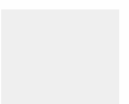




Deed of Variation in relation to the Rolling Stock Supply Contract Amendment and Restatement Deed

Transport for NSW (**Purchaser**)

Construcciones y Auxiliar de Ferrocarriles S.A. (**Supplier**)



Deed of Variation

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Key details

Date 22 October 2018

Parties

Name **Transport for NSW**
ABN 18 804 239 602
Short form name **Purchaser**
Notice details Level 5, Tower A
Zenith Centre
821 Pacific Highway
Chatswood NSW 2067
Attention: Director Vehicles, Vessels and Rolling Stock

Name **Construcciones y Auxiliar de Ferrocarriles SA (CAF)**
Short form name **Supplier**
Notice details José Miguel Iturrioz 26, 20200 Beasain, Spain
Attention: [REDACTED] International Division. Area Director

Background

- A The Purchaser entered into the *Amendment and Restatement Deed facilitating the incorporation of additional equipment for the Newcastle Light Rail System* with the Supplier on or about 23 May 2016 (**Amendment and Restatement Deed**).
- B The Purchaser and the Supplier have agreed to vary the Amendment and Restatement Deed on the terms of this deed to enable a process and payment terms associated with Provisional Operational Completion.

Agreed terms

1. Defined terms and interpretation

1.1 Defined terms

Except where the context otherwise requires, capitalised words which are not defined but which have a defined meaning in the Amendment and Restatement Deed, have the same meaning in this deed as in the Amendment and Restatement Deed, and:

Effective Date means date of execution of this Deed of Variation.

1.2 Interpretation

Clause 1.3 (*Interpretation*) of the Amendment and Restatement Deed is incorporated in and applies to this deed as if set out in full with any necessary amendments

1.3 Governing law and jurisdiction

This deed is governed by the law of New South Wales and each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of New South Wales and all courts of appeal from those courts.

2. Variation of Amendment and Restatement Deed

2.1 Variation

The parties agree that on and from the Effective Date Annexure A to the Amendment and Restatement Deed is varied in the manner set out in Schedule 1 to this deed.

2.2 Confirmation of Amendment and Restatement Deed

The parties agree that they are bound by and will comply with the provisions of the Amendment and Restatement Deed as varied by the preceding provisions of this clause 2.

2.3 Further action

Each party agrees to do all things necessary or desirable to give full effect to the variation under this deed.

2.4 Continued force and effect of Amendment and Restatement Deed

Except as amended under clause 2.1, the parties acknowledge and agree that the Amendment and Restatement Deed continues in full force and effect.

3. General

3.1 Alterations

This deed may be altered only in writing signed by each party.

3.2 Counterparts

This deed may be entered into by the exchange of executed counterparts.

3.3 Severability

A term or part of a term of this deed that is illegal or unenforceable may be severed from this deed and the remaining terms or parts of the term of this deed continue in force.

3.4 Waiver

A party does not waive a right, power or remedy if it fails to exercise or delays in exercising the right, power or remedy. A single or partial exercise of a right, power or remedy does not prevent another

or further exercise of that or another right, power or remedy. A waiver of a right, power or remedy must be in writing and signed by the party giving the waiver.

3.5 Entire agreement

To the extent permitted by law, in relation to its subject matter, this deed:

- (a) embodies the entire understanding of the parties, and constitutes the entire terms agreed by the parties; and
- (b) supersedes any prior written or other agreement of the parties, with respect to its subject matter.

3.6 Exclusion of proportionate liability

The parties agree that:

- (a) Part 4 of the *Civil Liability Act 2002* (NSW) does not apply; and
- (b) their rights, obligations and liabilities will be those which would exist if Part 4 of the *Civil Liability Act 2002* (NSW) did not apply.

3.7 Confidentiality

- (a) Subject to clause 3.7(b), the Supplier must:
 - (i) keep confidential this deed, any information relating to this deed and any discussions concerning this deed;
 - (ii) not use the information referred to in clause 3.7(a)(i) except as necessary for the performance of the Supplier's obligations under the Amendment and Restatement Deed; and
 - (iii) ensure that each of its officers, employees and subcontractors complies with the terms of clause 3.7(a)(i).
- (b) The Supplier is not obliged to keep confidential any information:
 - (i) which is in the public domain through no default of the Supplier; or
 - (ii) the disclosure of which is:
 - (A) required by Law;
 - (B) given with the written consent of the Purchaser; or
 - (C) given to a court in the course of proceedings to which the Supplier is a party.
- (c) The Supplier acknowledges that the Purchaser may disclose this deed (and information concerning the terms of this deed) under or in accordance with any one or more of the following:
 - (i) the *Government Information (Public Access) Act 2009* (NSW);
 - (ii) to satisfy the disclosure requirements of the New South Wales Auditor General or to satisfy the requirements of Parliamentary accountability; and
 - (iii) any other Law.
- (d) This clause 3.7 will survive the termination of this deed.

Schedule 1 – Amendments to the Amendment and Restatement Deed

1. In clause 1.1, insert the following new definitions:

Certificate of Provisional Operational Completion

means a certificate in the form set out in Annexure Part S issued under Clause 21AA.2(a)(i) in respect of the achievement of Provisional Operational Completion;

Date of Provisional Operational Completion

means:

- (a) the date certified by the Purchaser in a Certificate of Provisional Operational Completion to be the date on which Provisional Operational Completion was reached for each LRV; or
- (b) where another date is determined in any dispute resolution as the date on which Provisional Operational Completion was reached, that other date; and
- (c) in either case may be a different date in respect of the LRVs and the Additional LRVs;

Defect Rectification Works

means works required in connection with the rectification of any Defects notified by the Purchaser;

Provisional Operational Completion

means that stage in the carrying out of the work under the Contract when the requirements set out in Annexure Part F.A have been satisfied for each individual LRV;

2. In clause 1.1, replace the definition of 'Rolling Stock Initial Defects List' with the following definition:

Rolling Stock Initial Defects List

means:

- (a) the lists issued by the Purchaser under Clause 21AA.4 which will list Defects of the nature described in section 1 of Annexure Part F.A; and
- (b) the list issued by the Purchaser under Clause 21A.4 which will list Defects of the nature described in section 1 of Annexure Part F;

3. In subclause 2.3(b)(i), delete paragraphs (B) to (F) (inclusive) and replace them as follows:

- (B) % of the Option Price will be payable on Delivery of the first LRV under the option;
- (C) % of the Option Price, made up of five (5) payments equivalent to 3.6% of the Option Price will be payable on Delivery of each LRV, after the first delivered LRV, under the option;
- (D) % of the Option Price will be payable upon the first LRV under the option achieving Provisional Operational Completion;
- (E) % of the Option Price will be payable on Operation Completion under the option; and

- (F) % of the Option Price will be held back and be paid in accordance with the KPI Regime; and

4. Amend clause 19B as follows:

19B Maintenance

- (a) The Supplier acknowledges and agrees that the Purchaser may, but is not obliged to at any time prior to the Date of Delivery of the first Additional LRV, by written notice to the Supplier, require the Supplier to maintain the LRVs during the period between Delivery and the NLR Handover Date. In consideration of the Supplier providing such maintenance services, it will be entitled to claim payment in accordance with the prices set out in respect of 'Option 5' at Annexure Part ABH. For the avoidance of doubt, TfNSW acknowledges that the Supplier may appoint CAF Rail Australia Pty Ltd ABN 15 146 694 537 (CAF Australia) to carry out the maintenance services under this Clause 19B on the Supplier's behalf.
- (b) The scope of the maintenance services prior to handover to ISO is:
- (a)(i) preventive maintenance as described in the Technical Maintenance Plan and
 - (b)(ii) corrective maintenance for all issues/faults arisen during the testing and commissioning; and
 - (c)(iii) implementing all required adjustments to the LRVs.
- (c) The parties acknowledge and agree that:
- (i) certain amounts may become due and owing from the Purchaser to the Supplier under this Clause 19B (Relevant Payments);
 - (ii) from the date of this Contract, the Supplier directs the Purchaser to pay each Relevant Payment to CAF Australia, as and when it becomes due and owing to the Supplier in accordance with Clause 24.
- (d) The payment of any Relevant Payment by the Purchaser in accordance with Clause 19B(c), is to be made into the account notified by the Supplier from time to time.
- (e) The Supplier acknowledges and agrees that each payment of a Relevant Payment made by the Purchaser to CAF Australia in accordance with the direction referred to in Clause 19B(c) satisfies, to the equivalent extent, the Purchaser's obligation to pay that Relevant Payment to the Supplier under this Contract.
- (f) The Supplier acknowledges that the Purchaser's obligation to pay the Relevant Payment is subject to the Purchaser's rights of set off under this Contract.

5. Insert a new clause 21AA after clause 21 as follows:

21AA Provisional Operational Completion

21AA.1 Notice of Provisional Operational Completion

- (a) For each LRV the Supplier must give the Purchaser:
- (i) at least 10 Business Days' notice of when it expects to achieve Provisional Operational Completion; and
 - (ii) a request for a Certificate of Provisional Operational Completion when it believes that Provisional Operational Completion has been achieved.
- (b) The Supplier may not request a Certificate of Provisional Operational Completion any earlier than 10 Business Days after the date on which the Supplier gives notice under paragraph (a)(i), except with the prior written approval of the Purchaser.

- (c) The Supplier must attach to the request under paragraph (a)(ii) evidence satisfactory to the Purchaser that the Supplier has achieved all relevant requirements for Provisional Operational Completion as set out in Annexure Part F.A.

21AA.2 Determination of Provisional Operational Completion by the Purchaser

- (a) For each LRV, within 10 Business Days after receiving the request under Clause 21A.1(a)(ii) the Purchaser, acting reasonably, must either:
 - (i) if Provisional Operational Completion has been achieved, issue a Certificate of Provisional Operational Completion to the Supplier stating the date on which Provisional Operational Completion was achieved; or
 - (ii) if Provisional Operational Completion has not been achieved, either (at the discretion of the Purchaser):
 - (A) issue a notice to the Supplier listing the things remaining to be performed to achieve Provisional Operational Completion; or
 - (B) issue a written notice to the Supplier stating that Provisional Operational Completion is so far from being achieved that it is not practical to provide the list referred to in paragraph (ii)(A).
- (b) If the Purchaser fails to issue a Certificate of Provisional Operational Completion under paragraph (a)(i) or a notice under paragraph (a)(ii), Provisional Operational Completion will not be deemed to have occurred but nothing in this paragraph (b) will prejudice any right of the Supplier to damages.

21AA.3 Provisional Operational Completion not achieved

If a notice is issued by the Purchaser under Clause 21AA.1(a)(ii) the Supplier must continue to perform its obligations under the Contract to achieve Provisional Operational Completion and Clauses 21AA.1, 21AA.2 and 21AA.3 will reapply.

21AA.4 Rolling Stock Initial Defects List

- (a) The Purchaser will, at the time of issuing a Certificate of Provisional Operational Completion, issue the Rolling Stock Initial Defects List to the Supplier for each LRV.
- (b) As soon as possible after the Date of Provisional Operational Completion, but before the Date of Operational Completion, the Supplier must rectify any Defects in the Equipment, including the Defects contained in the Rolling Stock Initial Defects List issued pursuant to this Clause 21AA.4.

21AA.5 No restriction

In making a determination as to whether Provisional Operational Completion has been achieved the Purchaser:

- (a) will not be restricted by any notice already provided under Clause 21AA.2, as applicable; and
- (b) may raise any items of work as a ground for determining that Provisional Operational Completion has not been achieved.

21AA.6 Effect of Certificate of Provisional Operational Completion

A Certificate of Provisional Operational Completion:

- (a) does not constitute an approval by the Purchaser of the Supplier's performance of its obligations under the Contract;
- (b) is not to be taken as an admission or evidence that the Equipment, or any part of the Equipment, complies with the Contract; or
- (c) will not prejudice any rights or powers of the Purchaser under the Contract or otherwise according to law.

6. Amend clauses 21A.4 and 21A.5 as follows:

21A.4 Rolling Stock Initial Defects List

- (a) The Purchaser may ~~will~~, at the time of issuing a Certificate of Operational Completion, issue the Rolling Stock Initial Defects List to the Supplier.
- (b) Without limiting the Supplier's obligations under this Contract, as soon as possible after the Date of Operational Completion, the Supplier must rectify any all Defects in the Equipment, including the Defects contained in the Rolling Stock Initial Defects List issued pursuant to this Clause 21A.4.

21A.5 No restriction

In making a determination as to whether Operational Completion has been achieved the Purchaser:

- (a) will not be restricted by any notice already provided under Clause 21A.2, as applicable; ~~and~~
- (b) may raise any items of work as a ground for determining that Operational Completion has not been achieved; ~~and~~
- (c) will not be restricted by anything that occurs during the process of certifying Provisional Operational Completion in accordance with Clause 21AA.

7. Amend clause 22(a) as follows:

- (a) The Defects Liability Period stated in Item 31 ~~for each LRV~~ will commence on the Date of Provisional Operational Completion at 4.00 pm. The Defects Liability Period stated in Item 31 in respect to the LRVs and the Additional LRVs ~~may will~~ commence on ~~different dates~~ the Date of Provisional Operational Completion at 4.00 pm for each LRV.

8. In Annexure Part F, add new items to the requirements for Operational Completion as follows:

- 12. the items in the previously issued Rolling Stock Initial Defects Lists issued under Clause 21AA.4 for all LRVs have been rectified to the satisfaction of the Purchaser; and
- 13. Provisional Operational Completion has been achieved for all LRVs.

9. Add a new Annexure Part F.A after Annexure E, in the form of Schedule 2 of this deed.

10. Replace Annexure Part H with the document in Schedule 3 of this deed.

11. Replace the certificate in Annexure Part S with the certificates in Schedule 4 of this deed.

Schedule 2 – Annexure Part F.A

**ANNEXURE to the Australian/New Zealand Standard
General Conditions of Contract for the supply of
Equipment without installation
AS/NZS 4911-2003**

Part F.A

Requirements for Provisional Operational Completion

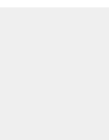
(Clause 2.1)

Provisional Operational Completion will be achieved when:

1. the Equipment (other than any Equipment which is the subject of the Purchaser's exercise of the option in Clause 2.3) is in accordance with the requirements of the Contract except for minor Defects which do not:
 - (a) prevent the Equipment from being capable of being used for the Intended Purpose; or
 - (b) adversely affect the normal use of the Equipment or the public image of the Purchaser or the LRVs;
2. the Equipment (other than any Equipment which is the subject of the Purchaser's exercise of the option in Clause 2.3) has passed all tests specified in the Not Rejected Testing and Commissioning Plan as being applicable to Operational Completion and the Test Reports and Test Report Summary have been Not Rejected;
3. the LRVs have successfully completed the Reliability Proving Period in accordance with section 33 of the LRV Specification;
4. all Safety Cases and safety assurance documentation required by the Not Rejected Safety Management and Accreditation Plan for Operational Completion have been Not Rejected;
5. the as-built drawings for each LRV of the Equipment (other than any Equipment which is the subject of the Purchaser's exercise of the option in Clause 2.3) have been delivered to the Purchaser;
6. the Supplier has obtained all Authorisations (other than the Accreditation contemplated by Clause 10A.4) required under relevant Legislative Requirements to be issued by any Authority before the Equipment (other than any Equipment which is the subject of the Purchaser's exercise of the option in Clause 2.3) can be used for the Intended Purpose;
7. the Supplier has provided all information and documentation, and taken all steps, necessary for the ISO to obtain the Accreditation referred to in Clause 10A.4 from ONRSR;
7. the ISO has obtained the Accreditation referred to in Clause 10A.4 from ONRSR; and
8. all warranties and guarantees required to be provided by manufacturers, sub-contractors and suppliers under the Contract have been so provided.

Schedule 3– Annexure Part H

See attached.



CAF Variation & Payment Schedule

			Mileage									
			Invoice	1st LRV Delivery	2nd LRV Delivery	3rd LRV Delivery	4th LRV Delivery	5th LRV Delivery	6th LRV Delivery	Provisional Operational Completion (1st LRV only)	Operational Completion	End of KPI Regime
Item	Variation	Title	Total									
0		Main contract (Annexure H)										
	VO-01	Additional LRV Specification Items										
	VO-02	Additional Handholds for Urbos 3 LRV (INNER WEST)										
	VO-03	Wrong Side Door Opening (WSDO) Solution for Urbos 3 LRVs (INNER WEST)										
4	VO-04	Provision of OESS to LRV										
	VO-05	Design Improvements on NLR Urbos LRVs										
6	VO-06	Additional (Fagle) Handholds for Urbos 3 LRVs (INNER WEST)										
7	VO-07	NLR LRV OESS Design Inclusions										
8	VO-08	Cab Drivers Points Bar Holder										
9	VO-09	Removal of Raleigh Protective Boxes from Scope										
10	VO-10	CAF to Provide Maintenance Services between delivery and handover										
11	VO-11	Removal of Ultrasonic Test Equipment from Scope										
12	VO-12	In Cab Points Switching										
		TOTALS										
		minus the IWE LRV VO's										
		Forecast Date										

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Schedule 4– Annexure Part S

Form of Certificate of Provisional Operational Completion (Clause 1.1)

TO: The Supplier

In accordance with Clause 21AA.2(a) of the contract between the Purchaser and the Supplier dated *[insert date]* with respect to the design of LRV *[insert number]* (**Contract**), I hereby certify that:

- (a) all conditions precedent to the Provisional Operational Completion have been achieved; and
- (b) Provisional Operational Completion occurred on *[insert date]*.

Terms defined in the Contract have the same meaning in this certificate.

.....
[Insert name of authorised representative of the Purchaser]

Date *[insert]*

Form of Certificate of Operational Completion (Clause 1.1)

TO: The Supplier

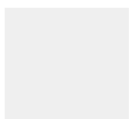
In accordance with Clause 21A.2(a) of the contract between the Purchaser and the Supplier dated *[insert date]* with respect to the design of LRV *[insert number]* (**Contract**), I hereby certify that:

- (a) all conditions precedent to the Operational Completion have been achieved; and
- (b) Operational Completion occurred on *[insert date]*.

Terms defined in the Contract have the same meaning in this certificate.

.....
[Insert name of authorised representative of the Purchaser]

Date *[insert]*

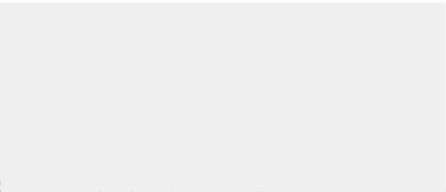


Signing page

EXECUTED as a deed.

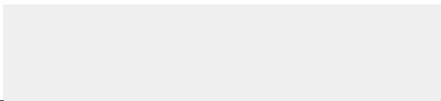
Each person who executes this deed on behalf of a party under a power of attorney declares that he or she is not aware of any fact or circumstance that might affect his or her authority to do so under that power of attorney.

Signed, sealed and delivered for and on behalf of **Transport for NSW (ABN 18 804 239 602)** by its authorised delegate in the presence of:



Signature of witness

PETER MATHER
Name of witness (print)



Signature of Authorised Delegate

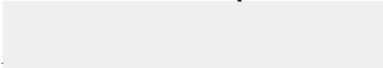
Anand Thomas
Name of Authorised Delegate (print)

PROGRAM DIRECTOR
Position held (print)

Signed, sealed and delivered by **Construcciones y Auxiliar de Ferrocarriles S.A. CIF A20001020** by its attorney in the presence of:



Signature of witness



Name of witness (print)



Signature of attorney

INAKI MENDIZABAL
Name of attorney (print)