreement to the FA will include the authorised representatives of the FA.

16.16 Audit of Records

At any time until the Last Date of Final Completion, and thereafter at any time required to enable a recalculation to be carried out under clause 26.8 or clause 26.13, the NOPs are required to provide:

- (a) detailed breakdowns of any Reimbursable Costs which have been aggregated on a monthly basis; and
- (b) TfNSW and the FA with the right to:
 - (i) audit the process by which Reimbursable Costs are incurred and recorded by the Participants;
 - (ii) have access at all reasonable times to the personnel and Records of the Participants that are related to Reimbursable Costs (such access is not to be unreasonably withheld); and
 - (iii) reproduce any Records referred to in clause 16.16(b)(ii).

16.17 Overpayments

- (a) If the FA, in pursuing its overriding obligations as described in clause 16.15(b), identifies that a NOP has been paid an amount that is greater than that to which it is entitled under clause 21 (the **Overpayment Amount**), then the Overpayment Amount will become a debt due and payable from the NOP to TfNSW.
- (b) An Overpayment Amount determined by the FA in accordance with clause 16.17(a) may, subject to the Principal's Representative's determination (in its absolute discretion) as to whether or not the Overpayment Amount is material, incur simple interest at the Default Rate from the day after the date on which the NOP received the Overpayment Amount to (and including) the date on which the Overpayment Amount is repaid to TfNSW.

16.18 Retention of Records

- (a) Due to the "open book" nature of this Agreement, the NOPs must provide to TfNSW at its request copies of all Records regarding the Reimbursable Costs or the IDE Activities.
- (b) Copies of the Records referred to in clause 16.18(a) must be provided to TfNSW in accordance with the Compensation Audit Plan.

16.19 Collaborative audit of compliance with MP

- (a) We will prepare and implement an audit plan in accordance with the TSRs.

- (b) The LT, the General Manager or a Participant may at any time request that an auditor approved by the LT carry out an audit on our compliance with any of the plans contained in the MP.
- (c) We will provide all documents, access and assistance necessary for the completion of any audit.
- (d) The audits will be carried out as collaborative audits involving our personnel and technical specialists.
- (e) If any non-conformance is detected, we will immediately take steps to rectify the non-conformance.
- (f) The costs of conducting an audit requested by the LT or the General Manager will be treated as Reimbursable Costs.
- (g) The costs incurred by TfNSW associated with:
 - (i) the initial audit or review of performance in respect of the KRAs or Program KRAs in accordance with the Program KRA Performance Requirements or Project KRA Performance Requirements (as applicable) will be paid for by TfNSW (and any such costs incurred by TfNSW will not constitute TfNSW IDA Costs); and
 - (ii) any additional audits or reviews of performance in respect of the KRAs or Program KRAs undertaken as a result of the information provided by the IDE not being sufficient to properly complete the initial audit or review, or the IDE providing additional information following the completion of the initial audit or review, will be TfNSW IDA Costs.
- (h) Unless we agree otherwise in writing and subject to clause 16.19(g), the cost of any audit requested by a Participant will be paid for by that Participant and will not be a Reimbursable Cost.

16.20 Continuing effect

The provisions of clauses 16.5 to 16.19 continue to operate and bind all Participants after termination of this Agreement.

16.21 Design

We acknowledge that:

- (a) in respect of the Initial Project:
 - (i) prior to the Commencement Date, TfNSW:
 - A. engaged the Detailed Designer and the Signalling Detailed Designer to carry out the design of the Project Works; and
 - B. made payments to the Detailed Designer and the Signalling Detailed Designer for the design of the Project Works;
 - (ii) the NOPs were, prior to the Commencement Date, given the opportunity to review:

- A. the status of the design documentation (including the Principal's Design) included in this Agreement (as at the Commencement Date); and
 - B. the progress of the Detailed Designer and the Signalling Detailed Designer against the milestones specified in their respective agreements with TfNSW;
- (iii) the TOC is based on:
- A. the version of the design documentation contained in the Works Brief (including the Principal's Design), which was developed from the version of the design documentation attached to the RFP that was given by TfNSW under the Proposal Development Deed and the subsequent versions of the design documentation and any additional design documentation otherwise provided to the NOPs prior to the Commencement Date; and
 - B. amounts estimated by the NOPs during the preparation of the relevant project proposal that was accepted by TfNSW to be payable for the design of the Project Works by the Signalling Detailed Designer (including an estimate of amounts paid to the Signalling Detailed Designer by TfNSW prior to the Commencement Date); and
- (iv) no Target Adjustment Event will arise in any way out of or in connection with the status of the design documentation (including the Principal's Design) as it appears in, or as referred to in, this Agreement; and
- (b) in respect of each Additional Project:
- (i) prior to the Reference Date, TfNSW:
 - A. may engage the Detailed Designer and/or the Signalling Detailed Designer to carry out the design of the Project Works; and
 - B. may have made payments to the Detailed Designer and the Signalling Detailed Designer for the design of the Project Works;
 - (ii) the NOPs will, prior to the Reference Date, be given the opportunity to review:
 - A. the status of the design documentation (including the Principal's Design) relating to the Project Works (as at the Reference Date); and
 - B. the progress of the Detailed Designer and the Signalling Detailed Designer (if any engaged) against the milestones specified in their respective agreements with TfNSW;
 - (iii) the TOC will be based on:
 - A. the version of the design documentation contained in the Works Brief, which will be developed from the version of the

design documentation attached to the RFP that was given by TfNSW under clause 8.2(a) and any subsequent versions of the design documentation and any additional design documentation provided to the NOPs prior to the Reference Date; and

- B. amounts estimated by the NOPs during the preparation of the Project Proposal to be payable for the design of the Project Works by the Detailed Designer and the Signalling Detailed Designer (including, if already engaged by TfNSW, an estimate of amounts paid to the Detailed Designer and the Signalling Detailed Designer by TfNSW prior to the Reference Date); and
- (iv) no Target Adjustment Event will arise in any way out of or in connection with:
- A. if the Detailed Designer or the Signalling Detailed Designer is novated to a NOP in accordance with clause 17.4, any amounts paid or payable to the Detailed Designer or the Signalling Detailed Designer (as applicable) for the design of the Project Works carried out up to and including the Reference Date (including any amounts paid or payable to the Detailed Designer or the Signalling Detailed Designer (as applicable) for the design of the Project Works carried out up to and including the Reference Date exceeding any relevant amounts allowed in the TOC); or
 - B. the status of the design documentation (including the Principal's Design) as at the Reference Date.

16.22 Information Documents

- (a) We acknowledge that:
- (i) prior to the Commencement Date, the NOPs were given access to all documents, core and other samples, exhibits, materials and other things which constitute Information Documents in respect of the Initial Project as at the Commencement Date; and
 - (ii) prior to each further Reference Date, the NOPs will be given access to documents, core and other samples, exhibits, materials and other things which constitute Information Documents in respect of an Additional Project as at the Reference Date.
- (b) Whether or not any Information Documents or any part thereof form or are included in an Exhibit to this Agreement, the NOPs acknowledge that:
- (i) the Information Documents or any part thereof do not form part of this Agreement and that clause 16.22(d) applies to the Information Documents or any part thereof; and
 - (ii) where Information Documents or any part thereof form or are included in an Exhibit to this Agreement, they do so only for the purposes of identification of that document or part thereof.
- (c) Without limiting clause 16.22(d):

- (i) the NOPs acknowledge that TfNSW does not warrant, guarantee, assume any duty of care or other responsibility for or make any representation about the accuracy, adequacy, suitability or completeness of the Information Documents, and the Information Documents do not form part of this Agreement; and
- (ii) the NOPs each release and discharge TfNSW from all Claims, costs, expenses and losses which they may have against TfNSW or otherwise suffer or incur arising out of, or in any way in connection with:
 - A. the provision of, or the purported reliance upon, or use of the Information Documents to or by the NOPs or any other person to whom the Information Documents are disclosed; or
 - B. a failure by TfNSW to provide any other information, data or documents to the NOPs,

except to the extent that such matters give rise to a Target Adjustment Event.

(d) The NOPs:

- (i) warrant that they did not in any way rely upon:
 - A. any information, data, representation, statement or document made by, or provided to the NOPs by, TfNSW or anyone on behalf of TfNSW or any other information, data, representation, statement or document for which TfNSW is responsible or may be responsible whether or not obtained from TfNSW or anyone on behalf of TfNSW; or
 - B. the accuracy, adequacy, suitability or completeness of such information, data, representation, statement or document,

for the purposes of entering into this Agreement except to the extent that any such information, statement or document forms part of this Agreement;
- (ii) warrant that they enter into this Agreement based on their own investigations, interpretations, deductions, information and determinations;
- (iii) warrant that they will not in any way rely upon:
 - A. any information, data, representation, statement or document made by, or provided to the NOPs by, TfNSW or anyone on behalf of TfNSW or any other information, data, representation, statement or document for which TfNSW is responsible or may be responsible whether or not obtained from TfNSW or anyone on behalf of TfNSW; or
 - B. the accuracy, adequacy, suitability or completeness of such information, data, representation, statement or document,

for the purposes of performing the Project Definition Services and preparing each Project Proposal, except to the extent that any such

information, statement or document is proposed by TfNSW as constituting a Project-Specific Schedule or Project-Specific Exhibit;

- (iv) warrant that they will perform the Project Definition Services and prepare each Project Proposal based on their own investigations, interpretations, deductions, information and determinations; and
- (v) acknowledge that they are aware that TfNSW has entered into this Agreement relying upon the warranties, acknowledgements and agreements in clauses 16.22(d)(i) to 16.22(d)(iv).

17. Works

17.1 Subcontracts

- (a) We will ensure that Subcontracts are entered into in accordance with the Procurement Management Plan and within the authorisation limits set by the LT from time to time.
- (b) The LT must approve a standard form contract or standard form contracts to be used for all Subcontracts, including Subcontracts with Key Subcontractors. In doing so, the LT may approve a single standard form contract or a set of standard form contracts for use depending on the type of Subcontractor and the nature of and risk associated with the work proposed to be performed by the Subcontractor.
- (c) Any proposed Subcontract that contains material changes to the standard form contract approved by the LT in accordance with clause 17.1(b) must be submitted to and approved by the LT prior to execution.
- (d) The terms of any Subcontract will:
 - (i) contain a requirement that the relevant Subcontractor execute a deed poll (in the form of Schedule 23 or in such other form as TfNSW may from time to time require) in favour of TfNSW, RailCorp, Sydney Trains, NSW Trains and Sydney Metro creating a duty of care in favour of TfNSW, RailCorp, Sydney Trains, NSW Trains and Sydney Metro in relation to the works or services to be conducted under the Subcontract, unless TfNSW decides (either in respect of a specified Subcontractor or a class or category of Subcontractors) in its absolute discretion that such a deed poll is not necessary;
 - (ii) be approved by the General Manager;
 - (iii) contain an assignment of IDE Intellectual Property Rights by the Subcontractor to the Participants;
 - (iv) contain confidentiality provisions substantially the same as those in clause 16.12;
 - (v) contain provisions which permit assignment or novation as contemplated by clause 27.4(h);
 - (vi) contain provisions which will permit us to perform our obligations in clause 16; and
 - (vii) contain the requirements regarding public liability insurance as set out in clause 26.5(b).

- (e) A Participant who engages a Subcontractor in connection with the IDE Activities does so in its own right and, for the purposes of that Subcontract will not be acting as the agent of any other Participant. However, the Participants will remain collectively responsible under this Agreement for the IDE Activities including any IDE Activities carried out by Subcontractors.
- (f) If a NOP engages a Subcontractor, the NOP must:
 - (i) where required in writing by either the LT or TfNSW, enforce or defend the relevant Subcontract for the benefit of the Participants and any such enforcement or defence actions, settlement or proceedings must be conducted under the written direction of either the LT or TfNSW;
 - (ii) ensure that the Subcontractor (and their subcontractors) executes a Confidentiality Undertaking and provide this to the Principal's Representative within 7 days of the engagement of that Subcontractor; and
 - (iii) where the Subcontractor is to carry out design work or other professional services, unless not required by the Principal's Representative, use our best endeavours (which must include complying with the Procurement Management Plan) to procure that Subcontractor to execute a deed in the form of Schedule 30 and provide this to the Principal's Representative within 7 days of the engagement of that Subcontractor.

17.2 Key Subcontractors

- (a) The Key Subcontractors specified in the Agreement Particulars have been pre-approved by TfNSW to carry out the parts of the IDE Activities or Works specified in the Agreement Particulars in relation to those Key Subcontractors, subject to clauses 17.1(b), 17.1(c) and 17.1(d).
- (b) A NOP must obtain the prior written approval of the LT before replacing or removing a Key Subcontractor, or requiring that Key Subcontractor to carry out parts of the IDE Activities other than those which are specified for that Key Subcontractor in the Agreement Particulars.

17.3 Nominated Subcontractors

- (a) We:
 - (i) must not enter into any Subcontract with a Prohibited Subcontractor;
 - (ii) must enter into a Subcontract with each Nominated Subcontractor in respect of the relevant Nominated Subcontract Work; and
 - (iii) agree that no act or omission of a Nominated Subcontractor will affect our obligations under this Agreement.
- (b) TfNSW makes no representation as to any Nominated Subcontractor's:
 - (i) quality of work;
 - (ii) timeliness of work;
 - (iii) availability to perform the relevant Nominated Subcontract Work; or

- (iv) creditworthiness.

17.4 Novation of Consultant

We acknowledge that, in respect of a Project, if the Agreement Particulars specifies that a consultant is to be novated:

- (a) as part of their Accepted Project Proposal, the NOPs submitted or will submit an executed deed of novation in the form of Schedule 38 for the novation of the professional services contract with the relevant consultant to a NOP or to the NOPs jointly; and
- (b) the deed of novation:
 - (i) in respect of the Initial Project:
 - A. was held in escrow by TfNSW until the Commencement Date; and
 - B. is now released from escrow and is binding upon TfNSW and the NOP or NOPs by whom it was executed (as applicable); and
 - (ii) in respect of each Additional Project:
 - A. will be held in escrow by TfNSW until the Reference Date; and
 - B. will, upon the Reference Date, be released from escrow and be binding upon TfNSW and the NOP or NOPs by whom it is executed (as applicable).

17.5 Deed Poll by NOPs in favour of Rail Transport Agency

We acknowledge that:

- (a) we agree to give the persons named in the Agreement Particulars the benefit of certain rights in accordance with the deed poll referred to in clause 17.5(b), without affecting the allocation of risk under this Agreement;
- (b) each NOP must, within 5 Business Days of the Commencement Date, provide TfNSW with an executed deed poll in favour of the persons named in the Agreement Particulars in the form set out in Schedule 35; and
- (c) it is a condition precedent to any obligation of TfNSW to pay the NOP any amount under clause 21 that the NOP provide an executed deed poll as required by clause 17.5(b).

17.6 Related party transactions

A NOP must obtain the prior written approval of the LT before entering into an agreement with, or engaging the services of, a Related Party of that NOP in relation to the performance of the IDE Activities.

17.7 Statutory Requirements

- (a) In carrying out the IDE Activities, we will:

- (i) comply with all Statutory Requirements (including all Approvals);
- (ii) without limiting clause 17.7(a)(i):
 - A. identify and obtain any additional planning and other Approvals as may be required from time to time;
 - B. unless otherwise expressly specified in Schedule 10.n, comply with the requirements of the Planning Approval and all other Approvals, including those conditions and requirements that TfNSW is required, under the terms of the Approvals, to comply with; and
 - C. in respect of any:
 - 1) Approvals which are to be obtained by TfNSW after the Commencement Date (including the Planning Approval); or
 - 2) conditions and requirements of Approvals which pursuant to Schedule 10.n are to be satisfied or fulfilled by TfNSW,

provide TfNSW with such reasonable assistance as may be reasonably required by TfNSW to enable TfNSW to obtain the Approvals or satisfy or fulfil the conditions and requirements; and
- (iii) ensure that all Subcontractors do likewise.
- (b) Without limiting clause 17.7(a)(i), TfNSW will obtain the Planning Approval.

17.8 Subcontractor warranties

- (a) We will use our best endeavours (which must include complying with the Procurement Management Plan) to obtain written warranties in favour of TfNSW, RailCorp, Sydney Trains, NSW Trains and Sydney Metro from Subcontractors, to the extent such warranties are relevant, that any:
 - (i) materials incorporated into the Project Works are correctly designed, fabricated and installed to the standards set out in this Agreement or, if not set out, then to good industry standards and codes of practice; and
 - (ii) design of, and any materials incorporated into, the Project Works are of the required quality and fit for the intended purposes as stated in, or reasonably inferred from, this Agreement.
- (b) We will use our best endeavours (which must include complying with the Procurement Management Plan) to obtain from each Subcontractor:
 - (i) a signed deed poll in the form of Schedule 23 or such other form as TfNSW may from time to time require (and provide an original of this to TfNSW); and
 - (ii) the warranties listed in Warranties Schedule for the warranty period stipulated in the Warranties Schedule in the form set out in Schedule 18

in favour of TfNSW, RailCorp and any other entity nominated by the Principal's Representative from time to time.

17.9 Work health and safety

- (a) We are committed to achieving outstanding performance in relation to health and safety and making every effort to ensure safety and maintain a workplace free of accidents, injuries and risks to health and safety.
- (b) In this clause 17.9, the terms "principal contractor", "workplace" and "construction project" have the same meanings assigned to those terms under the *Work Health and Safety Act 2011* (NSW) (in this clause, **the Act**) and the *Work Health and Safety Regulation 2017* (NSW) (in this clause, **the Regulation**).
- (c) In respect of each Project, unless the Agreement Particulars specifies otherwise, for the purpose of the WHS Legislation and this Agreement, the Works and any Other Contractor Work is taken to be part of the same 'construction project'.
- (d) Without limiting our obligations under any other provision of this Agreement, we agree as follows:
 - (i) TfNSW:
 - A. engages the NOP specified in the Agreement Particulars (the "**Principal Contractor**") as the principal contractor in respect of the IDE Activities and (except to the extent that the Principal's Representative (in its absolute discretion) directs otherwise in writing) all Other Contractor Work; and
 - B. authorises the Principal Contractor to have management and control of each workplace at which the IDE Activities and the Other Contractor Work are to be carried out and to discharge the duties of a principal contractor under the WHS Legislation; and
 - (ii) the Principal Contractor:
 - A. accepts the engagement and agrees to discharge the duties imposed on a principal contractor by the WHS Legislation;
 - B. must ensure that all Subcontractors comply with their respective obligations under the Act and the Regulation;
 - C. must at all reasonable times provide the other Participants with access to such records as may be necessary to establish the Principal Contractor's compliance with its obligations under this clause;
 - D. must ensure that the Participants carry out the IDE Activities in a manner which ensures that the Participants satisfy their obligations under the Act and the Regulation; and
 - E. must immediately inform the other Participants in writing of all incidents involving injury to any person arising during the carrying out of the IDE Activities.

17.10 Work Health and Safety Management Plan

- (a) We acknowledge that:
- (i) the Principal Contractor:
 - A. in respect of the Initial Project, has prepared a draft Work Health and Safety Management Plan that was submitted to TfNSW pursuant to the Proposal Development Deed and the RFP; and
 - B. in respect of each Additional Project, will prepare a draft Work Health and Safety Management Plan for submission to TfNSW as part of the Project Proposal;
 - (ii) the Principal Contractor must submit a final Work Health and Safety Management Plan to the Principal's Representative:
 - A. so as to ensure that there is no delay or disruption to the IDE Activities and in any event no later than 10 Business Days after the Reference Date; and
 - B. under cover of a written notice entitled "Submit for Review", which identifies the Work Health and Safety Management Plan and that it is submitted under this clause 17.10;
 - (iii) we must not commence any of the IDE Activities to which the Work Health and Safety Management Plan applies unless:
 - A. the Principal's Representative has issued the notice referred to in clause 17.10(b)(iii) in respect of it; or
 - B. the relevant period of time in clause 17.10(b) has expired and the Principal's Representative has not rejected it, made comments on it or made a request referred to in clause 17.10(b)(ii) in respect of it (except, in the case of comments or a request, where the Principal Contractor have responded to the comments or the request (as applicable) within the required time period and in a manner satisfactory to the Principal's Representative as referred to in clause 17.10(c)); and
 - (iv) the Principal Contractor must, in any event, finalise the Work Health and Safety Management Plan so as to ensure that there is no delay or disruption to the IDE Activities and in any event in accordance with the requirements of this Agreement to the satisfaction of the Principal's Representative.
- (b) The Principal's Representative may review the Work Health and Safety Management Plan, or any resubmitted Work Health and Safety Management Plan and within 15 Business Days after its submission:
- (i) reject the Work Health and Safety Management Plan (and state reasons) if in its opinion the Work Health and Safety Management Plan (or any part) does not comply with the requirements of this Agreement;

- (ii) make comments on the Work Health and Safety Management Plan, or request clarification or additional information; or
 - (iii) notify the Principal Contractor that it has no (or has no further) comments to make.
- (c) If the Work Health and Safety Management Plan is:
- (i) rejected or deemed to be rejected, the Principal Contractor must submit an amended Work Health and Safety Management Plan to the Principal's Representative within 10 Business Days after the date of such rejection or deemed rejection and this clause 17.10 will re-apply; or
 - (ii) not rejected and the Principal's Representative responds to the submission with comments, or requests clarification or additional information, the Principal Contractor must respond to the comments or request within 10 Business Days or such other period as may be directed by the Principal's Representative.
- If the Principal Contractor:
- (iii) responds to the Principal's Representative's comments or request within the period referred to in clause 17.10(c)(ii) in a manner satisfactory to the Principal's Representative, the Principal's Representative will notify the Principal Contractor that it has no (or no further) comments to make within 5 Business Days of that response; or
 - (iv) fails to respond to the Principal's Representative's comments or request within the period referred to in clause 17.10(c)(ii) in a manner satisfactory to the Principal's Representative, or the Principal's Representative does not give a notice under clause 17.10(c)(iii):
 - A. the Work Health and Safety Management Plan will be deemed to be rejected;
 - B. the Principal's Representative shall, by notice in writing, confirm that the Work Health and Safety Management Plan has been rejected; and
 - C. clause 17.10(c)(i) will apply.
- (d) Without limiting any requirement of the WHS Legislation, the TSRs or this Agreement, the Work Health and Safety Management Plan must:
- (i) set out in adequate detail the procedures the Principal Contractor will implement to manage the IDE Activities from a work health and safety perspective;
 - (ii) describe how the Principal Contractor proposes to ensure the IDE Activities are performed consistently with Statutory Requirements; and
 - (iii) address the matters specified in the TSRs.
- (e) After the Work Health and Safety Management Plan has been finalised, the Principal Contractor must:

- (i) continue to correct any defects in or omissions from the Work Health and Safety Management Plan (whether identified by the Principal's Representative or the Principal Contractor); and
 - (ii) regularly review and, as necessary, revise the Work Health and Safety Management Plan in accordance with the WHS Legislation,
and submit an amended draft of its Work Health and Safety Management Plan to the Principal's Representative, after which clauses 17.10(b) and 17.10(c) will reapply (to the extent applicable).
- (f) The Principal Contractor must document and maintain detailed records of inspections or audits undertaken as part of the Work Health and Safety Management Plan.
- (g) We must:
- (i) provide all assistance required by the Principal Contractor in preparing the Work Health and Safety Management Plan and any revisions to the Work Health and Safety Management Plan; and
 - (ii) carry out the IDE Activities in accordance with, and otherwise implement, the Current Work Health and Safety Management Plan.

17.11 Safety Compliance

- (a) In carrying out the IDE Activities, we will ensure that we (and our Associates) comply with:
- (i) the Current Work Health and Safety Management Plan;
 - (ii) the Serious Incident Protocol attached to this Agreement as Schedule 27 (which is to be signed by all LT Members);
 - (iii) all Statutory Requirements;
 - (iv) all proper safety directives, procedures and work instructions issued by the Principal Contractor and to the extent not inconsistent with them, by TfNSW using the TfNSW Reserved Powers, the General Manager or personnel authorised by the LT to issue such directives, procedures and instructions;
 - (v) the terms of the Interface Agreements, any Third Party Agreement and any Statement of Principles;
 - (vi) the other requirements of this Agreement relating to work health, safety and rehabilitation management including the applicable provisions of the TSRs; and
 - (vii) our obligations under the WHS Legislation, including the obligation to consult, cooperate and coordinate activities with all other persons who have a work health and safety duty in relation to the same matter.
- (b) We will carry out the IDE Activities:
- (i) safely and in a manner that does not put the health and safety of persons at risk; and

- (ii) in a manner that protects property.

If TfNSW reasonably considers there is a risk to the health and safety of people or damage to property arising from the IDE Activities, TfNSW may direct the NOPs to change their manner of working or to cease working.

- (c) We must:

- (i) notify the Principal's Representative immediately (and in any event within 12 hours of such matter arising) of all work health, safety and rehabilitation matters arising out of, or in any way in connection with, the IDE Activities;
- (ii) institute systems to obtain regular written assurances from all Subcontractors about their ongoing compliance with the WHS Legislation including the due diligence obligation contained therein;
- (iii) provide the written assurances obtained pursuant to clause 17.11(c)(ii), together with written assurance(s) from us about our ongoing compliance with the WHS Legislation, to the Principal's Representative;
- (iv) provide the Principal's Representative with a written report at each LT Meeting, on all work health, safety and rehabilitation matters (including matters concerning or arising out of, or in connection with, this clause 17.11), or any other relevant matters as the Principal's Representative may require from time to time, including a summary of our compliance with the WHS Legislation;
- (v) in carrying out the IDE Activities, ensure that we (and our Associates) do anything necessary to enable TfNSW to comply with its responsibilities and obligations under the TfNSW Safety Management System; and
- (vi) cooperate with all Other Contractors and TfNSW to ensure that all parties are able to comply with their respective obligations under the WHS Legislation.

- (d) Each of us will immediately inform TfNSW and the Principal Contractor if we become aware that the Principal Contractor is not complying with its obligations as principal contractor.

- (e) If requested by the LT or TfNSW or required by the WHS Legislation, a NOP shall produce evidence of any approvals, certificates, authorisations, licences, prescribed qualifications or experience, or any other information relevant to work health and safety (as the case may be) to the satisfaction of the LT or TfNSW (as applicable).

17.12 Rail Safety Work

We will ensure that any person carrying out rail safety work (as defined in section 8 of the *Rail Safety National Law* (NSW)) for or on behalf of the IDE in relation to the IDE Activities has Rail Safety Worker Competency.

17.13 Protection of people, the environment and property

- (a) We are dedicated to protecting people, the environment and property in carrying out the IDE Activities and we will, in carrying out the IDE Activities:

- (i) provide all things and take all measures necessary to protect people, the environment and property;
- (ii) avoid unnecessary interference with the passage of people and vehicles;
- (iii) prevent damage to services or property;
- (iv) prevent obstruction or other interference with services;
- (v) prevent nuisance and unnecessary noise and disturbance;
- (vi) prevent environmental damage or pollution;
- (vii) ensure that the IDE Activities do not have any adverse impact on TfNSW, RailCorp, Sydney Trains, NSW Trains or Sydney Metro infrastructure and operations to a greater extent than is inherently necessary for the performance of the IDE Activities;
- (viii) comply with all Statutory Requirements relating to the protection of the environment;
- (ix) prevent contamination of land;
- (x) seek to ensure that the IDE Activities are carried out in a competent, proper and efficient manner and so as to minimise harm to the environment;
- (xi) seek to minimise the generation of waste;
- (xii) seek to maximise and encourage the recovery, recycling and reuse of recoverable resources; and
- (xiii) ensure that our Subcontractors do likewise,

provided that this clause will not be taken to mean that TfNSW authorises any action constituting a breach of any Statutory Requirements.

- (b) Our obligations include the provision of barricades, guards, fencing, temporary roads, footpaths, warning signs, lighting, watching, traffic flagging, safety helmets and clothing, removal of obstructions and protection of services.

17.14 Protection of cultural heritage and native title rights

We are committed to the protection of cultural heritage items and native title rights and will:

- (a) if any cultural heritage items are discovered by us immediately give written notice to TfNSW;
- (b) comply with TfNSW's instructions required to enable TfNSW to comply with any obligations arising as a result of the operation of Statutory Requirements in relation to heritage items and native title;
- (c) comply with Statutory Requirements relating to the protection of Aboriginal objects and places and other items of cultural heritage;
- (d) comply with guidelines for the identification and protection of Aboriginal objects and places and items of cultural heritage; and

- (e) ensure that our Associates do likewise.

17.15 National Greenhouse and Energy Reporting Act 2007 (Cth)

We acknowledge and agree that:

- (a) if any of the IDE Activities, or the activities of any of our personnel, in connection with the IDE Activities (the **Relevant Matters**) constitute a "facility" within the meaning of the NGER Legislation, then:
- (i) if a person can be nominated as having operational control for the purposes of the NGER Legislation then:
- A. the person identified in the Agreement Particulars is nominated as having operational control of the facility and is the NGER NOP; and
- B. for the purposes of the NGER Legislation, the NGER NOP:
- 1) will be taken to be the controlling corporation in relation to that facility;
 - 2) will comply with any obligations arising in respect of the NGER Legislation; and
 - 3) must do all things necessary to give effect to their nomination as having operational control in relation to the facilities constituted by the Relevant Matters;
- (ii) if a person cannot be nominated as having operational control for the purposes of the NGER Legislation then:
- A. the person (**Controlling Person**) who in accordance with the NGER Legislation has or is taken to have operational control for the purpose of the NGER Legislation is the having operational control in relation to the facilities constituted by the Relevant Matters; and
- B. for the purposes of the NGER Legislation the Controlling Person will be or be taken to be the controlling corporation in relation to in relation to the facilities constituted by the Relevant Matters and will comply with any obligations arising in respect of the NGER Legislation,
- but the NGER NOP will be the person identified in the Agreement Particulars; and
- (iii) if TfNSW incurs, or (but for this clause) would incur, an obligation or liability under or in connection with the NGER Legislation as a result of or in connection with any of the Relevant Matters, and the NGER Legislation provides that such liability can be transferred by TfNSW or the NSW Government or any of its agencies to another person then the person nominated as the NGER NOP must, on the written request of TfNSW, do all things reasonably necessary to ensure the obligation or liability is transferred to the NGER NOP;

- (b) if TfNSW or the Controlling Person requests it, the NGER NOP must provide Greenhouse Data to TfNSW or the Controlling Person (or both):
 - (i) to the extent that, in a manner and form that, and at times that, will enable TfNSW or the Controlling Person to comply with the NGER Legislation irrespective of whether TfNSW or the Controlling Person or the NGER NOP or any other person has an obligation to comply with the NGER Legislation in connection with any Relevant Matters; and
 - (ii) otherwise as requested by TfNSW from time to time;
- (c) in relation to the facilities constituted by the Relevant Matters, the NGER NOP must also provide to TfNSW or the Controlling Person all Greenhouse Data and other information which the NGER NOP provides to any other person under the NGER Legislation in connection with any Relevant Matters, at the same time as the NGER NOP provides that Greenhouse Data or other information to that other person;
- (d) in relation to the facilities constituted by the Relevant Matters the NGER NOP must:
 - (i) collect and record all such Greenhouse Data as may be required to enable reporting under the NGER Legislation or enable the NGER NOP to discharge its obligations under this clause 17.15, and keep that Greenhouse Data for at least 7 years after the end of the year in which the Relevant Matters occur; and
 - (ii) permit any persons appointed or authorised by TfNSW to examine, monitor, measure, copy, audit and/or verify the Greenhouse Data and co-operate with and provide all reasonable assistance to any such persons (including by doing such things as giving access to premises, plant and equipment, producing and giving access to documents and answering any relevant questions);
- (e) TfNSW may provide or otherwise disclose the Greenhouse Data and any other information which TfNSW obtains under this clause 17.15 to any other person, and may otherwise use the Greenhouse Data and other information for any purpose as TfNSW sees fit; and
- (f) nothing in this clause 17.15 is to be taken as meaning that TfNSW has agreed to perform any statutory obligation that the NGER NOP or Controlling Person may have regarding the provision of Greenhouse Data to any authority.

17.16 Minimise disruption

In carrying out the IDE Activities, we will minimise disruption or inconvenience to:

- (a) the existing network of rail lines and rail stations owned or operated by RailCorp, Sydney Trains, NSW Trains or Sydney Metro;
- (b) existing road network and pedestrian facilities; and
- (c) TfNSW and other owners, occupiers, tenants and potential tenants of the Site in their occupation or use of, or attendance on, any part of the Site, including any occupation or use of the Works or a Portion.

17.17 Statutory Functions

- (a) The NOPs appreciate that TfNSW is subject to obligations in its capacity as a NSW Government agency.
- (b) In carrying out the IDE Activities, we will ensure that our officers, employees and Subcontractors and agents do not proceed with any course of action during the carrying out of the IDE Activities which may prejudice or in any way detrimentally affect any of TfNSW's obligations and duties in its capacity as a NSW Government agency.
- (c) Nothing in this Agreement will in any way unlawfully restrict or otherwise unlawfully affect the unfettered discretion of:
 - (i) TfNSW or any Rail Transport Agency to exercise any of their respective functions and powers pursuant to any legislation; or
 - (ii) the ASA to exercise any of its functions and powers pursuant to the ASA Charter,including any functions or powers required to be exercised by TfNSW or any Rail Transport Agency pursuant to any Configuration Management Framework.
- (d) Without limiting clause 17.17(c), anything which TfNSW, any other Rail Transport Agency or the ASA do, or fail to do or purport to do, pursuant to their respective functions and powers either as an AEO or under any legislation, the ASA Charter or the Configuration Management Framework, will be deemed not to be an act or omission by TfNSW under this Agreement.
- (e) The NOPs each release and discharge TfNSW from all Claims, costs, expenses and losses which they may have against TfNSW or otherwise suffer or incur arising under, out of, or in any way in connection with, this Agreement as a result of the exercise by TfNSW, any other Rail Transport Agency or the ASA of their respective functions and powers either as an AEO or under any legislation, the ASA Charter or the Configuration Management Framework, except to the extent that:
 - (i) this gives rise to a Target Adjustment Event; or
 - (ii) such costs, expenses and losses otherwise constitute Reimbursable Costs.

17.18 Commonwealth Funding

- (a) This clause 17.18 will apply in respect of a Project if the Agreement Particulars specifies that the Project is partially funded by the Commonwealth. Otherwise, this clause 17.18 will have no application.
- (b) The NOPs:
 - (i) acknowledge that the Project will be partially funded by the Commonwealth in accordance with the Project MOU; and
 - (ii) must:
 - A. provide TfNSW with any information or assistance reasonably required in relation to reporting or attendance at meetings; and

- B. prepare any reports reasonably required by the Principal's Representative (including those referred in the Commonwealth Government's document entitled "Notes on Administration for the Nation Building Program"),

to ensure that TfNSW is able to comply with its obligations under the Project MOU, the Head MOU, the National Land Transport Act and any other memorandum of understanding or arrangement between the State of NSW and the Commonwealth Government that may apply to the Project from time to time.

- (c) Assistance for the purposes of clause 17.18(b) includes permitting a person authorised by the Australian Government Minister administering the National Land Transport Act, at all reasonable times, to:
 - (i) inspect any work involved in the carrying out of the Project; and
 - (ii) inspect and make copies of any documents relating to the Project.
- (d) In all publications, promotional and advertising materials, public announcements and activities in relation to the Project, the IDE must acknowledge the financial support that it has received from the Australian Government. Such acknowledgement must be in a manner approved by the Principal's Representative prior to its use.

17.19 Options

- (a) The Principal's Representative may (in its absolute discretion), by written notice given to the Participants at any time within the period stated in the relevant Options Schedule, exercise any Option. Commencing upon the issue of such a notice by the Principal's Representative, we must perform our obligations under this Agreement on the basis that, in respect of the Project, the Compensation Framework, the Works Brief and the provisions of this Agreement will be adjusted as set out in the Options Schedule for the relevant Option.
- (b) For the avoidance of doubt:
 - (i) TfNSW is not under any obligation whatsoever to exercise any Option; and
 - (ii) no Target Adjustment Event will arise in respect of TfNSW not exercising any Option.
- (c) Where TfNSW does not exercise its discretion to exercise an Option, TfNSW may (in its absolute discretion), either by itself or by third parties, undertake the work contemplated by the relevant Option.
- (d) The exercise of an Option by the Principal's Representative under this clause 17.19 will not relieve the Participants from their liabilities or obligations (including those arising out of any warranties given under this Agreement) whether under this Agreement or otherwise according to any law.

17.20 WHS Accreditation Scheme

- (a) This clause 17.20 will apply in respect of a Project if the Agreement Particulars specifies that the Project has Commonwealth funding. Otherwise, this clause 17.20 will have no application.

- (b) We acknowledge that TfNSW is not permitted to enter into this Agreement unless:
 - (i) the NOPs are accredited persons pursuant to the WHS Accreditation Scheme;
 - (ii) the NOPs will be accredited persons prior to carrying out any building work (as defined in section 6 of the BCIP Act) in relation to the IDE Activities; or
 - (iii) section 26(g) of the Building and Construction Industry (Improving Productivity) (Accreditation Scheme) Rules 2019 (Cth) applies.
- (c) Each NOP:
 - (i) warrants that it is accredited under the WHS Accreditation Scheme; and
 - (ii) must comply with all the requirements of, and maintain accreditation under, the WHS Accreditation Scheme while building work (as defined in section 6 of the BCIP Act) is carried out.

17.21 Engineering Authorisation

The NOP specified in the Agreement Particulars must obtain (or ensure that a relevant Subcontractor obtains) ASA Authorisation in respect of all relevant IDE Activities and we must carry out the Asset Services in accordance with that ASA Authorisation.

17.22 ASA Compliance

- (a) We must (and must ensure that Subcontractors) comply with the conditions of the applicable ASA Authorisation referred to in clause 17.21.
- (b) The NOPs must ensure that arrangements in respect of ASA Authorisation as referred to in clause 17.21 are in place for so long as the IDE Activities are carried out.
- (c) We must (and must ensure that Subcontractors):
 - (i) implement and comply with the requirements of any ASA Requirements applicable to the IDE Activities;
 - (ii) cooperate fully with the ASA in the performance of the ASA's functions;
 - (iii) provide access to premises and resources as reasonably required by the ASA, including so that it can effectively carry out its review, surveillance and audit functions;
 - (iv) comply with the directions, instructions and requirements issued by the ASA;
 - (v) notify the ASA of any matter that could reasonably be expected to affect the exercise of the ASA's functions;
 - (vi) provide the ASA with any information relating to its activities or any documents or other things reasonably required by the ASA in the exercise of its functions; and

- (vii) provide TfNSW with such assistance as may be reasonably required by TfNSW to enable TfNSW to cooperate fully with the ASA and to implement and comply with ASA Requirements.
- (d) The NOPs each release and discharge TfNSW from all Claims, costs, expenses and losses which they may have against TfNSW or otherwise suffer or incur arising out of, or in any way in connection with, the requirement to obtain ASA Authorisation or the obligation to comply with the requirements of the ASA and the ASA Authorisation, except to the extent that:
 - (i) such matters gives rise to a Target Adjustment Event; or
 - (ii) such costs, expenses and losses otherwise constitute Reimbursable Costs.

17.23 Rail Safety

- (a) Without limiting any other clause in this Agreement, we must comply with the Rail Safety Legislation.
- (b) We must ensure that we do not do anything, or fail to do anything, that would cause TfNSW or any other Rail Transport Agency to be, or that would contribute to TfNSW or any other Rail Transport Agency being, in breach of the Rail Safety Legislation.
- (c) Without limiting clause 17.23(a), we acknowledge and agree that:
 - (i) the IDE Activities and the Works are being undertaken for the purpose of the construction of rail infrastructure;
 - (ii) TfNSW holds the TfNSW Accreditation; and
 - (iii) to the extent that the IDE Activities comprise Railway Operations, we carry out those IDE Activities pursuant to an Accreditation held by one of the Participants or a Subcontractor as required by the Rail Safety Legislation.
- (d) In carrying out the IDE Activities, we must:
 - (i) comply with:
 - A. all conditions of the TfNSW Accreditation and the TfNSW Safety Management System; and
 - B. all conditions of any Accreditation of the NOPs or a Subcontractor as referred to in clause 17.23(e) and any associated safety management system,

to the extent applicable to the IDE Activities;
 - (ii) develop, implement and maintain appropriate systems, procedures and records and make these available to TfNSW upon request, to ensure compliance the requirements of clause 17.23(d)(i);
 - (iii) not do anything (or fail to do anything) which jeopardises the TfNSW Accreditation or any Accreditation referred to in clause 17.23(e); and
 - (iv) ensure that all Subcontractors engaged in, or in connection with, the IDE Activities comply with clauses 17.23(d)(i) to 17.23(d)(iii).

- (e) In carrying out any part of the IDE Activities which require Accreditation:
 - (i) as a Rolling Stock Operator; or
 - (ii) as a Rail Infrastructure Manager, and in respect of which TfNSW does not have effective control and management of the relevant rail infrastructure for the purposes of the Rail Safety Legislation,

the NOPs must ensure that a NOP holds the necessary Accreditation for that part of the IDE Activities.
- (f) We must liaise and cooperate with TfNSW and each other Rail Transport Agency and provide any reasonable assistance and documentation to TfNSW and each other Rail Transport Agency, as such party may require in relation to safety matters.
- (g) Without limiting clause 17.23(f), we must provide the Principal's Representative with copies of all notices, reports and other correspondence given or received by us under, or in connection with, the Rail Safety Legislation relating to the IDE Activities or the Works, promptly after such notices are given or received (but in any event no later than 5 Business Days after they are given or received by us).
- (h) We must, and must ensure that our Subcontractors:
 - (i) promptly give all Investigative Authorities such access to premises and information as any Investigative Authority lawfully requests, within the time requested;
 - (ii) cooperate with and respond to any lawful requests made by any Investigative Authority, within the time requested; and
 - (iii) ensure that we (or our Subcontractors) do not hinder or delay any Investigative Authority in carrying out its duties.

18. Quality

18.1 Quality assurance

We are committed to ensuring that the IDE Activities and the Works are consistent with a Best For Project approach. For the achievement of this objective, we will establish, implement and maintain a quality assurance system to a standard equivalent to or better than the standard referred to in the Agreement Particulars.

18.2 Certificates

- (a) Together with each Payment Claim and at the Completion of the Project Works or each Portion, the Participants will submit to the Principal's Representative the IDE Certificate of Construction Compliance, identifying the work covered.
- (b) Each of the certificates provided by the Participants in accordance with clause 18.2(a) will be accompanied by a register prepared by the Participants for each of the following matters:
 - (i) management plans, method statements and inspection and test plans;
 - (ii) records of all compliance and other associated test records showing achievement of the acceptance criteria identified in the above inspection and test plans;

- (iii) deficiency notices; and
 - (iv) concessions granted for non-conforming work.
- (c) For the avoidance of doubt, each of the following certificates must be completed and issued separately for each Project:
- (i) the IDE Certificate of Design Compliance;
 - (ii) the Detailed Designer's Certificate of Design Compliance;
 - (iii) the Signalling Designer's Certificate of Design Compliance;
 - (iv) the Designers' Certificates of Design Compliance; and
 - (v) the IDE Certificate of Construction Compliance.

18.3 Defects

- (a) TfNSW may (in its absolute discretion):
- (i) inform us of the existence of a Defect which becomes apparent at any time prior to the expiration of the Defects Notification Period; and
 - (ii) issue a notice under clause 18.3(a)(i) even if we are otherwise aware of the Defect and clause 18.3(c)(ii) applies.
- (b) A notice by TfNSW under clause 18.3(a):
- (i) must identify the Defect;
 - (ii) may be given at any time prior to the expiration of the Defects Notification Period; and
 - (iii) may state the time in which the rectification work is to be carried out and completed.

If the LT considers that the part of the Project Works or IDE Activities identified as a Defect in a notice issued by TfNSW under clause 18.3(a)(i) is not a Defect, a Participant may by written notice to the other Participants and TfNSW request that the issue be resolved in accordance with clause 28.2.

- (c) If:
- (i) we receive any notice under clause 18.3(a)(i), we will rectify the Defect within the period stated in that notice and in accordance with any other requirement stated in that notice; or
 - (ii) we otherwise become aware of a Defect at any time prior to the expiration of the Defects Notification Period, we will, subject to clause 18.3(c)(i), rectify the Defect within a reasonable period.
- (d) If TfNSW gives a notice under clause 18.3(a)(i) or we otherwise become aware of a Defect prior to the expiration of the Defects Notification Period, the Defects Notification Period will be extended in relation to the particular Defect identified in the notice by a period of 12 months, commencing on the date of rectification of the Defect.

- (e) TfNSW will be entitled to rectify a Defect itself or engage others to do rectification work if TfNSW considers that:
 - (i) the rectification work must be carried out urgently for safety, environmental or other reasons of urgency; or
 - (ii) we have not undertaken the rectification work in the time required by clause 18.3(c).
- (f) Where TfNSW rectifies a Defect pursuant to clause 18.3(e), any costs reasonably incurred by TfNSW in doing so will be treated as TfNSW IDA Costs.
- (g) Subject to clause 18.3(h), the NOPs will be reimbursed in accordance with the Compensation Framework for the costs reasonably incurred by them in rectifying Defects pursuant to clause 18.3(c).
- (h) The LT must, within a reasonable time of Completion, determine any amount which should be withheld, until the Date of Final Completion, or deducted from any final payment in order to ensure that the obligations of the Participants in relation to the rectification of Defects are completed.

19. Time, progress and Completion

19.1 Progress and Date for Completion

- (a) We will:
 - (i) except as otherwise approved by the General Manager, progress the IDE Activities in accordance with the Current Program; and
 - (ii) without limiting clause 19.1(a)(i), achieve Completion of the Project Works by the Date for Completion.
- (b) The Date for Completion may only be adjusted by the LT and any such changes must be approved by TfNSW (in its absolute discretion).

19.2 Suspension of IDE Activities

- (a) Except to the extent necessary to avoid an event having, or which is reasonably foreseeable as having, an adverse impact on the environment, public health or safety, we will not suspend the IDE Activities without a written direction from TfNSW or pursuant to clause 27.8(d)(i).
- (b) If TfNSW considers that suspension of the whole or part of the IDE Activities is necessary or appropriate for any reason, TfNSW may direct that we suspend the progress of the whole or part of the IDE Activities for such time as TfNSW decides and we will promptly suspend that part of the IDE Activities.
- (c) TfNSW may direct that we are to recommence the whole or the relevant part of the IDE Activities at any time.
- (d) If TfNSW requires a suspension under this clause 19.2 for its convenience due to reasons within TfNSW's control, the LT will recommend whether the Compensation Framework should be adjusted to take into account the effect of the suspension, in which case clause 20.4 will apply.

- (e) Despite any other provision of this Agreement, the NOPs are not entitled to payment of Fee in respect of any Reimbursable Costs associated with a suspension under this clause 19.2.
- (f) We will use all reasonable endeavours to mitigate costs whether arising during the period of, or as the result of, any suspension.

19.2A Operational Readiness

- (a) When the General Manager considers that we have achieved Operational Readiness, the General Manager will submit a notice to the LT for its approval. The notice must include a statement by the General Manager to the effect that, to the best knowledge of the General Manager, having made reasonable enquiries, the Project Works or the Portion have reached Operational Readiness.
- (b) If the LT concurs with the General Manager that we have achieved Operational Readiness, the LT will countersign the notice from the General Manager under clause 19.2A(a) and submit it to the Principal's Representative for approval.
- (c) If the Principal's Representative agrees that Operational Readiness has been achieved, the Principal's Representative will countersign the notice submitted by the LT under clause 19.2A(b) and indicate the Date of Operational Readiness.
- (d) If the LT or the Principal's Representative does not consider that Operational Readiness has been achieved, the LT will notify the General Manager or the Principal's Representative will notify the LT (as applicable), indicating details of work that the LT or the Principal's Representative (as applicable) considers to be outstanding to achieve Operational Readiness.
- (e) If the LT considers that Operational Readiness has been achieved but the Principal's Representative does not agree, and a NOP wishes to pursue the issue, the NOP may by written notice to the other Participants and TfNSW request that the issue be resolved in accordance with clause 28.2.
- (f) Once the General Manager is satisfied that the outstanding work has been completed in accordance with this Agreement, the General Manager will again initiate the approval process under this clause 19.2A.
- (g) We acknowledge and agree that:
 - (i) the Date of Operational Readiness will be relevant only:
 - A. as expressly stated as a KPI in the Project KRA Performance Requirements; or
 - B. for the purposes of clause S7-5.3.5 of Schedule 7; and
 - (ii) the achievement of Operational Readiness (and any notice issued by the Principal's Representative under this clause 19.2A) will not limit or otherwise affect our obligations under this Agreement in respect of the achievement of Completion, or any obligation under this Agreement which is referable to the Date of Completion, including the operation of clause 15.6.

19.3 Certificate of Completion

- (a) When the General Manager considers that we have achieved Completion, the General Manager will submit a certificate in the form set out in Schedule 15 (with Part 1 completed) to the LT for its approval. The certificate must include a statement by the General Manager to the effect that:
 - (i) the General Manager is not aware of any Defects other than the minor Defects listed on the certificate which:
 - A. do not prevent the Project Works or the Portion from being Ready For Operations; and
 - B. can be corrected without prejudicing the convenient use of the Project Works or the Portion; and
 - (ii) to the best knowledge of the General Manager, having made reasonable enquiries, the Project Works or the Portion have reached Completion.
- (b) If the LT concurs with the General Manager that we have achieved Completion, the LT will complete Part 2 of the certificate submitted by the General Manager under clause 19.3(a) and submit it to the Principal's Representative for approval.
- (c) If the Principal's Representative agrees that Completion has been achieved, the Principal's Representative will complete Part 3 of the certificate submitted by the LT under clause 19.3(b) and indicate the Date of Completion.
- (d) If the LT or the Principal's Representative does not consider that Completion has been achieved:
 - (i) the LT or the Principal's Representative (as applicable) will complete the relevant Part of the certificate submitted by the General Manager under clause 19.3(a) or by the LT under clause 19.3(b) (as applicable) indicating details of work that the LT or the Principal's Representative considers to be outstanding to achieve Completion and submit the certificate to the General Manager; and
 - (ii) the General Manager will promptly inform the Participants that Completion has not been achieved and the details of the outstanding work required to achieve Completion.
- (e) If the LT considers that Completion has been achieved but the Principal's Representative does not agree, and a NOP wishes to pursue the issue, the NOP may by written notice to the other Participants and TfNSW request that the issue be resolved in accordance with clause 28.2.
- (f) Once the General Manager is satisfied that the outstanding work has been completed in accordance with this Agreement, the General Manager will again initiate the approval process under this clause 19.3.
- (g) Upon the completion and issue of a Certificate of Completion under this clause 19.3:
 - (i) we must hand over the Project Works or the Portion to TfNSW; and
 - (ii) we must correct all minor Defects listed in the Certificate of Completion as soon as possible after the Date of Completion.

19.4 Certificate of Final Completion

- (a) In respect of each Project, after expiry of the last Defects Notification Period applicable to that Project, and provided the General Manager is not aware of any outstanding Defects or any other matter which would prevent Final Completion from being achieved, the General Manager will submit a certificate in the form set out in Schedule 16 (with Part 1 completed) to the LT for its approval.
- (b) If the LT agrees that Final Completion has been achieved, the LT will complete Part 2 of the certificate submitted by the General Manager under clause 19.4(a) and submit it to the Principal's Representative for approval.
- (c) If the Principal's Representative agrees that Final Completion has been achieved, the Principal's Representative will complete Part 3 of the certificate submitted by the LT under clause 19.4(b).
- (d) If the LT or the Principal's Representative does not consider Final Completion has been achieved:
 - (i) the LT or the Principal's Representative (as applicable) will complete the relevant Part of the certificate submitted by the General Manager under clause 19.4(a) or by the LT under clause 19.4(b) (as applicable) indicating what the LT or the Principal's Representative considers to be outstanding to achieve Final Completion and submit the certificate to the General Manager; and
 - (ii) the General Manager will promptly inform the Participants that Final Completion has not been achieved and any details of the outstanding work or the failure to perform or observe the relevant obligation under this Agreement.
- (e) If the LT considers that Final Completion has been achieved but the Principal's Representative does not agree, and a NOP wishes to pursue the issue, the NOP may by written notice to the other Participants and TfNSW request that the issue be resolved in accordance with clause 28.2.
- (f) Once the General Manager is satisfied that Final Completion has been achieved, the General Manager will again initiate the approval process under this clause 19.4.

19.5 Portions

- (a) In addition to any Portions described in the Agreement Particulars, the LT or the Principal's Representative may at any time determine that any part of the Project Works will be regarded as a Portion.
- (b) References in this Agreement to Certificate of Completion, Completion, Date for Completion, Date for Operational Readiness, Date of Completion, Date of Operational Readiness, Defects Notification Period, Project Works and Ready For Operations (or Operational Readiness) will be interpreted separately for each Portion where the context requires or permits.

20. Directions by TfNSW and Target Adjustment Events

20.1 TfNSW Reserved Powers

Although the Participants intend that decisions affecting the Works will be made collectively as required by clause 4.5, each Participant acknowledges that the final decision on the

following matters ("**TfNSW Reserved Powers**") ought to be, and is, reserved for unilateral determination by TfNSW in its absolute and unfettered discretion:

- (a) functional requirements, scope and design parameters for the Works (including the addition of work, the omission of work, changes to the levels, lines, positions or dimensions of work, changes to the character or quality of any work, and any other changes to the scope of the Works);
- (b) matters which are likely to have an impact on the cost of the Works, including future operation and maintenance costs;
- (c) matters which are likely to have an impact on the benefit derived by TfNSW or any other Rail Transport Agency from the Works or the IDE Activities;
- (d) timing or sequencing of the IDE Activities (including the Date for Completion);
- (e) urgent protection of people, property, the Works or the environment;
- (f) communications and interface issues with Stakeholders;
- (g) Site access arrangements;
- (h) protection of any items of cultural heritage value;
- (i) anything necessary to enable TfNSW to comply with its responsibilities and obligations under any Approvals, Statutory Requirements or the TfNSW Safety Management System with respect to the IDE Activities or the Works;
- (j) anything TfNSW judges appropriate to allow TfNSW to comply with its statutory obligations or responsibilities or to preserve and satisfy the Environment Protection Licence or TfNSW's role as a determining Authority for the purposes of any Approval;
- (k) anything which affects or may affect the TfNSW Accreditation or any Accreditation of any other Rail Transport Agency;
- (l) anything affecting any environmental or planning permit or approval;
- (m) the removal of an LT Member or an MT Member;
- (n) the decision whether to approve or not approve a recommendation made by the LT under clause 20.4 that the Compensation Framework should be adjusted, other than a recommended adjustment to:
 - (i) the TOC; or
 - (ii) any other targets (other than the Date for Completion) that affect the Compensation Framework; and
- (o) any matter in respect of which this Agreement provides that TfNSW has absolute discretion,

and the Participants will abide by and implement any direction of TfNSW in respect of any TfNSW Reserved Power ("**TfNSW Reserved Power Direction**") as though it were a decision of the LT.

No TfNSW Reserved Power Direction will invalidate this Agreement. If a TfNSW Reserved Power Direction omits or deletes any part of the Works, TfNSW may carry out the omitted or deleted work itself or by engaging others.

Any discretion or power of unilateral determination which is reserved or accorded to TfNSW under this Agreement or by law may be exercised solely for the benefit of TfNSW, despite any other terms of this Agreement.

20.2 Impact Request

TfNSW may (but is not obliged to) issue an Impact Request to the LT before giving a TfNSW Reserved Power Direction in respect of the TfNSW Reserved Power.

If TfNSW issues an Impact Request, the LT must promptly make a recommendation as to:

- (a) whether the proposed TfNSW Reserved Power Direction referred to in the Impact Request would constitute a Target Adjustment Event; and
- (b) the adjustment which would be made to the Compensation Framework to take account of the proposed TfNSW Reserved Power Direction,

and provide written notice as to its recommendation to TfNSW.

If TfNSW subsequently gives the TfNSW Reserved Power Direction, the procedure in clause 20.4 will apply.

20.3 Target Adjustment Events

- (a) The GM must give the LT and the Principal's Representative an initial notice (in the form set out in Part 1 of the "Target Adjustment Event Notification Form" in Schedule 36) of any potential Target Adjustment Event within 60 calendar days of the first occurrence of the circumstances giving rise to the potential Target Adjustment Event, except where the potential Target Adjustment Event is the result of a TfNSW Reserved Power Direction for which TfNSW has issued an Impact Request.
- (b) The LT must consider any such details that it receives under clause 20.3(a) and, if the LT considers that a potential Target Adjustment Event notified by the GM under clause 20.3(a) may constitute a Target Adjustment Event, promptly notify the Principal's Representative (in the form set out in Part 2 of the "Target Adjustment Event Notification Form" in Schedule 36).
- (c) If the LT has notified the Principal's Representative under clause 20.3(b), the GM must:
 - (i) promptly (and in any event within 60 calendar days) after the issue of the initial notice under clause 20.3(a); and
 - (ii) every 60 calendar days thereafter until the finalisation of the matter in accordance with this clause 20.3 and clause 20.4,

submit (in the form of Part 1 of the "Target Adjustment Event Approval Form" in Schedule 36) further relevant details of the potential Target Adjustment Event to the LT and the Principal's Representative, including any submissions or recommendations it believes are appropriate and any additional information necessary to enable the LT to comply with its obligations under clause 20.3(e).

- (d) There will be no adjustments made to the Compensation Framework if:
 - (i) the initial notice of the potential Target Adjustment Event is not given within the period required under clause 20.3(a); or
 - (ii) the further details required under clause 20.3(c) are not given within the period required under clause 20.3(c).
- (e) The LT must consider any details that it receives under clause 20.3(c) and consider:
 - (i) whether there is a Target Adjustment Event; and
 - (ii) if so the adjustments, if any, to be made to the Compensation Framework,
 and the procedure in clause 20.4 will apply.
- (f) We acknowledge that, in respect of a Project (other than the Initial Project or a Project that is Ad Hoc Works):
 - (i) an event specified in paragraphs (a) to (c) of the definition of “Target Adjustment Event” in Schedule 1 may occur prior to the Reference Date and in connection with the performance of Project Definition Services or Early Execution Works;
 - (ii) if that occurs, the LT may, after the Reference Date, recommend to the Principal’s Representative that the relevant event be dealt with for the purposes of this Agreement as if it were a Target Adjustment Event;
 - (iii) the Principal’s Representative will not unreasonably withhold its consent to any such recommendation; and
 - (iv) if the Principal’s Representative consents in writing to any such recommendation by the LT, the relevant event will be dealt with for the purposes of this Agreement as if it were a Target Adjustment Event.

20.4 Adjustments to Compensation Framework

- (a) If, in accordance with clause 20.3(e), the LT believes that a Target Adjustment Event:
 - (i) has not occurred, or will not occur, the LT will within 60 calendar days of receiving the details referred to in clause 20.3(c) notify the Principal’s Representative (by appropriately completing and issuing the form set out in Part 2 of the “Target Adjustment Event Approval Form” in Schedule 36); or
 - (ii) has occurred, or will occur, (including a TfNSW Reserved Power Direction which the LT believes gives rise to a Target Adjustment Event), the LT will within 60 calendar days of receiving the details referred to in clause 20.3(c):
 - A. consider what adjustments, if any, should be made to the Compensation Framework to take into account the Target Adjustment Event; and
 - B. make a recommendation to the Principal’s Representative (by appropriately completing and issuing the form set out in Part

2 of the "Target Adjustment Event Approval Form" in Schedule 36) that a Target Adjustment Event has occurred, or will occur, and of any adjustment that should be made to the Compensation Framework to take into account the Target Adjustment Event.

- (b) The Principal's Representative must review the recommendation and either (by appropriately completing and issuing the form set out in Part 3 of the "Target Adjustment Event Approval Form" in Schedule 36):
 - (i) approve the recommendation made by the LT, in which case the Compensation Framework will be adjusted in accordance with the LT's recommendation; or
 - (ii) not approve the recommendation made by the LT, in which case the Principal's Representative must issue a notice to the LT stating that it does not approve the LT's recommendation and providing its reasons for withholding its approval.
- (c) If the LT receives a notice under clause 20.4(b)(ii) it must consider the reasons provided by the Principal's Representative and may submit a new recommendation to the Principal's Representative, in which case clause 20.4(b) will reapply.
- (d) If the Principal's Representative does not approve a second recommendation made by the LT, and a NOP wishes to pursue the issue, the NOP may by written notice to the other Participants request that the issue be resolved in accordance with clause 28.2.

20.5 LT may recommend a change to the Works

- (a) The LT may, at any time, recommend to TfNSW a change to the functional requirements, scope and design parameters for the Works (including the addition of work, the omission of work, changes to the levels, lines, positions or dimensions of work, changes to the character or quality of any work, and any other changes to the scope of the Works).
- (b) Any recommendation under clause 20.5(a) must:
 - (i) include details of adjustments, if any, which would be made to the Compensation Framework to take account of the proposed change;
 - (ii) include details of any additional costs that would be incurred by TfNSW if the change were implemented (other than as a result of an adjustment to the Compensation Framework), including additional operation, maintenance and/or decommissioning costs;
 - (iii) include details of any impacts on the Planning Approval and any additional property impacts that may result from the proposed change;
 - (iv) confirm that the Works will be fit for their intended purposes as stated in, or reasonably inferred from, the Works Brief and this Agreement, notwithstanding the proposed change; and
 - (v) clearly indicate that it is a recommendation given under this clause 20.5.

- (c) TfNSW will consider any recommendation given by the LT under this clause 20.5 but we acknowledge and agree that TfNSW may accept (with or without conditions) or reject the recommendation in its absolute and unfettered discretion.
- (d) If TfNSW accepts the recommendation TfNSW will issue a direction to proceed with the recommendation in which event:
 - (i) the LT will ensure that the notice is complied with; and
 - (ii) the Compensation Framework will be adjusted in the manner set out in the recommendation (in which case the change to the Works will constitute a Target Adjustment Event).
- (e) If TfNSW does not accept the recommendation, the recommendation will be withdrawn by the LT and we will continue to perform the IDE Activities as if the recommendation had not been made.

20.6 Adjusting the Compensation Framework

A reference to adjusting the Compensation Framework includes, if appropriate:

- (a) adjusting the Date for Completion;
- (b) adjusting the Date for Operational Readiness;
- (c) adjusting the TOC;
- (d) adjusting any other targets that affect the Compensation Framework; and
- (e) adjusting any other aspect of the Compensation Framework including the definitions and any documents referred to in the Compensation Framework.

20.7 Target Adjustment Guidelines

- (a) When the LT and the Principal's Representative are considering whether a circumstance or event justifies a change in any of the targets in the Compensation Framework and related terms, they will act consistently with the Target Adjustment Guidelines and this clause 20.7.
- (b) We will share all risks and opportunities associated with the delivery of the Works, regardless of whether or not:
 - (i) those risks/opportunities are within our control; or
 - (ii) we could (or should) reasonably have foreseen them; or
 - (iii) we made any provision for them in the TOC,
 except for those types of risks/opportunities that we have specifically agreed will be retained solely by a particular Participant either in this Agreement or the Target Adjustment Guidelines.
- (c) We acknowledge that:
 - (i) the list of scenarios in the Target Adjustment Guidelines for which risk/opportunity is shared is not exhaustive;

- (ii) without limiting paragraphs (a) and (b) of the definition of “Target Adjustment Event” in Schedule 1 or clause 20.3(f), the list of scenarios in the Target Adjustment Guidelines for which risk/opportunity is retained unilaterally by TfNSW is exhaustive; and
- (iii) without limiting paragraphs (a) and (b) of the definition of “Target Adjustment Event” in Schedule 1 or clause 20.3(f), there are no other types of situations other than those listed in the Target Adjustment Guidelines where the risk/opportunity is retained unilaterally by TfNSW.

21. Payments

21.1 Compensation for Works

- (a) Subject to clauses 11.2, 11.3, 13.3, 22.3 and 23.3, TfNSW will pay the NOPs for carrying out the IDE Activities in accordance with:
 - (i) except in respect of Project Definition Services, clause 21.2 and the Compensation Framework; and
 - (ii) in respect of Project Definition Services:
 - A. clause 21.2;
 - B. the RFP; and
 - C. subject to the RFP, the Compensation Framework.
- (b) Payment to the NOPs pursuant to clause 21.1(a) will be the sole compensation to the NOPs for the fulfilment of their obligations under this Agreement.
- (c) The Compensation Framework may only be adjusted:
 - (i) in accordance with clause 20.4 or 20.5, where there is a Target Adjustment Event;
 - (ii) in accordance with clause 1.9; or
 - (iii) if:
 - A. the LT determines that the Compensation Framework is unsuitable to achieve the Objectives or part of it is not consistent with the principles of the Compensation Framework;
 - B. the LT makes a recommendation to the Principal's Representative that the Compensation Framework should be adjusted, providing details of the proposed adjustment; and
 - C. the Principal's Representative, in its absolute discretion, approves the recommendation made by the LT.

21.2 Invoices and payments

- (a) At each of the following times:

- (i) on the 5th Business Day of each calendar month, the General Manager will, with input from the Participants, prepare and submit to TfNSW a separate Payment Claim for each of the following:
 - A. each Proposed Additional Project, including any Project Definition Services and Early Execution Works;
 - B. each Project; and
 - C. each package of Program Management Activities,
 in relation to the IDE Activities performed by the Participants:
 - D. in respect of the first such Payment Claim, since the IDE Activities were commenced; or
 - E. in respect of any subsequent Payment Claim, which have not been the subject of any previous Payment Claim; and
 - (ii) within 60 days of the Date of Final Completion for each Project, the General Manager will, with input from the Participants, prepare and submit to TfNSW a single Payment Claim, in relation to the IDE Activities performed by the Participants which have not been the subject of any previous Payment Claim.
- (b) A Payment Claim submitted by the General Manager pursuant to 21.2(a) will:
- (i) if a claim in respect of a Project (other than a Project that is Ad Hoc Works) or a Proposed Additional Project, clearly separate amounts claimed in respect of Project Execution Works, Project Definition Services and Early Execution Works;
 - (ii) include, at a minimum, the information set out in Schedule 17; and
 - (iii) be accompanied by:
 - A. if a design package has been completed:
 - 1) the IDE Certificate of Design Compliance;
 - 2) in respect of the Detailed Designer, the Detailed Designer's Certificate of Design Compliance;
 - 3) in respect of the Signalling Detailed Designer, the Signalling Designer's Certificate of Design Compliance; and
 - 4) in respect of any other Designers, the Designers' Certificate of Design Compliance; and
 - B. the IDE Certificate of Construction Compliance.
- (c) The amounts to be included in a Payment Claim submitted under this Agreement will be calculated in accordance with the Compensation Framework and this Agreement.

- (d) A Payment Claim must not include any amounts for Reimbursable Costs incurred more than 6 months prior to the date of the Payment Claim unless, in relation to a particular Reimbursable Cost:
- (i) the LT agrees otherwise and makes a recommendation to the Principal's Representative to allow payment of the Reimbursable Costs; and
 - (ii) the Principal's Representative (in its absolute discretion) approves the recommendation.
- (e) TfNSW must issue a Payment Schedule within 10 Business Days after receipt of a Payment Claim. The Payment Schedule must identify the Payment Claim to which it relates and must be based on the Compensation Framework. If the Payment Schedule shows an amount less than the claimed amount (excluding payments already made), the Payment Schedule must state why the amount is less.
- (f) TfNSW may issue a Payment Schedule at any time even if the General Manager has not lodged a Payment Claim.
- (g) The following conditions must be satisfied before TfNSW is obliged to make any payment to the NOPs under this clause 21.2:
- (i) if required under clause 21.9, a Payment Claim must be accompanied by a single Tax Invoice in respect of the Payment Claim;
 - (ii) all relevant sections of the Payment Claim must be properly completed;
 - (iii) a Payment Claim must be accompanied by a statement by the General Manager that the amounts shown in the Payment Claim are in accordance with the terms of this Agreement;
 - (iv) each Final Project Payment Claim must be accompanied by a statement by the FA in a form approved by TfNSW confirming that the amounts shown in the Payment Claim are in accordance with the terms of this Agreement;
 - (v) a Payment Claim must be accompanied by an LT resolution endorsing the claimed amount; and
 - (vi) compliance with clauses 15.2(f) and 21.5.
- (h) We agree that any separate payment made by TfNSW to a NOP in response to a payment claim or adjudication application under the *Building and Construction Industry Security of Payment Act 1999* (NSW) must be taken into account in the next Payment Claim issued under this clause 21.2.
- (i) Subject to clause 21.2(g), TfNSW will pay the NOPs (or the NOPs will pay TfNSW as the case may be) the amounts stated in a Payment Schedule in accordance with clause 21.2(j).
- (j) Payment by TfNSW to the NOPs or by the NOPs to TfNSW (as the case may be) under clause 21.2(i) will be made no later than 15 Business Days after receipt by TfNSW of the relevant Payment Claim.
- (k) No payment by TfNSW will be evidence of the value of work, an admission of liability or that the work has been executed satisfactorily, but will be deemed to be a

provisional payment on account and subject to a final verification audit by an FA and TfNSW.

- (l) Nothing in this clause 21.2 limits or otherwise affects TfNSW's rights under section 175B(7) of the *Workers Compensation Act 1987* (NSW), Schedule 2 Part 5 section 18 of the *Payroll Tax Act 2007* (NSW) or section 127 of the *Industrial Relations Act 1996* (NSW).
- (m) In relation to TfNSW IDA Costs incurred by TfNSW, TfNSW will submit to the General Manager, at the times or periods required by the LT and as otherwise determined by TfNSW a statement:
 - (i) of its TfNSW IDA Costs for the relevant month; and
 - (ii) by the FA confirming that the amounts shown in the statement are in accordance with the terms of this Agreement.

TfNSW must submit all TfNSW IDA Costs to the General Manager within 6 months of incurring the relevant TfNSW IDA Costs.

- (n) The LT may recommend that an interim payment on account of anticipated or actual Painshare or Gainshare be made under the Gainshare/Painshare Regime, and either TfNSW or the NOPs (as the case may require) may pay or allow the amount so recommended.
- (o) If in TfNSW's view it becomes likely that the NOPs will be required to pay TfNSW an amount under the Gainshare/ Painshare Regime, TfNSW may retain such amounts from the monthly payments under clause 21.2(i) so that TfNSW has retained a total amount under this clause 21.2(o) that is equal to the total likely liability of the NOPs under the Gainshare/ Painshare Regime.
- (p) In respect of each Project, the payments made in respect of the Final Project Payment Schedule will be deemed to be in full and final settlement of all entitlements to compensation arising pursuant to this Agreement in respect of that Project except to the extent that:
 - (i) payments are required pursuant to clause 26.8 or 26.13; or
 - (ii) matters have been deliberately or fraudulently concealed by a Participant.
- (q) At any time after a Payment Claim has been paid the FA may undertake an audit of that Payment Claim to confirm that the amounts shown in the Payment Claim are in accordance with the terms of this Agreement. If the FA demonstrates to the LT that any amount shown in the Payment Claim is not in accordance with the terms of this Agreement, then any adjustment necessary must be made in the Payment Claim following that demonstration.
- (r) The NOPs:
 - (i) must appoint one NOP as the agent for all NOPs for the purposes of claiming and receiving payment from TfNSW in respect of this Agreement;
 - (ii) must notify TfNSW in writing of the identity of the NOP referred to in clause 21.2(r)(i) and of any changes in the identity of that NOP; and

- (iii) acknowledge and agree that any payment made by TfNSW in respect of this Agreement to the NOP referred to in clause 21.2(r)(i) or any other NOP notified under clause 21.2(r)(ii) will be deemed to be in satisfaction of TfNSW's obligation to pay all NOPS.

21.3 Payment for materials at Site but not incorporated

- (a) If the NOPS wish to be paid for materials at the Site but not incorporated into the Works then, if requested by TfNSW, the Payment Claim under clause 21.2(a) must include evidence and documentation to establish to the satisfaction of TfNSW that:
 - (i) the materials exist;
 - (ii) unencumbered ownership will pass to TfNSW on or before payment by TfNSW; and
 - (iii) the materials are properly stored at the Site, labelled as the property of TfNSW and insured in the name of TfNSW and the relevant NOP supplying it.
- (b) The amount to be paid will be the value of the materials as determined by TfNSW in accordance with the principles set out in the Compensation Framework.

21.4 Payment for materials not at Site

If a NOP wishes to be paid for materials that are not stored on the Site, then prior approval must be obtained from the LT.

21.5 Participants to lodge statutory declarations

- (a) Each Payment Claim must be accompanied by a statutory declaration from each of the NOPS:
 - (i) in the form set out in Schedule 9;
 - (ii) including the details required by Schedule 9;
 - (iii) made by a person who is in a position to know the facts attested to; and
 - (iv) be properly sworn or affirmed according to the *Oaths Act 1900* (NSW) or the equivalent legislation applicable in the place where the declaration is made.
- (b) Statutory declarations must also be provided at other times as requested by the General Manager.

21.6 TfNSW may make direct payments on request

Without limiting any right or obligation of TfNSW at law, at a NOP's written request and out of money due and payable to that NOP, TfNSW may pay money on that NOP's behalf to workers or Subcontractors of that NOP.

21.7 TfNSW may pay on court order

TfNSW may pay money direct to a worker of a NOP or Subcontractor and recover the amount paid from the NOPS as a debt due if TfNSW is presented with:

- (a) a court order in respect of money payable to the worker or Subcontractor under an award, Enterprise Agreement or Subcontract for work, services, materials, plant, equipment or advice supplied for the Works; and
- (b) a statutory declaration that no money has been paid under the court order.

21.8 Set-off, withholding and reduction

- (a) Without prejudice to any other rights, TfNSW may:
 - (i) deduct from any monies which may be, or become, payable to a NOP any money due from that NOP to TfNSW under this Agreement;
 - (ii) in respect of each Project, withhold from any monies which may be, or become, payable to a NOP an amount equal in value to all or any part of such monies if:
 - A. we have failed to provide the Principal's Representative any Management Plan or revised Management Plan required to be provided in accordance with this Agreement;
 - B. a Value for Money Report has not been developed and provided to the Principal's Representative in accordance with this Agreement;
 - C. we have failed to comply with a material requirement of the TSRs;
 - D. without limiting clause 21.8(a)(ii)C, an Estimating Agreement (as referred to in TfNSW Standard Requirements: TSR CC – Collaborative Contracts) has not been finalised and signed;
 - E. without limiting clause 21.8(a)(ii)C, appropriate benchmarking data has not been provided to TfNSW in accordance with the requirements of this Agreement;
 - F. without limiting clause 21.8(a)(ii)C, reports do not comply with the requirements of the TSRs;
 - G. any corrective action required as a result of, or arising out of, an audit is not addressed within the timeframe agreed in writing by us (or, failing agreement, within a reasonable timeframe); or
 - H. we fail to provide to TfNSW or the Principal's Representative any other information, document, plan or report as required by this Agreement,
- and:
- I. TfNSW has notified the NOP of its intention to exercise its right under this clause 21.8(a)(ii); and
 - J. the NOP has failed, within 5 Business Days of the date of the notice under clause 21.8(a)(ii)I, to show reasonable cause why TfNSW should not exercise its right under this clause 21.8(a)(ii),

provided, however, that TfNSW will not be entitled to withhold an aggregate amount under this clause 21.8(a)(ii) in respect of a Project that exceeds 15% of the total Fee that has previously been paid in respect of that Project;

- (iii) in respect of any monies which may be, or become, payable to a NOP, withhold payment to the extent TfNSW is required or permitted to do so by law; or
- (iv) deduct from any monies which may be, or become, payable to a NOP, any amount that has been paid to that NOP in respect of Project Definition Services as contemplated by clause 11.2(b)(ii) to the extent that TfNSW is satisfied, acting reasonably, that:
 - A. the relevant PDS Documentation was not submitted in accordance with this Agreement and the RFP; or
 - B. we have otherwise not complied with the requirements of this Agreement and the RFP in relation to the relevant Project Definition Services,

and:

- C. TfNSW has notified the NOP of its intention to exercise its right under this clause 21.8(a)(iv); and
 - D. the NOP has failed, within 5 Business Days of the date of the notice under clause 21.8(a)(iv)C, to show reasonable cause why TfNSW should not exercise its right under this clause 21.8(a)(iv).
- (b) Any moneys withheld in accordance with clause 21.8(a)(ii) will be released when the circumstances referred to in clause 21.8(a)(ii) no longer apply or we have remedied the relevant circumstances to the reasonable satisfaction of the Principal's Representative.
 - (c) Nothing in this clause 21.8 will affect the right of TfNSW to recover from the NOP the whole of any debt or any balance that remains owing by that NOP after any deduction.

21.9 GST

- (a) In this clause 21.9:
 - (i) "GST" and other terms used in this clause 21.9 (other than Recipient) have the meanings ascribed to those terms by the GST Legislation;
 - (ii) any reference to GST payable by an entity includes any GST payable by the representative member of any GST group of which that entity is a member;
 - (iii) any reference to input tax credits to which an entity is entitled will include input tax credits to which the representative member of any GST group of which that entity is a member is entitled; and
 - (iv) if the GST Legislation treats part of a supply as a separate supply for the purpose of determining whether GST is payable on that part of the

supply or for the purpose of determining the tax period to which that part of the supply will be attributable, such part of the supply will be treated as a separate supply for the purposes of this clause.

- (b) If a party is required under this Agreement to reimburse or pay to another party an amount calculated by reference to a cost, expense, or an amount paid or incurred by that party, the amount of the reimbursement or payment will be reduced by the amount of any input tax credits to which that party (or an entity on whose behalf the party is acting) is entitled in respect of any acquisition relating to that cost, expense or other amount.
- (c) If a payment to be made under this Agreement is calculated as a percentage of another amount, that payment will be calculated as a percentage of that amount excluding any GST component.
- (d) If GST is payable by an entity ("**Supplier**") in relation to any supply that it makes under or in connection with this Agreement, the parties agree that:
 - (i) any consideration (including the value of any non-monetary consideration) provided for that supply under or in connection with this Agreement other than under this clause 21.9(d) ("**Agreed Amount**") is exclusive of GST;
 - (ii) an additional amount will be payable by the party providing consideration for that supply ("**Recipient**") equal to the amount of GST payable by the Supplier on that supply; and
 - (iii) the additional amount is payable at the same time as any part of the Agreed Amount is to be first provided for that supply and the Supplier will provide a tax invoice to the Recipient in respect of that supply, no later than that time.
- (e) To the extent, if any, that any consideration (or part thereof) is specified in this Agreement to be inclusive of GST, that consideration (or the relevant part) shall be excluded from the Agreed Amount for the purposes of calculating the additional amount under clause 21.9(d)(ii).
- (f) If the Supplier determines on reasonable grounds, is advised by the Commissioner of Taxation or otherwise becomes aware that the GST payable on a supply made under or in connection with this Agreement is different to the additional amount paid by the Recipient to the Supplier in accordance with clause 21.9(d)(ii) (if any) in respect of that supply such that:
 - (i) the Supplier is required to pay an amount (or further amount) of GST in respect of that supply; or
 - (ii) the Supplier receives or becomes entitled to receive a refund or credit of the whole or any part of the GST paid by the Supplier in relation to that supply,the Supplier must either:
 - (iii) provide a corresponding refund or credit to the Recipient; or
 - (iv) will be entitled to receive the amount of that variation from the Recipient,

as the case may be.

- (g) For the purposes of calculating whether the GST payable on a supply made under or in connection with this Agreement is different to the additional amount paid by the Recipient to the Supplier for the purposes of clause 21.9(f) any additional amount referred to in clause 21.9(d)(ii) is taken to be amended by the amount of any earlier variation made under this clause.
- (h) Where an adjustment event occurs in relation to a supply made by the Supplier under or in connection with this Agreement, and the adjustment event gives rise to an adjustment under the GST Legislation, the Supplier will issue an adjustment note to the Recipient in respect of that supply within 14 days after becoming aware of the relevant adjustment.
- (i) This clause shall not merge on termination of this Agreement.
- (j) The NOPs must do all things necessary under the GST Legislation to enable TfNSW to deal with the NOPs as though they were a single entity for GST purposes, including registration of a partnership comprised of the NOPs for GST purposes. The NOPs must ensure that any tax invoice issued by or on behalf of the NOPs complies with the requirements of the GST Legislation and the NOPs must indemnify TfNSW for any loss, cost or expense incurred by TfNSW as a result of any failure of the NOPs to do so or any failure by the NOPs to comply with the requirements of the GST Legislation.

21.10 Long Service Levy

We will pay the Long Service Levy to the Building and Construction Industry Long Service Payments Corporation.

22. Program Management Activities

22.1 Program Management Activities and Program Management Budgets

- (a) TfNSW may (in its absolute discretion), from time to time, notify us in writing of:
 - (i) work, services, activities or tasks that TfNSW proposes that we carry out under, and in accordance with, this Agreement, despite those work, services, activities or tasks not forming part of any one Project, including where such work, services, activities or tasks relate to multiple Projects; and
 - (ii) a proposed budget for costs relating to the performance of the proposed Program Management Activities referred to in clause 22.1(a)(i), which budget may apply to a period of time or particular parts of the proposed Program Management Activities.
- (b) Within 5 Business Days of receipt of a notice under clause 22.1(a), we will notify TfNSW in writing whether we agree with the proposed Program Management Activities and the proposed Program Management Budget.
- (c) If Program Management Activities and an associated Program Management Budget have been agreed in writing in accordance with clause 22.1(b), we must carry out the Program Management Activities in accordance with this Agreement. For the avoidance of doubt, we must not carry out any work, services, activities or tasks

notified by TfNSW to us under clause 22.1(a)(i) in respect of which a Program Management Budget has not been agreed in writing.

- (d) If Program Management Activities and an associated Program Management Budget have not been agreed in writing in accordance with clause 22.1(b), TfNSW may (in its absolute discretion):
- (i) either by itself or by third parties, undertake the Program Management Activities;
 - (ii) elect not to proceed with the Program Management Activities; or
 - (iii) issue a revised notice under clause 22.1(a).

22.2 Payment for Program Management Activities

- (a) We agree that the exercise by TfNSW of any of its rights under this clause 22, or the performance of any work, services, activities or tasks required by this clause 22, including:
- (i) the carrying out of any Program Management Activities; and
 - (ii) participation in any discussions with a view to agreeing any Program Management Activities, any Program Management Budget or any adjustment to any Program Management Budget,
- will not:
- (iii) constitute a Target Adjustment Event;
 - (iv) give rise to any increase in any Fee; or
 - (v) give rise to any increase in any TOC,
- but nothing in this clause 22.2(a) will limit or otherwise affect the rights and entitlements of a Participant, or the operation of any other provision of this Agreement, in respect of events or circumstances the occurrence of which this Agreement otherwise expressly provides will:
- (vi) constitute a Target Adjustment Event;
 - (vii) give rise to any increase in a Fee; or
 - (viii) give rise to any increase in a TOC.

22.3 Program Management Budgets

- (a) In respect of each package or period of Program Management Activities the subject of a Program Management Budget, TfNSW will not be under any obligation to pay a NOP any amount which will result in the Total PMA Costs exceeding the Program Management Budget.
- (b) A Program Management Budget may be revised as follows:
- (i) the Principal's Representative may (in its absolute discretion) in writing authorise increases in a Program Management Budget; or

- (ii) a Program Management Budget may be reduced by written agreement from all Participants.
- (c) Each Program Management Budget is:
 - (i) inclusive of all amounts referred to in the definition of “Total PMA Costs” in Schedule 1 in relation to the relevant package or period of Program Management Activities; and
 - (ii) exclusive of GST.
- (d) We will not be under any obligation to continue to carry out Program Management Activities to the extent the Total PMA Costs exceed (or will exceed, if Program Management Activities are continued) the Program Management Budget.

23. Ad Hoc Works

23.1 Ad Hoc Works and AHW Expenditure Limits

- (a) TfNSW may (in its absolute discretion), from time to time, notify us in writing of:
 - (i) work, services, activities or tasks that TfNSW proposes that we carry out under, and in accordance with, this Agreement, despite those work, services, activities or tasks not forming part of any current Project, but which will themselves constitute an Additional Project for the purposes of this Agreement, which notice must specify:
 - A. any proposed Project-Specific Schedules and Project-Specific Exhibits applicable to the proposed Ad Hoc Works; and
 - B. any parts of this Agreement that TfNSW proposes not apply to the proposed Ad Hoc Works; and
 - (ii) a proposed budget for costs relating to the performance of the proposed Ad Hoc Works.
- (b) Within 5 Business Days of receipt of a notice under clause 23.1(a), we will notify TfNSW in writing whether we agree with the proposed Ad Hoc Works and proposed AHW Expenditure Limit.
- (c) If Ad Hoc Works, an associated AHW Expenditure Limit and the items referred to in clause 23.1(a)(i)A and 23.1(a)(i)B have been agreed in writing in accordance with clause 23.1(b), we agree that, on and from the date of such agreement:
 - (i) subject to clause 23.1(c)(iii), we must carry out the Ad Hoc Works in accordance with this Agreement;
 - (ii) the package of Ad Hoc Works will be an Additional Project for the purposes of this Agreement;
 - (iii) all parts of this Agreement will apply to the Ad Hoc Works, except those parts of this Agreement referred to in clause 23.1(a)(i)B; and
 - (iv) each Project-Specific Schedule and Project-Specific Exhibit specified in the written notice referred to in clause 23.1(a) will be deemed to form part of this Agreement.

- (d) For the avoidance of doubt, we must not carry out any work, services, activities or tasks notified by TfNSW to us under clause 23.1(a)(i) in respect of which:
 - (i) the items referred to in clause 23.1(a)(i)A or 23.1(a)(i)B have not been agreed in writing; or
 - (ii) an AHW Expenditure Limit has not been agreed in writing.
- (e) If Ad Hoc Works, an associated AHW Expenditure Limit and the items referred to in clause 23.1(a)(i)A and 23.1(a)(i)B have not been agreed in writing in accordance with clause 23.1(b), TfNSW may (in its absolute discretion):
 - (i) either by itself or by third parties, undertake the Ad Hoc Works;
 - (ii) elect not to proceed with the Ad Hoc Works; or
 - (iii) issue a revised notice under clause 23.1(a).

23.2 Payment for Ad Hoc Works

- (a) We agree that the exercise by TfNSW of any of its rights under this clause 23, or the performance of any work, services, activities or tasks required by this clause 23, including:
 - (i) the carrying out of any Ad Hoc Works; and
 - (ii) participation in any discussions with a view to agreeing any Ad Hoc Works, any AHW Expenditure Limit, any other matter referred to in clause 23.1(a) or any adjustment to any AHW Expenditure Limit,
 will not:
 - (iii) constitute a Target Adjustment Event;
 - (iv) give rise to any increase in any Fee; or
 - (v) give rise to any increase in any TOC,
 but nothing in this clause 23.2(a) will limit or otherwise affect the rights and entitlements of a Participant, or the operation of any other provision of this Agreement, in respect of events or circumstances the occurrence of which this Agreement otherwise expressly provides will:
 - (vi) constitute a Target Adjustment Event;
 - (vii) give rise to any increase in a Fee; or
 - (viii) give rise to any increase in a TOC.

23.3 AHW Expenditure Limits

- (a) In respect of each package of Ad Hoc Works the subject of an AHW Expenditure Limit, TfNSW will not be under any obligation to pay a NOP any amount which will result in the Total AHW Costs exceeding the AHW Expenditure Limit.
- (b) An AHW Expenditure Limit may be revised as follows:

- (i) the Principal's Representative may (in its absolute discretion) in writing authorise increases in an AHW Expenditure Limit; or
 - (ii) an AHW Expenditure Limit may be reduced by written agreement from all Participants.
- (c) Each AHW Expenditure Limit is:
- (i) inclusive of all amounts referred to in the definition of "Total AHW Costs" in Schedule 1 in relation to the relevant package of Ad Hoc Works; and
 - (ii) exclusive of GST.
- (d) We will not be under any obligation to continue to carry out Ad Hoc Works to the extent the Total AHW Costs exceed (or will exceed, if the Ad Hoc Works are continued) the AHW Expenditure Limit.

24. Reporting against Expenditure Limits and Budgets

We will ensure that every fortnight during:

- (a) in respect of the Project Definition Services, the Project Proposal Phase; or
- (b) in respect of the Early Execution Works, the Program Management Activities or the Ad Hoc Works, the carrying out of such IDE Activities,

in addition to our monthly report, TfNSW is provided with a report (separately for each PDS Expenditure Limit, EEW Expenditure Limit, Program Management Budget and AHW Expenditure Limit) in respect of each fortnightly period (the "**Reporting Period**") that contains:

- (c) the Total PDS Costs, Total EEW Costs, Total PMA Costs or Total AHW Costs (as applicable) for the relevant IDE Activities incurred during the Reporting Period;
- (d) Total PDS Costs, Total EEW Costs, Total PMA Costs or Total AHW Costs (as applicable) for the relevant IDE Activities incurred on and from the commencement of the Project Proposal Phase or the carrying out of the relevant IDE Activities (as applicable) to the end of the Reporting Period;
- (e) an updated cashflow forecast for the relevant IDE Activities;
- (f) forecast Total PDS Costs, Total EEW Costs, Total PMA Costs or Total AHW Costs (as applicable) to complete the relevant IDE Activities;
- (g) variance between forecast Total PDS Costs, Total EEW Costs, Total PMA Costs or Total AHW Costs (as applicable) to complete the relevant IDE Activities and actual Total PDS Costs, Total EEW Costs, Total PMA Costs or Total AHW Costs (as applicable) for the relevant IDE Activities to date and for the previous Reporting Period; and
- (h) graphical and tabular representation of actual Total PDS Costs, Total EEW Costs, Total PMA Costs or Total AHW Costs (as applicable) incurred in carrying out the relevant IDE Activities as against forecast Total PDS Costs, Total EEW Costs, Total PMA Costs or Total AHW Costs (as applicable);
- (i) for carrying out the relevant IDE Activities for the Reporting Period; and

- (ii) to complete the relevant IDE Activities,

taking proper account of amounts likely to be payable under clause 21 in respect of relevant IDE Activities to be performed, or likely to be performed,

in each case separately identifying each component of Total PDS Costs, Total EEW Costs, Total PMA Costs or Total AHW Costs (as applicable).

25. Remedies and liabilities

- (a) Subject to clauses 25(d) and 25(e), to the extent permitted by law, the respective rights, obligations and liabilities of each of us as set out in this Agreement (including the deed poll in Schedule 34) exclusively govern our rights in relation to this Agreement and the Works and we do not have any other rights or remedies arising out of or in connection with this Agreement and the Works, at law (including negligence) or equity, other than as set out in this Agreement.
- (b) This Agreement creates legally enforceable rights:
 - (i) despite the fact that certain matters are to be settled, resolved, determined or agreed by the LT; and
 - (ii) irrespective of how or whether any matters to be settled, resolved, determined or agreed by the LT are settled, resolved, determined or agreed.
- (c) Interpretation of this Agreement which is consistent with the principles in clauses 25(a) and 25(b) is to be adopted.
- (d) To the extent permitted by law and despite any other provisions of this Agreement (except clause 25(e)):
 - (i) each Participant releases and discharges the other Participants from all Claims, costs, expenses and losses which they may have against the other Participants or otherwise suffered or incurred; and
 - (ii) each Participant agrees that no Participant will be liable to any other Participant,

(whether the right of action or the liability is under this Agreement, the deed poll in Schedule 34, at law, in equity, under statute or otherwise) with respect to any breach of this Agreement (or the deed poll in Schedule 34) or any negligent act, error or omission in connection with the Works or this Agreement (including the deed poll in Schedule 34), except to the extent that the breach, act, error or omission constitutes a Wilful Default.
- (e) Nothing in this Agreement, including clauses 25(a), 25(d), 27.1 or 28 limits, excludes or constitutes a waiver of any right or remedy of a Participant with respect to or arising out of or in connection with any Wilful Default by any other Participant.
- (f) Each Participant is liable for and indemnifies the other Participants for all costs, expenses, damages, losses or other amounts arising out of or in connection with that Participant's Wilful Default.

26. Insurances and indemnities

26.1 Insurance for the Works

Except to the extent otherwise provided in the Agreement Particulars:

- (a) the Participants acknowledge that TfNSW has, prior to the Reference Date, effected contract works insurance on the same or substantially similar terms as those set out in Exhibit D, or on such other terms as have been agreed in writing by the parties, (the "**Works Policy**") for the Works and the IDE Activities. TfNSW may, in its discretion, have other insureds named or included in the policies;
- (b) the Participants acknowledge that the effecting and the maintenance of the Works Policy by TfNSW does not affect the Participant's obligations or liabilities under this Agreement; and
- (c) TfNSW will:
 - (i) maintain the Works Policy until the Date of Completion; and
 - (ii) notify the Participants if the Works Policy ceases to be in effect.

26.2 Liability Insurance

Except to the extent otherwise provided in the Agreement Particulars:

- (a) the Participants acknowledge that TfNSW has, prior to the Reference Date, effected public liability insurance on the same or substantially similar terms as those set out in Exhibit D, or on such other terms as have been agreed in writing by the parties, (the "**Liability Policy**") for the Works and the IDE Activities. TfNSW may, in its absolute discretion, have other insureds named or included in the policy;
- (b) the Participants acknowledge that the effecting and maintenance of the Liability Policy by TfNSW does not affect the Participants' obligations or liabilities under this Agreement; and
- (c) TfNSW will:
 - (i) maintain the Liability Policy until the expiry of the last Defects Notification Period applicable to the Project; and
 - (ii) notify the Participants if the Liability Policy ceases to be in effect.

26.3 Professional indemnity insurance

Except to the extent otherwise provided in the Agreement Particulars:

- (a) the Participants acknowledge that TfNSW will effect professional indemnity insurance within 15 Business Days of the Reference Date on the same or substantially similar terms as those set out in Exhibit D, or on such other terms as have been agreed in writing by the parties, (the "**PI Policy**");
- (b) TfNSW may, in its absolute discretion, have other insureds named or included in the policy;

- (c) the Participants acknowledge that the effecting and the maintenance of the PI Policy by TfNSW does not affect the Participants' obligations or liabilities under this Agreement; and
- (d) TfNSW will use all reasonable endeavours to maintain the PI Policy for a period of 6 years after the Date of Final Completion.

26.4 Insurance of employees

- (a) Each Participant shall maintain insurances until the Last Date of Final Completion and while ever the rectification of Defects is carried out under clause 18.3, against liability for death of or injury to its employees including liability by statute and at common law.
- (b) The NOPS' employee insurance policies will be for the maximum amount required by law, and where permitted by law, will extend to indemnify TfNSW for TfNSW's statutory liability to persons employed by any NOP.
- (c) The Participants will ensure that every Subcontractor is similarly insured.
- (d) The NOPS will provide the Principal's Representative with evidence of compliance with this clause 26.4 prior to the commencement of the IDE Activities and when otherwise requested by the Principal's Representative from time to time.

26.5 Subcontractors' insurance

- (a) The Participants will use all reasonable endeavours to ensure that all Subcontractors (excluding Designers, who are subject to the requirements in clause 26.6):
 - (i) have, and maintain for a period of 7 years after completion of all of their work forming part of, or otherwise relating to, the IDE Activities, a minimum of \$5 million professional indemnity insurance, with an excess /deductible of no more than the amount which the LT determines is acceptable, where the Subcontractor is providing services in a professional capacity;
 - (ii) have appropriate insurance for plant and equipment and for any work or other items intended for incorporation into the Works while ever that work or those items are not covered by the Works Policy;
 - (iii) have and maintain insurance against liability for death of or injury to its employees including liability by statute and at common law; and
 - (iv) indemnify the Participants in so far as possible at law against all claims against the Participants that are related to bodily injury or death caused by the Subcontractor.
- (b) A Participant that engages a Subcontractor must ensure that the terms of the Subcontract provide that:
 - (i) TfNSW has effected public liability insurance under this Agreement which covers the rights and interests of the Subcontractor and its liabilities to third parties in accordance with the insurance policy;
 - (ii) a copy of this insurance policy will be made available to the Subcontractor;

- (iii) the public liability insurance is subject to the exclusions, conditions and excesses noted on the policy; and
 - (iv) each Subcontractor must:
 - A. satisfy itself of the nature and extent of TfNSW's insurance; and
 - B. if required by the Subcontractor, take out insurance to:
 - 1) insure any risks not insured by TfNSW's insurance; or
 - 2) cover any such exclusions, conditions or excesses in that insurance,
- which the Subcontractor wants to insure against or cover.

26.6 Designers' Insurance

The Participants will use all reasonable endeavours to ensure that all Designers:

- (a) except where the relevant Designer is a Participant, have, and maintain for a period of 7 years after completion of all of their work forming part of, or otherwise relating to, the IDE Activities, professional indemnity insurance for an amount not less than that stated in the Agreement Particulars, with an excess/deductible of no more than the amount which the LT determines is acceptable;
- (b) except where the relevant Designer is a Participant, have a minimum of \$10 million public liability insurance cover in the joint names of the Designer and each Participant, covering the Participants and Designers for their respective rights and interests, and their liabilities to third parties and to each other, with an excess/deductible of no more than the amount which the LT determines is acceptable;
- (c) have and maintain insurance against liability for death of or injury to its employees including liability by statute and at common law; and
- (d) except where the relevant Designer is a Participant, indemnify the Participants in so far as possible at law against all claims against the Participants that are related to bodily injury or death caused by the Designer.

26.7 Notices of potential claims

- (a) The relevant NOP will, as soon as practicable, inform TfNSW and the LT in writing of any occurrence which may give rise to a claim or potential claim under the Works Policy, Liability Policy or the PI Policy regardless of whether the likely value of such claim is less than the applicable deductible. The relevant NOP will keep TfNSW and the LT informed of subsequent developments concerning the claim.
- (b) The Participants must, despite any other provision of this Agreement, comply in all respects with procedures for notifying a claim under the Works Policy, Liability Policy or the PI Policy as set out in Schedule 28 ("**Project Insurance Claims Protocol**").

- (c) The Participants must comply with the terms of the policies of insurance effected for each Project, including any notification requirements under that insurance.
- (d) Each NOP will also ensure that it informs TfNSW and the LT pursuant to clause 26.7(a) in respect of any occurrence which may give rise to a claim or potential claim under the Works Policy, Liability Policy or the PI Policy concerning Subcontractors under that NOP's control or direction.

26.8 Accounting for insurance proceeds

To the extent that a Participant receives payment under an insurance policy which reimburses that Participant for any cost, loss, expense or damage that has been or is to be treated as a Reimbursable Cost then the relevant Participant must account to the other Participants for that payment in full. In respect of each Project, if that happens after the date on which the Final Project Payment Schedule is signed under clause 21.2(e), then within 21 days of the Participant receiving the insurance payment:

- (a) the relevant Participant must notify the other Participants in writing of the payment received;
- (b) the General Manager must recalculate the Final Project Payment Schedule to take into account the proceeds received under the insurance policy;
- (c) the LT must arrange for the FA to verify that the amounts shown in the recalculation of the Final Project Payment Schedule are correct and in accordance with this Agreement; and
- (d) subject to the terms of this Agreement, the NOPs will as necessary make payment(s) to TfNSW, or TfNSW will pay the NOPs as the case may be, such that the total amounts paid to the NOPs under this Agreement are in accordance with the recalculated and verified Final Project Payment Schedule. Any such payments must be made within 10 Business Days after the verification by the FA of the Final Project Payment Schedule.

This clause 26.8 survives termination of this Agreement.

26.9 Other insurances by NOPs

- (a) The NOPs will obtain and maintain any insurance specified in the Agreement Particulars as required to be obtained and maintained by the NOPs.
- (b) The NOPs will obtain and maintain insurance (or ensure that insurance is obtained and maintained) for all Construction Plant belonging to, leased, hired or used by or otherwise in the care, custody or control of any NOP or its Associates at places where the Works are being carried out, such insurance to be for not less than the market value of the Construction Plant and against all usually insured risks. If the Construction Plant has become the property of TfNSW pursuant to this Agreement, TfNSW must be an insured under the insurance.
- (c) If the IDE Activities include any work involving asbestos or asbestos decontamination, including stripping, encapsulation or removal, the NOPs will obtain and maintain asbestos liability insurance (either through a NOP or a specialist asbestos removal Subcontractor):
 - (i) in the joint names of each Participant and covering the Participants and all Subcontractors for their respective rights and interests, and their liabilities to third parties and each other;

- (ii) for \$10 million for any one occurrence and \$20 million in the aggregate;
 - (iii) with an excess or deductible of no more than the amount which the LT determines is acceptable;
 - (iv) from at least 60 days before any work involving asbestos or asbestos decontamination commences; and
 - (v) for so long as there is a risk that an event covered by the insurance may occur in relation to the Works or the IDE Activities.
- (d) Unless otherwise determined by the LT, the NOPs will obtain and maintain comprehensive motor vehicle insurance covering all mechanically propelled vehicles, whether registered or required under the law to be registered, used by the NOPs at any time in connection with the Works, extended specifically to cover transportation of items and substances (including for third party liability, property damage and personal injury or death in accordance with relevant laws), such insurance to cover all amounts which the NOP or its officers, employees or agents might become legally liable to pay.
- (e) The NOPs will obtain and maintain marine transit insurance for any part of the Works that are in transit (including storage and transhipment) from any place outside Australia:
- (i) on an "all risks" basis, including war, riots, strikes and civil commotion coverage, covering those things until they are delivered to the Site, unpacked and inspected and confirmed as in sound condition;
 - (ii) in the joint names of each Participant and covering the Participants and all Subcontractors for their respective rights and interests, and their liabilities to third parties and each other;
 - (iii) that includes a delayed unpacking clause and a 50:50 clause; and
 - (iv) for as long as there is a risk that an event covered by the insurance may occur in relation to the Works or IDE Activities.
- (f) Unless otherwise determined by the LT, the NOPs will obtain and maintain appropriate insurance (for replacement value) in respect of all materials being or to be fabricated overseas for the Works in the joint names of each Participant for the period required by any law.
- (g) The NOPs will obtain and maintain any insurance required by virtue of any change in Statutory Requirements.
- (h) For each insurance policy referred to in this clause:
- (i) the NOPs must ensure that:
 - A. TfNSW receives at least 30 days' notice of any material change of the policy;
 - B. a notice of claim given by a Participant or a Subcontractor will be accepted by the insurer as a notice of claim by all of the insured; and
 - C. upon becoming aware of any fact, matter or thing entitling the insurer to cancel the policy, immediate notice is given in

writing to TfNSW about that fact, matter or thing at least 30 days prior to the insurer giving any notice of cancellation; and

- (ii) we must ensure that we do not do anything which prejudices the insurance policy; and
- (iii) the NOPs must ensure that they:
 - A. do not do anything which prejudices the insurance policy;
 - B. where required, rectify anything which might prejudice any insurance policy;
 - C. reinstate any insurance policy which lapses;
 - D. do not cancel, vary in any material way which reduces the level of cover to the Participants or allow an insurance policy to lapse without the prior written consent of the LT;
 - E. immediately notify TfNSW of any event that may result in an insurance policy lapsing or being cancelled, and replace that insurance policy prior to it lapsing or being cancelled; and
 - F. give full, true and particular information to the insurer of all matters and things the non-disclosure of which might in any way prejudice or affect any such policy or the payment of all or any benefits under the insurance policy.

26.10 Cross liability

Any insurance required to be effected by the Participants, the NOPs or the Subcontractors in joint names shall include a cross-liability clause in which the insurer agrees to waive all rights of subrogation or action against any of the persons comprising the insured and for the purpose of which the insurer accepts the term "insured" as applying to each of the insureds as if a separate policy of insurance had been issued to each of them (subject always to the overall sum insured not being increased thereby).

26.11 Settlement of claims

Settlement of claims under the Works Policy, the Liability Policy and the PI Policy will be dealt with in accordance with any claims procedure notified by TfNSW.

26.12 Indemnities

- (a) Each Participant (the "**Indemnifier**") will indemnify each other Participant (an "**Indemnified Participant**") against claims by any third party against an Indemnified Participant in respect of:
 - (i) loss of or damage to any property; or
 - (ii) personal injury (including mental as well as bodily injury), disease, illness or death,

arising out of or in connection with any act or omission of the Indemnifier or its Associates in carrying out the IDE Activities, whatever the cause, including breach of this Agreement, tort (including negligence) or breach of statute or otherwise.

- (b) An Indemnifier's liability to indemnify an Indemnified Participant under clause 26.12(a):
- (i) includes legal costs in connection with the claim against the Indemnified Participant (on a solicitor and own client basis and whether incurred by or awarded against the Indemnified Participant);
 - (ii) will be reduced proportionally to the extent that an act or omission of the Indemnified Participant or its Associates contributed to the loss, damage, injury, disease, illness or death; and
 - (iii) is limited to the greater of:
 - A. any amount which the Indemnifier recovers or is entitled to recover under the Works Policy, the Liability Policy or the PI Policy; and
 - B. any amount which, but for a failure of the Indemnifier to comply with its obligations under this Agreement, the Indemnifier would have recovered or been entitled to recover under the Works Policy, the Liability Policy or the PI Policy,

with respect to the Indemnifier's liability to the Indemnified Participant under clause 26.12(a).
- (c) To avoid circularity, a reference in clause 26.12(b)(iii) to any amount which the Indemnifier recovers or is entitled to recover under the Works Policy, the Liability Policy or the PI Policy, is a reference to the maximum amount which the Indemnifier would have received payment or been indemnified for under the relevant insurance policy if:
- (i) clause 25 did not affect that liability and the limitation in clause 26.12(b)(iii) did not apply;
 - (ii) the insurance policy were interpreted disregarding clauses 25 and 26.12(b)(iii); and
 - (iii) the Indemnifier had paid each Indemnified Participant in full the amount of its liability (being its liability unlimited by clauses 25 and 26.12(b)(iii)) in a manner which entitled the Indemnifier to claim under the insurance policy.
- (d) To avoid doubt or circularity, the parties do not intend clauses 25 or 26.12(b)(iii) to limit the Indemnifier's ability to recover any amount under any insurance policy.
- (e) Clause 26.12(b)(iii) will not apply:
- (i) where the Indemnifier does not take all reasonable steps to ensure that it is indemnified under any applicable policy of insurance against its liability to the Indemnified Participant; or
 - (ii) to the extent that the loss, damage, injury, disease, illness or death, arises out or in connection with a Wilful Default.

26.13 Accounting for third party payments and recoveries

- (a) If, during the period of 6 years commencing on:

- (i) the Date of Final Completion;
- (ii) the date of termination of this Agreement under clause 27.1 or 27.8; or
- (iii) the date TfNSW exercises the right to step in any take over (either itself or by engaging contractors) the whole of the IDE Activities under clause 27.1,

(as applicable) a Participant is required to pay to a third party or recovers from a third party, any moneys (whether by way of compensation or otherwise) which are a Reimbursable Cost or compensation for or reimbursement of any cost, loss, expense or damage that has been or is to be treated as a Reimbursable Cost then the relevant Participant must as applicable account to the other Participants in full for the payment or the recovered moneys (net of any unrecovered costs incurred by that Participant in recovering those moneys).

If that happens after the date on which the Final Project Payment Schedule is signed under clause 21.2(e), then within 21 days of the Participant paying or receiving the moneys:

- (iv) the relevant Participant must notify the other Participants in writing of the payment made or received;
- (v) the General Manager must recalculate the Final Project Payment Schedule to take into account the recovered moneys;
- (vi) the parties must arrange for the FA to verify that the amounts shown in the recalculation of the Final Project Payment Schedule are correct and in accordance with this Agreement; and
- (vii) subject to the terms of this Agreement, the NOPs will as necessary make payment(s) to TfNSW, or TfNSW will pay the NOPs as the case may be, such that the total amounts paid to the NOPs under this Agreement are in accordance with the recalculated and verified Final Project Payment Schedule. Any such payments must be made within 10 Business Days after the issue by the FA of the relevant recalculated and verified Final Project Payment Schedule.

- (b) Clause 26.13(a) does not apply to amounts recovered from an insurer under an insurance policy. That situation is dealt with in clause 26.8.

27. Termination or step in

27.1 Notice of termination or step in

Notwithstanding any express or implied term of this Agreement and without prejudice to any of TfNSW's other rights under this Agreement or otherwise, TfNSW may at any time in its absolute discretion, for its sole convenience and for any reason, by written notice to the NOPs:

- (a) terminate this Agreement or step in and take over (either itself or by engaging contractors) the whole or any part of the IDE Activities remaining to be performed; and
- (b) in its absolute discretion, complete the uncompleted part of the IDE Activities either itself or by engaging any other person, including any one or more of the NOPs.

27.2 Effect of termination

- (a) If this Agreement is terminated (or deemed to have been terminated) under clause 27.1 or 27.8, TfNSW may take and use, in any way, the whole or any part of the Works (including any work carried out by the Participants under, or in connection with, the Proposal Development Deed).
- (b) On and from the date on which this Agreement is terminated (or deemed to have been terminated) under clause 27.1 or 27.8 each Participant releases and discharges each other Participant from all Claims, costs, expenses and losses which we may have against each other, or which the relevant other may suffer or incur arising out of, or in any way in connection with, the performance of the IDE Activities with the exception of:
 - (i) any Claims in relation to a Wilful Default;
 - (ii) any obligation to account for insurance proceeds under clause 26.8;
 - (iii) any obligation to account for payments or recovered moneys under clause 26.13(a), and
 - (iv) any claims for payment under clause 27.6.
- (c) The NOPs will not be liable for that part of the Project Works that is not completed as a result of termination of this Agreement under clauses 27.1 or 27.8.

27.3 Effect of step in

- (a) If TfNSW exercises the right to step in and take over (either itself or by engaging contractors) the whole or any part of the IDE Activities under clause 27.1, TfNSW may take and use, in any way, the whole or any part of the Works forming part of any Project to which such IDE Activities relate (including any work carried out by the Participants under, or in connection with, the Proposal Development Deed).
- (b) On and from the date on which TfNSW exercises the right to step in and take over (either itself or by engaging contractors) the whole or any part of the IDE Activities under clause 27.1, each Participant releases and discharges each other Participant from all Claims, costs, expenses and losses which we may have against each other arising out of, or in any way in connection with, the performance of such IDE Activities with the exception of:
 - (i) any Claims in relation to a Wilful Default;
 - (ii) any obligation to account for insurance proceeds under clause 26.8;
 - (iii) any obligations to account for payments or recovered moneys under clause 26.13(a); and
 - (iv) any claims for payment under clause 27.7.
- (c) The NOPs will not be liable for that part of the Project Works that is not completed as a result of TfNSW exercising the right to step in and take over (either itself or by engaging contractors) the whole or any part of the IDE Activities under clause 27.1.

27.4 Actions following termination

If this Agreement is terminated under either clause 27.1 or 27.8, we will immediately:

- (a) cease work under this Agreement;
- (b) protect property (including Project Documentation) in our possession in which TfNSW has or may acquire an interest;
- (c) demobilise from the Site all persons, Construction Plant, Temporary Works, vehicles, equipment and other things owned by or under the control of the NOPs;
- (d) remove all rubbish from the Site;
- (e) leave the whole of the Site in a safe, clean and tidy condition;
- (f) rehabilitate any Remote Sites and Extra Land in accordance with the requirements of all relevant Authorities and other relevant persons;
- (g) unless not required by the Principal's Representative (acting reasonably), provide to the Principal's Representative a properly executed certificate in the form of Schedule 21 or a release on terms otherwise satisfactory to the Principal's Representative from all claims or demands (whether for damages or otherwise howsoever arising) from the owner or occupier of, and from other persons having interest in, any Remote Sites or Extra Land;
- (h) if requested by TfNSW in writing, assign or novate to TfNSW all rights and benefits under Subcontracts;
- (i) transfer ownership of, and deliver to, TfNSW, all Project Documentation;
- (j) provide TfNSW with possession of all materials and other things on the Site or off-Site and deliver to TfNSW all necessary documents, which are required for the Project Works;
- (k) if requested by TfNSW (in its absolute discretion) in writing:
 - (i) to the extent permitted by law, transfer to TfNSW or its nominee the benefit of any Approvals obtained or held by us which relate to the IDE Activities; and
 - (ii) provide all necessary information and assistance to enable TfNSW or its nominee to obtain any Approvals which relate to the IDE Activities; and
- (l) comply with any directions of TfNSW, including any directions to carry out the activities or do the things referred to in clauses 27.4(a) to 27.4(k) (inclusive).

27.5 Actions following step in

If TfNSW exercises the right to step in and take over (either itself or by engaging contractors) the whole or any part of the IDE Activities under clause 27.1, we will immediately:

- (a) cease such IDE Activities;
- (b) protect property (including Project Documentation) in our possession relating to such IDE Activities in which TfNSW has or may acquire an interest;
- (c) if TfNSW exercises the right to step in and take over (either itself or by engaging contractors) all IDE Activities associated with a particular Site under clause 27.1:

- (i) demobilise from the Site all persons, Construction Plant, Temporary Works, vehicles, equipment and other things owned by or under the control of the NOPs;
 - (ii) remove all rubbish from the Site; and
 - (iii) leave the whole of the Site in a safe, clean and tidy condition;
- (d) rehabilitate any Remote Sites and Extra Land relating to such IDE Activities in accordance with the requirements of all relevant Authorities and other relevant persons;
- (e) unless not required by the Principal's Representative (acting reasonably), provide to the Principal's Representative a properly executed certificate in the form of Schedule 21 or a release on terms otherwise satisfactory to the Principal's Representative from all claims or demands (whether for damages or otherwise howsoever arising) from the owner or occupier of, and from other persons having interest in, any Remote Sites or Extra Land;
- (f) if requested by TfNSW in writing, assign or novate to TfNSW all rights and benefits under Subcontracts relating to such IDE Activities;
- (g) transfer ownership of, and deliver to, TfNSW, all Project Documentation relating to such IDE Activities;
- (h) provide TfNSW with possession of all materials and other things on the Site or off-Site and deliver to TfNSW all necessary documents, which are required for the Project Works and which relate to such IDE Activities;
- (i) if requested by TfNSW (in its absolute discretion) in writing:
- (i) to the extent permitted by law, transfer to TfNSW or its nominee the benefit of any Approvals obtained or held by us which relate to such IDE Activities; and
 - (ii) provide all necessary information and assistance to enable TfNSW or its nominee to obtain any Approvals which relate to such IDE Activities; and
- (j) comply with any directions of TfNSW, including any directions to carry out the activities or do the things referred to in clauses 27.5(a) to 27.5(i) (inclusive).

27.6 Termination payments

Subject to TfNSW's rights under or in connection with this Agreement, including the rights to withhold or set-off payment and recover damages, if this Agreement is terminated (or deemed to have been terminated) by TfNSW under clause 27.1 or by the NOP's under clause 27.8(d)(ii), TfNSW will pay the NOPs or the NOPs will pay TfNSW, as the case may be, the difference between:

- (a) the sum of (without any double counting):
 - (i) the amounts payable for the IDE Activities carried out prior to the date of termination which will in respect of the Gainshare/Painshare Regime be determined on a just and equitable basis by the LT; and

- (ii) each of the following amounts (but, for the avoidance of doubt, excluding any amount in respect of Fee that would (but for the termination) have been payable in respect of such amounts, and any other amount in respect of profit and corporate overhead):
- A. the cost of materials reasonably ordered by the NOPs for the Works, which they are legally liable to accept, but only if the materials become the property of TfNSW after payment;
 - B. costs reasonably incurred by the NOPs in the expectation of completing the whole of the Project Works and not included in any payment by TfNSW;
 - C. reasonable costs of demobilisation;
 - D. reasonable cancellation costs incurred by the NOPs in cancelling any Subcontracts; and
 - E. the reasonable costs of complying with any directions given by TfNSW on or after termination,
- except to the extent a provision of this Agreement expressly excludes such amounts from constituting Reimbursable Costs; and
- (b) an amount equal to any amounts which TfNSW previously paid to the NOPs.

27.7 Step in payments

Subject to TfNSW's rights under or in connection with this Agreement, including the rights to withhold or set-off payment and recover damages, if TfNSW exercises the right to step in and take over (either itself or by engaging contractors) the whole or any part of the IDE Activities under clause 27.1, TfNSW will (to the extent not already payable) pay the NOPs:

- (a) to the extent relating to such IDE Activities, the cost of materials reasonably ordered by the NOPs for the Works, which they are legally liable to accept, but only if the materials become the property of TfNSW after payment;
- (b) costs reasonably incurred by the NOPs in the expectation of completing such IDE Activities and not included in any payment by TfNSW;
- (c) if TfNSW exercises the right to step in and take over (either itself or by engaging contractors) all IDE Activities associated with a particular Site under clause 27.1, reasonable costs of demobilisation;
- (d) reasonable cancellation costs incurred by the NOPs in cancelling any Subcontracts if such cancellation is necessary due to TfNSW exercising the right to step in and take over (either itself or by engaging contractors) the IDE Activities under clause 27.1; and
- (e) the reasonable costs of complying with any directions given by TfNSW on or after the date on which TfNSW exercises the right to step in and take over (either itself or by engaging contractors) such IDE Activities under clause 27.1, to the extent such directions relate to such IDE Activities.

27.8 Wilful Default

If a Wilful Default occurs in respect of a Participant (the "**Defaulting Participant**"), then:

- (a) where the Wilful Default is not the occurrence of an Insolvency Event, and the Defaulting Participant fails to rectify the default within 10 Business Days (or such longer period agreed in writing by the Principal's Representative, acting reasonably) after the other Participants have notified it in writing that they require the default to be rectified (such notice to be marked "**Notice of Wilful Default**"); or
 - (b) where the Wilful Default is the occurrence of an Insolvency Event,
- the other Participants may, without prejudice to any other rights or remedies they may have under this Agreement or otherwise:
- (c) in the case that the Defaulting Participant is an NOP, do either or both of the following:
 - (i) wholly or partly suspend any payment due to the Defaulting Participant until the default has been remedied; and/or
 - (ii) by joint written notice, exclude the Defaulting Participant from further participation in the performance of the IDE Activities; or
 - (d) in the case that the Defaulting Participant is TfNSW, do either or both of the following by joint written notice to TfNSW:
 - (i) wholly or partly suspend the IDE Activities until the default has been remedied; and/or
 - (ii) terminate this Agreement.

27.9 Exclusion from further participation

If the other Participants exclude a NOP from further participation in the performance of the IDE Activities by notice under clause 27.8(c)(ii):

- (a) the other Participants may employ and pay other persons to replace the NOP in the performance of the IDE Activities and may use all design documentation, Temporary Works and Construction Plant provided by the NOP and necessary to perform the IDE Activities;
- (b) the Defaulting Participant will promptly, if required by the other Participants, assign or novate to TfNSW without payment the benefit of any agreements for the performance of any part of the IDE Activities;
- (c) as and when required by the LT (and not before), the Defaulting Participant will remove from the Site any Temporary Works, Construction Plant and other property provided by the NOP and if it fails to do so, within a reasonable period determined by the LT (being at least 10 Business Days), the other Participants may remove and/or sell any such Temporary Works, Construction Plant or other property (but without such other Participants being responsible for any loss or damage);
- (d) without limiting clause 21.8, the Defaulting Participant will be entitled to payment (in accordance with the any relevant rates contained in this Agreement) for any Temporary Works, Construction Plant and other property provided by it which the LT requires it to leave on Site for a period after the Defaulting Participant's exclusion from participation in the IDE Activities;
- (e) the Defaulting Participant and its LT Members will no longer be entitled to be represented on or vote as part of the LT or otherwise participate in any Project;

- (f) the other Participants may execute all deeds and documents (including, for the purposes of assigning or novating to TfNSW or another NOP any Subcontract, a deed of novation in the form of Schedule 25) and do all such things on behalf of the Defaulting Participant, including making decisions and determinations at the LT meetings, as are necessary for the performance of the IDE Activities and the Defaulting Participant irrevocably authorises any directors or managers of the other Participants to act as its attorneys for the purpose of executing such deeds and documents and doing those things;
- (g) if requested by the other Participants or TfNSW (in its absolute discretion) in writing:
 - (i) to the extent permitted by law, transfer to one of the other Participants (or their nominee) the benefit of any Approvals obtained or held by the Defaulting Participant; and
 - (ii) provide all necessary information and assistance to enable the other Participants (or their nominees) to obtain any Approvals obtained or held by the Defaulting Participant; and
- (h) the Defaulting Participant must execute all deeds and documents (including, for the purposes of assigning or novating to TfNSW or another NOP any Subcontract, a deed of novation in the form of Schedule 25), and do all such things required by TfNSW as are necessary to assist the other Participants in the performance of the IDE Activities.

27.10 Power of attorney

Each NOP must:

- (a) within 5 Business Days of the Commencement Date; and
- (b) as a condition precedent to any obligation of TfNSW to pay the NOPs any amount under clause 21,

provide to TfNSW two copies of a power of attorney (in the form of a deed poll) giving effect to the authorisation referred to in clause 27.9(f), executed by the relevant NOP.

28. Resolution of Disagreements

28.1 Handling Disagreements

- (a) The Participants will try to settle any Disagreement in good faith in a manner consistent with the Principles. If despite these efforts a Disagreement remains unresolved, any of the Participants may give a written notice to each of the other Participants within 14 days of the initial disagreement requesting that the Disagreement be considered by the LT.
- (b) The LT will consider any Disagreement referred to it and will give due consideration to submissions by all Participants, to any recommendation by the General Manager in respect of the Disagreement and to any other relevant information.
- (c) The LT will make a decision on any Disagreement referred to it and advise each Participant of that decision by written notice within 14 days of being notified of the Disagreement. The decision of the LT will be final and binding on the Participants.

- (d) If the LT is unable to achieve unanimity in respect of a decision to be made by the LT in respect of a Material LT Issue within 5 Business Days of the issue being referred to the LT, and a Participant wishes to pursue the issue, the Participant may by written notice to the other Participants request that the deadlock be resolved in accordance with clause 28.2.
- (e) The parties agree that nothing in this clause 28.1 limits the rights of any party to take such action as may be necessary to enforce its rights under clauses 25(e) and 25(f).

28.2 Deadlock resolution procedure

This clause 28.2 applies where a Participant gives a written notice pursuant to clause 18.3(b), 19.2A(e), 19.3(e), 19.4(e), 20.4(d) or 28.1(d). Where such a notice is given the matter will be referred to:

- (a) the expert determined by the LT prior to any Participant having given a written notice pursuant to clause 18.3(b), 19.2A(e), 19.3(e), 19.4(e), 20.4(d) or 28.1(d); or
- (b) if no expert is determined by the LT pursuant to clause 28.2(a) or the expert determined by the LT pursuant to clause 28.2(a) is not available:
 - (i) an expert determined by the LT; or
 - (ii) if the LT is unable to achieve unanimity in respect of the identity of the expert within 7 days, an expert nominated by the Chair of the Resolution Institute (or the person acting in that position at the time),

and the Participants must enter into an agreement with the expert in substantially the same form as that set out in Schedule 29.

The Participants acknowledge that the agreement which they must enter into with the expert will:

- (c) describe the procedure by which the expert will determine the matter;
- (d) entitle each Participant to lodge with the expert a draft written submission setting out that Participant's position as to how the matter should be determined;
- (e) require the expert to meet separately with each Participant to discuss its draft written submission and the expert's preliminary view on it;
- (f) if:
 - (i) the LT is still unable to achieve unanimity; or
 - (ii) the LT and the Principal's Representative are still unable to agree,
 after the expert has met with each Participant, entitle each Participant to lodge with the expert a final written submission setting out that Participant's position as to how the matter should be determined;
- (g) require the expert to select which of the alternative final submissions lodged by the Participants is most closely aligned with the Principles;
- (h) preclude the expert from imposing on the Participants a position other than one of the final submissions by one of the Participants; and

- (i) require each Participant to release the expert from and against all claims, except in the case of fraud on the part of the expert, which may be made against the expert in connection with the expert's appointment to determine the matter.

In making his or her determination the expert will do so on a de novo and impartial basis and will not be constrained by:

- (j) any agreement or decision by the LT; or
- (k) any rejection, refusal or failure to agree by the Principal's Representative, including any decision made by the Principal's Representative under clause 20.4 in its absolute discretion,

on the relevant Disagreement.

The Participants agree that the position set out in the final submission selected by the expert will be treated as:

- (l) a unanimous decision of the LT in respect of the relevant Material LT Issue; or
- (m) a unanimous decision of the LT and the Principal's Representative regarding the matter in respect of which the notice was given under clause 18.3(b), 19.2A(e), 19.3(e), 19.4(e) or 20.4(d),

for the purposes of this Agreement.

29. Value for Money

29.1 Value for money

The Participants agree that it is a fundamental obligation of the IDE to:

- (a) ensure and deliver value for money to TfNSW and demonstrate value for money to all Stakeholders and key interested parties; and
- (b) carry out the IDE Activities so as to achieve the objectives of the VFM Statement.

29.2 Benchmarking of the IDE's performance

- (a) The NOPs have agreed to benchmark the performance of the Participants against the performance of other incentivised delivery entities and alliances delivering other works or projects similar to the Project Works, including as set out in the TSRs.
- (b) The NOPs agree that for the purposes of benchmarking the performance of the Participants they will, in a manner consistent with the Principles, fully, frankly and honestly disclose all information relating to:
 - (i) the actual outturn performance of all aspects of the IDE Activities; and
 - (ii) the IDE Activities or the Project Works,

other than that which the LT determines is genuinely commercial in confidence.

- (c) Where the LT determines that information is genuinely commercial in confidence, the LT must determine an acceptable and appropriate manner to protect the confidential nature of the information but will share the information for the purposes of benchmarking the actual outturn performance of the Participants.

- (d) For the purposes of this Agreement, the expression "commercial in confidence" will have the interpretation that the term has under the operation of the GIPA Act.

30. Miscellaneous Provisions

30.1 Service of notices

- (a) At any time and from time to time TfNSW may notify the NOPs of an electronic portal or document management system to be used for the purposes of the Agreement. TfNSW's notice will set out:
- (i) the relevant electronic portal or document management system;
 - (ii) the commencement date for use of the electronic portal or document management system;
 - (iii) any password, login details or similar information required for the NOPs to use the electronic portal or document management system;
 - (iv) the electronic portal address details for TfNSW, the Principal's Representative, NOP1 and NOP2; and
 - (v) any other information reasonably necessary for the use and service of notices via the electronic portal or document management system.
- (b) Any notice, consent or other communication given by one Participant (or the Principal's Representative) to another Participant (or the Principal's Representative), unless the contrary intention appears, must be in writing and must:
- (i) before the date referred to in clause 30.1(a)(ii), be delivered by hand or registered mail, addressed in accordance with the contact details for the receiving Participant (or the Principal's Representative) stated in the Agreement Particulars; and
 - (ii) on and from the date referred to in clause 30.1(a)(ii):
 - A. in the case of notices, consents or other communications by the NOPs:
 - 1) without limiting clause 30.1(b)(ii)A.2), be sent to the electronic portal address of TfNSW or the Principal's Representative (as applicable); and
 - 2) under clauses 19, 27 or 28, in addition to the copy of the notice sent pursuant to clause 30.1(b)(ii)A.1), also be delivered or posted to the relevant address stated in the Agreement Particulars; and
 - B. in the case of notices, consents or other communications by TfNSW or the Principal's Representative:
 - 1) be delivered or posted to the relevant address stated in the Agreement Particulars; or

- 2) except in relation to notices by TfNSW under clauses 27.1 and 28.1, be sent to the electronic portal address of the intended recipient.
- (c) For the avoidance of doubt, no notice referred to in clause 30.1(b)(ii)A.2) shall be effective unless delivered in accordance with both clauses 30.1(b)(ii)A.1) and 30.1(b)(ii)A.2).
- (d) Subject to clause 30.1(c), a notice, consent or other communication that complies with this clause is regarded as given and received:
 - (i) if it is sent by the electronic portal:
 - A. if the time and date recorded on the notice, consent or other communication on which it was registered on the electronic portal is by 5.00pm on a Business Day - on that day; or
 - B. if the time and date recorded on the notice, consent or other communication on which it was registered on the electronic portal is after 5.00pm on a Business Day, or on a day that is not a Business Day - on the next Business Day; and
 - (ii) if it is sent by mail:
 - A. within Australia using:
 - 1) regular prepaid post or registered post - 6 Business Days after the date of posting;
 - 2) priority prepaid post or priority registered post - 4 Business Days after the date of posting; or
 - 3) express post - 2 Business Days after the date of posting; or
 - B. to or from a place outside Australia - 10 Business Days after the date of posting.
- (e) Where clause 30.1(b)(ii)A.2) applies, the relevant notice will be taken to have been received on the later of:
 - (i) the date determined in accordance with clause 30.1(d)(i); and
 - (ii) the date determined in accordance with clause 30.1(d)(ii).
- (f) We may change our address to which notices can be sent to us by giving each other notice of the change in accordance with this clause.

30.2 Right to assign or subcontract

We must not:

- (a) assign our rights under this Agreement; or
- (b) subcontract the performance of any of our obligations under this Agreement (except pursuant to clause 17.1),

without the prior written approval of each other, which must not be unreasonably withheld.

Any change in control (as defined in sections 9 and 50AA of the *Corporations Act 2001* (Cth)) of a NOP will be deemed to be an assignment of its rights under this Agreement.

30.3 Governing law

This Agreement is governed by the laws of New South Wales.

30.4 Status of Agreement

This Agreement:

- (a) is a contract for services, not a contract of service; and
- (b) does not give rise to any legally binding obligation between any of our employees and each other one of us.

30.5 Tariff concessions

Where goods are to be imported into Australia in connection with the Works, the NOPs will do all that is reasonably necessary to assist TfNSW in obtaining the full benefit of any tariff concession in respect of the same.

30.6 Australian currency

Except where expressed to the contrary, all prices and sums of money and all payments made under this Agreement are in Australian currency.

30.7 Relationship of the Participants

- (a) Except as expressly provided in this clause or clause 27.9, this Agreement is not intended to create and should not be construed as creating, any partnership, joint venture or fiduciary relationship between any one or more of us or confer a right in favour of any of us to enter into any commitment on behalf of each other or otherwise to act as its agent.
- (b) Each of us is an independent entity, and for the purposes of this Agreement, each of our Associates will not be deemed to be Associates of each other, unless deemed otherwise by law and, without limiting the generality of this clause, we will pay all costs associated with our own officers and employees including any fringe benefits tax liability attaching to the grant of any fringe benefit to our officers and employees in respect of their employment.

30.8 Entire agreement

This Agreement as amended from time to time contains the entire agreement between us and supersedes all prior arrangements whether written or oral and any heads of agreement, letters of intent, representations and other documents in relation to the Works issued or entered into prior to the Commencement Date.

30.9 Non-waiver

Waiver or relaxation partly or wholly of any of the terms of this Agreement will:

- (a) be effective only if in writing and signed by each of us;
- (b) apply only to a particular occasion unless expressed to be continuing; and

- (c) not constitute a waiver or relaxation of any other term of this Agreement.

30.10 Corporate power and authority

We represent to each other and must ensure that we have full power to enter into and perform our obligations under this Agreement and that when executed it will constitute legal, valid and binding obligations in accordance with its terms.

30.11 No representation or reliance

We each acknowledge that we:

- (a) (or any person acting on our behalf) have not made any representation or other inducement to enter into this Agreement, except for representations or inducements expressly set out in this Agreement; and
- (b) do not enter into this Agreement in reliance on any representation or other inducement by or on behalf of each other, except for any representation or inducement expressly set out in this Agreement.

30.12 Severability

If any provision of this Agreement, or its application to any of us, is or becomes invalid, void, voidable or otherwise unenforceable for any reason:

- (a) that provision or its application to any of us will be severed from this Agreement; and
- (b) the remainder of this Agreement or the application of its provisions to any of us will not be affected.

30.13 Indemnities

- (a) Each indemnity in this Agreement is a continuing obligation, separate and independent from the other obligations under this Agreement and survives termination, completion or expiration of this Agreement.
- (b) It is not necessary for us to incur expense or to make any payment before enforcing a right of indemnity conferred by this Agreement.

30.14 Limitations and exclusions of rights and liabilities

Any provision of this Agreement which seeks to limit or exclude a right or liability is to be construed as doing so only to the extent permitted by law.

30.15 Survival after termination

- (a) The termination of this Agreement will not affect any terms of this Agreement that expressly provide that they will operate after termination or which of necessity must continue to have effect after termination, notwithstanding that the clauses themselves do not expressly provide for this.
- (b) For clarity, and without limiting clause 30.15(a), clauses 16.12, 21.8, 25, 26.12, 26.13 and 27 and this clause 30 will continue to have effect after any termination as referred to in clause 30.15(a).

- (c) For the avoidance of doubt any term of this Agreement which continues to apply after the termination of this Agreement (including those referred to in clause 30.15(b)), will continue to operate after the exclusion of a NOP from further participation in the performance of the IDE Activities.

30.16 Prior work

This Agreement will apply to any work done by any of us in relation to the IDE Activities prior to the Commencement Date.

30.17 Australian Government Requirements

- (a) This clause 30.17 will apply in respect of a Project if the Agreement Particulars specifies that the Project is partially funded by the Commonwealth. Otherwise, this clause 30.17 will have no application.
- (b) The NOPs:
- (i) declare as at the Reference Date; and
 - (ii) must ensure during the term of this Agreement, that, in relation to the Works, each of them and each of their respective Subcontractors and Related Entities:
 - (iii) complies with, and acts consistently with, the Building Code;
 - (iv) meets the requirements of section 11 of the Building Code;
 - (v) is not subject to an Exclusion Sanction or a formal warning that any further failure to comply with the Building Code may result in the imposition of an Exclusion Sanction;
 - (vi) has not been the subject of an adverse decision, direction or order, or failed to comply with a decision, direction or order, made by a court or tribunal for a breach of the BCIP Act, a designated building law, work health and safety law, competition and consumer law or the *Migration Act 1958* (Cth) (other than a decision, direction or order that is stayed or has been revoked);
 - (vii) has not been required to pay any amount under an adjudication certificate or owed any unsatisfied judgement debts to a Building Contractor or Building Industry Participant;
 - (viii) only uses products that comply with the relevant Australian standards published by, or on behalf of, Standards Australia;
 - (ix) unless approved by the ABC Commissioner, is not excluded from performing Building Work funded by a state or territory government; and
 - (x) if the Agreement Particulars state that a Workplace Relations Management Plan is required, will comply with the Workplace Relations Management Plan approved by the ABCC in accordance with Part 6 of the Building Code.

- (c) Each NOP acknowledges and agrees that compliance with the Building Code does not relieve the NOPs from any responsibility or obligation under this Agreement, or from liability for any Defect arising from compliance with the Building Code.
- (d) Each NOP must promptly:
 - (i) notify the ABCC of:
 - A. any breach or suspected breach of the Building Code as soon as practicable, but no later than 2 Business Days after becoming aware of the breach or suspected breach, and advise the ABCC of the steps proposed to be taken by the NOPs to rectify the breach; and
 - B. the steps taken to rectify any breach of the Building Code with 14 days of providing a notification under clause 30.17(d)(i)A; and
 - (ii) give TfNSW a copy of any notification given by the NOPs to the ABCC under clause 30.17(d)(i) and respond to any requests for information by TfNSW concerning matters related to the Building Code so as to enable TfNSW to comply with its obligations under section 28 of the Building Code.
- (e) Each NOP acknowledges the powers and functions of the ABC Commissioner and the ABCC under the BCIIIP Act and the Building Code and must ensure that it (and must procure that its Subcontractors and each Related Entity) complies with any requests made by the ABCC and the ABC Commissioner within those powers and functions, including requests:
 - (i) for entry under section 72 of the BCIIIP Act;
 - (ii) to interview any person under section 74 of the BCIIIP Act;
 - (iii) to produce records or documents under sections 74 and 77 of the BCIIIP Act; and
 - (iv) for information concerning matters relating to the Building Code under subsection 7(c) of the Building Code.
- (f) Each NOP must not enter into a Subcontract for any aspect of the Works unless:
 - (i) the Subcontractor has submitted a Declaration of Compliance, including the further information outlined in Attachment A to the Declaration of Compliance, which the NOPs agree is substantially in the same form as the model declaration of compliance applicable to contractors and subcontractors in relation to the Building Code; and
 - (ii) the Subcontract with the Subcontractor includes an equivalent clause to this clause 30.17.
- (g) Each NOP must provide the Commonwealth with any Subcontractor's Declaration of Compliance referred to in clause 30.17(f) promptly upon request.
- (h) Each NOP must maintain adequate records of the compliance with the Building Code by:
 - (i) the NOPs;

- (ii) the Subcontractors; and
- (iii) any Related Entity of the NOPs.

30.18 Corrupt Conduct

TfNSW may direct to have removed, within a stated time, from any part of the IDE Activities, any person engaged on the Works (including a Subcontractor) who has been found to have engaged in corrupt conduct (as defined by the *Independent Commission Against Corruption Act 1988* (NSW)) by the Independent Commission Against Corruption.

30.19 Management Systems

We have agreed to use the management systems set out in the Agreement Particulars, which shall not be amended without the prior written approval of TfNSW.

30.20 Exclusion of Proportionate Liability

To the extent permitted by law, Part 4 of the *Civil Liability Act 2002* (NSW) (and any equivalent statutory provision in any other state or territory) is excluded in relation to all and any rights, obligations or liabilities of each of the Participants under this Agreement whether these rights, obligations or liabilities are sought to be enforced in contract, tort or otherwise.

Without limiting the above, the rights, obligations and liabilities of the Participants under this Agreement with respect to proportionate liability are as specified in this Agreement and not otherwise, whether these rights, obligations or liabilities are sought to be enforced by a claim in contract, in tort or otherwise.

30.21 Body or authority ceases to exist

If a body or an authority (other than a party) referred to in this Agreement ceases to exist, reference to it is to be taken to be to the body or authority that replaces it or, if it is not replaced, that then serves substantially the same functions. Reference to the head or other officer of the body or authority that has ceased to exist is to be taken to be to the head or other officer of the body or authority that replaces it or serves substantially the same function.

30.22 Aboriginal participation

We must, except to the extent otherwise directed in writing by the Principal's Representative (in its absolute discretion):

- (a) comply with the requirements of the NSW Government Aboriginal Participation in Construction (APIC) Policy (June 2018);
- (b) enter the requirements of the Approved Aboriginal Participation Plan (and any amendments) in the APIC policy reporting portal available at <https://app.onegov.nsw.gov.au>, or such other website as may be notified by the Principal's Representative from time to time (**Aboriginal Participation Portal**);
- (c) report against those requirements in accordance with the APIC policy reporting requirements on a monthly basis:
 - (i) to the Principal's Representative; and
 - (ii) through the Aboriginal Participation Portal;

- (d) promptly after the Date of Completion of each Project:
 - (i) prepare a final Aboriginal Participation Report in accordance with the APIC policy reporting requirements and identifying if Aboriginal participation requirements were met in respect of the relevant Project; and
 - (ii) provide the final Aboriginal Participation Report in respect of the relevant Project to the Principal's Representative; and
- (e) following approval by the Principal's Representative, submit the details of the final Aboriginal Participation Report through the Aboriginal Participation Portal.

31. NSW Code of Practice

31.1 NSW Code and NSW Guidelines

In addition to terms defined in this Agreement, terms used in this clause 31 have the same meaning as is attributed to them in the New South Wales Industrial Relations Guidelines: Building and Construction Procurement (**NSW Guidelines**). The NSW Code and NSW Guidelines are available at www.industrialrelations.nsw.gov.au.

31.2 Primary Obligation

- (a) We must at all times comply with, and meet any obligations imposed by, the NSW Government's Code of Practice for the Building and Construction Industry (**NSW Code**) and NSW Guidelines.
- (b) We must notify the Construction Compliance Unit (**CCU**) of any possible noncompliance with the NSW Code and NSW Guidelines and of remedial action taken, within 24 hours of becoming aware of the possible non-compliance.
- (c) Where we engage a subcontractor or consultant, we must ensure that the contract imposes on the subcontractor or consultant equivalent obligations to those in this clause 31.2, including that the subcontractor or consultant must at all times comply with, and meet any obligations imposed by, the NSW Code and the NSW Guidelines.
- (d) We must not appoint or engage another party in relation to any Project where that appointment or engagement would breach a sanction imposed on the other party in relation to the NSW Code or NSW Guidelines.

31.3 Access and information

- (a) We must maintain adequate records of compliance with the NSW Code and NSW Guidelines by us, our subcontractors, consultants and related entities in relation to the IDE Activities.
- (b) We must allow, and take reasonable steps to facilitate, authorised personnel (including personnel of the CCU) to:
 - (i) enter and have access to sites and premises controlled by us, including but not limited to the Site;
 - (ii) inspect any work, material, machinery, appliance, article or facility;
 - (iii) access information and documents;

- (iv) inspect and copy any record relevant to any Project;
- (v) have access to personnel; and
- (vi) interview any person,

as is necessary for the authorised personnel to monitor and investigate compliance with the NSW Code and NSW Guidelines, by us, our subcontractors, consultants and related entities.

- (c) The NOPs and their related bodies corporate, must agree to, and comply with, a request from authorised personnel (including personnel of the CCU) for the production of specified documents by a certain date, whether in person, by post or electronic means.

31.4 Sanctions

- (a) The NOPs warrant that neither they, nor any of their related entities, are subject to a sanction in connection with the NSW Code or NSW Guidelines that would have precluded them from responding to a procurement process for work to which the NSW Code and NSW Guidelines apply.
- (b) If the NOPs do not comply with, or fail to meet any obligation imposed by, the NSW Code or NSW Guidelines, a sanction may be imposed against them in connection with the NSW Code or NSW Guidelines.
- (c) Where a sanction is imposed:
 - (i) it is without prejudice to any rights that would otherwise accrue to the parties; and
 - (ii) the State of NSW (through its agencies, Ministers and the CCU) is entitled to:
 - A. record and disclose details of non-compliance with the NSW Code or NSW Guidelines and the sanction; and
 - B. take them into account in the evaluation of future procurement processes and responses that may be submitted by the NOPs, or their related entities, in respect of work to which the NSW Code and NSW Guidelines apply.

31.5 Compliance

Where a change to this Agreement or the Works is proposed, and that change may, or may be likely to, affect compliance with the NSW Code and NSW Guidelines, we must immediately notify TfNSW (or its nominee) of the change, or likely change and specify:

- (a) the circumstances of the proposed change;
- (b) the extent to which compliance with the NSW Code and NSW Guidelines will be, or is likely to be, affected by the change; and
- (c) what steps we propose to take to mitigate any adverse impact of the change,

and the Principal's Representative will direct us as to the course we must adopt within 10 Business Days of receiving notice.

Executed as an agreement

Signed by Transport for NSW
ABN 18 804 239 602 by its authorised delegate in
the presence of:

[Redacted Signature]

Signature of witness

[Redacted Name]

Full name of witness

[Redacted Position]

Position

[Redacted Signature]

Signature of delegate

[Redacted Name]

Print Full Name

[Redacted Position]

Position

Signed, sealed and delivered by John Holland Pty Ltd
ACN 004 282 268 by its Attorney under a Standing
Power of Attorney dated 16 April 2018 (and the Attorney
hereby certifies that at the date of signature the Attorney
has no notice of the revocation of the Standing Power of
Attorney dated 16 April 2018) in the presence of:

[Redacted Signature]

Signature of Witness

[Redacted Name]

Print Full Name

[Redacted Signature]

Signature of Attorney

[Redacted Name]

Print Full Name

**Executed by Jacobs Group (Australia) Pty Ltd ACN
001 024 095** in accordance with s 127(1) of the
Corporations Act 2001:

[Redacted Signature]

Signature of Director

[Redacted Name]

Print Full Name

[Redacted Signature]

Signature of Director/Company Secretary

[Redacted Name]

Print Full Name

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