Sydney Growth Trains Project

Delivery Deed

TfNSW

RailCorp

Supplier

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Our reference 13647/80172419
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Delivery Deed

Date

Transport for NSW ABN 18 804 239 602 (TfNSW)
Rail Corporation New South Wales ABN 59 325 778 353 (RailCorp)
Downer EDI Rail Pty Limited ABN 92 000 002 031 (Supplier)

Background

A. TfNSW intends to introduce changes to the timetable for rail passenger services in New South Wales during, or prior to, 2018.

B. In order to achieve the intended timetable changes, TfNSW has agreed (on behalf of RailCorp and the Operator) to procure, and the Supplier has agreed to design, develop, manufacture, test, commission, supply and deliver new passenger Sets and other related Assets on the terms and conditions of this deed.

C. The Supplier has also agreed to design, develop, manufacture, test, commission, supply and deliver the Option Sets if RailCorp (or TfNSW on behalf of RailCorp) elects to exercise the option to purchase the Option Sets pursuant to this deed.

D. RailCorp will own the Sets and the other Assets and the Operator will operate the Sets.

E. The Supplier has also agreed to design, construct, commission and hand-over the MF Works under the MF Works Deed.

F. The Supplier will maintain the Sets and other Assets pursuant to the terms and conditions of the TLS Deed.

Agreed terms

1. Interpretation

1.1 Definitions

In this deed, unless the context otherwise requires, the following expressions have the following meanings:

Acceptance Criteria means, for a Set, any or all of the Provisional Acceptance Criteria, the Final Acceptance Criteria and the Fleet Acceptance Criteria relating to that Asset, as applicable.

Accreditation means accreditation (including provisional accreditation) in accordance with the requirements of the Rail Safety National Law, including any regulation, guidelines or ordinance made pursuant to the Rail Safety National Law.

Accreditation Variation has the meaning given in clause 6.1(a).

Accreditation Variation Application means all and any applications or submissions required to be made to ONRSR under or in accordance with the Rail Safety National Law or Rail Safety National Regulations in order to obtain any Accreditation Variation.
Accreditation Variation Documents means all documentation required to be prepared and submitted to ONRSR to support an Accreditation Variation Application.

Accredited Person has the meaning given in clause 6.1(a).

ACICA has the meaning given in paragraph 1.4(c)(ii) of Schedule 8.

ACICA Arbitration Rules has the meaning given in paragraph 1.7(a) of Schedule 8.

ACICA Expedited Arbitration Rules has the meaning given in paragraph 1.7(a) of Schedule 8.

Actual Mass means, in respect of a Set, the mass of that Set in kilograms, measured as the "average total vehicle mass Ma" in accordance with the procedures set out in "EPR-0026 Static Vehicle Weight Test".

Additional Network Access Right has the meaning given in clause 13.6(a).

Advance Payment Bond has the meaning given in paragraph 2.1(a) of Schedule 14.

Affected Party means a party affected, or which alleges that it is affected, by a Force Majeure Event.

Agreed Network Access Rights means the Network Access Rights described in and determined in accordance with clause 13.4.

Agreed Rates has the meaning given to it in paragraph 2 of Schedule 12.

Alert Event means an actual or likely event or circumstance which arises or could arise because of the Delivery Phase Activities and which may interfere with or threaten:

(a) the use of RailCorp Land for railway purposes or the operation of RailCorp's Facilities;
(b) the safe operation of the Railway;
(c) the operational capacity or efficiency of the Railway; or
(d) the future safe operation of the Railway or the future operational capacity or efficiency of the Railway,

including any event or circumstance which has or is likely to have a material detrimental effect on:

(e) the Railway, RailCorp's Facilities or any RailCorp Land;
(f) the safety of the Railway passengers, station patrons, or representatives of TfNSW or the Operator; or
(g) the operation of the Railway.

AMS has the meaning given in SPR Appendix 14.

Annual Access Forward Lookahead has the meaning given in clause 13.4(b)(i).

Applicable Cure Period has the meaning given in clause 26.3(c)(i).
Approval means any licence, permit, consent, approval, determination, certificate or exemption from or by any Authority or under any Mandatory Requirement which must be obtained or satisfied (as the case may be):

(a) to perform the Delivery Phase Activities; or

(b) for the Operator or another NSW Rail Entity to perform, or continue to perform, their respective Operations Functions,

but does not include:

(c) any direction given by TfNSW’s Representative pursuant to a Project Agreement; or

(d) the exercise by TfNSW of its rights under a Project Agreement.

Approved Cure Plan has the meaning given in clause 26.3(c).

Approved Mitigation Plan has the meaning given in clause 26.4(c).

Arbitration Expedition Notice has the meaning given in paragraph 1.7(b)(i) of Schedule 8.

Asset means each of the Sets and the Spare Driver Trailer Car and includes all Spares, Special Tools, Consumables and other chattels supplied as part of the Delivery Phase Activities or used by the Supplier or its Subcontractors for the purposes of carrying out the TLS Phase Activities.

Asset Information System or AIS means the system for the storage, processing, transmission and management of Asset information as referred to in section 2.18.3 of the SPR.

Asset Management Plan means the Project Plan of that name.

Asset Management System means the Asset management arrangements described in section 2.18 of the SPR.

Asset Standards Authority or ASA means that body within TfNSW known as the ‘Asset Standards Authority’ with the objectives, functions, powers and governance as described in its charter, a copy of which can be found at www.asa.transport.nsw.gov.au.

Associate means, in relation to a person that is a corporation, any Related Body Corporate of that person, and any of their respective officers, employees, agents, contractors, consultants, nominees, licensees or advisors and:

(a) in the case of the Supplier, it includes the Supplier’s Subcontractors and their respective officers, employees, agents, contractors, consultants, nominees, licensees or advisors (but does not include TfNSW or any of its officers, employees, agents, contractors, consultants, nominees, licensees or advisors);

(b) in the case of TfNSW, it includes the State, the Operator, each other NSW Rail Entity controlled by the Secretary of Transport for NSW, each other entity controlled by the Secretary of Transport for NSW and, in each case, their respective officers, employees, agents, contractors, consultants, nominees, licensees or advisors (but does not include the Supplier or any of its officers, employees, agents, contractors, consultants, nominees, licensees or advisors);

(c) in the case of the State, it includes:

(i) the Minister for Transport and Infrastructure;

(ii) the Secretary of Transport for NSW; and
(iii) any other person to whom the State delegates a right, power, function or duty from time to time,

but only insofar as each is acting in connection with the Project and does not include the Supplier or its officers, employees, agents, contractors, consultants, nominees, licensees or advisors.

**Authorisation and Accreditation Plan** means the Project Plan of that name.

**Authorised Engineering Organisation or AEO** means an organisation providing a defined engineering service or product that has been assessed and granted authorised engineering organisation status by the Asset Standards Authority.

**Authority** means:

(a) any governmental, semi-governmental or local-government authority, administrative or judicial body or tribunal, department, commission, public authority, agency, minister, statutory corporation or instrumentality, body, or any other similar entity having jurisdiction in relation to the Delivery Phase Activities; or

(b) any other person having a right to impose a requirement, or whose consent is required under any Mandatory Requirements, with respect to any part of the Delivery Phase Activities.

**Available** and **Availability** have the meanings given in the TLS Deed.

**Availability Period** has the meaning given in the TLS Deed.

**B2B Gateway** has the meaning given in SPR Appendix 3.

**Bank Bill** means a bill of exchange (as defined in the *Bills of Exchange Act 1909* (Cth)) that has been accepted by a bank authorised under a law of the Commonwealth of Australia or any state to carry on banking business.

**Bank Bill Rate** means, in respect of a period, the rate, expressed as a yield per cent per annum (rounded up, if necessary, to 4 decimal places) that is quoted as the average bid rate on the Reuters monitor system page "BBSY" (or any page that replaces that page) at about 10.10 am (Sydney time) on the first day of the relevant period for which the rate is sought, for Bank Bills that have a tenor in months which is closest to the period, provided that if there is a manifest error in the calculation of that average bid rate or if no average bid rate is so published for Bank Bills of that tenor by about 10.30 am, then the Bank Bill Rate will be the bid rate specified by the non-defaulting party reasonably, acting in good faith, having regard to the rates otherwise bid for Bank Bills having a tenor as described above at or around that time.

**Business Day** means any day in New South Wales that:

(a) is not a Saturday, Sunday or public holiday; and

(b) does not fall during the period:

(i) commencing on the Monday before 24 December in any given year; and

(ii) ending on the Friday following 1 January of the following year.

**Car** means a single vehicle which forms part of a Set.

**Change in Control** means, in respect of an entity, any event which occurs such that a change occurs in the Control of that entity.

**Change in Disability Law** means a Change in Law the terms of which relate to the ability of persons to access and use the Sets.
Change in Law means:

(a) the amendment, repeal or change of a Law existing at the date of this deed;
(b) the enactment of a new Law; or
(c) a change in the interpretation or application of a Law brought about by:
   (i) the amendment, repeal or change of another Law existing at the date of this deed; or
   (ii) the enactment of a new Law,

which directly affects the interpretation or application of the first mentioned Law,

but excluding any such amendment, repeal, change or enactment of a Law which, as at the date of this deed:

(d) was published or of which public notice had been given (even as a possible amendment, repeal, change or enactment); or
(e) a party experienced and competent in the delivery of works and services similar to the Delivery Phase Activities and the TLS Phase Activities (as applicable) would have reasonably foreseen or anticipated,

in substantially the same form as the amendment, repeal, change or enactment eventuating after the date of this deed.

Change in Railway Law means a Change in Law the terms of which apply to the rail industry, and not to any other industry.

Change in Rail Industry Standards means a change to a Rail Industry Standard coming into effect or implementation, after the date of this deed.

Claim includes any claim, action, demand or proceeding including any claim, action, demand or proceeding:

(a) under, arising out of, or in any way in connection with, any Project Agreement;
(b) arising out of, or in any way in connection with the Project, the Project Activities or either party’s conduct prior to the date of this deed; or
(c) otherwise at law or in equity, including:
   (i) by statute;
   (ii) in tort for negligence or otherwise, including negligent misrepresentation; or
   (iii) for restitution, including restitution based on unjust enrichment.

Claim Event has the meaning given in clause 42.1(a).

Collateral Warranty Deed Poll means a deed poll in the form set out in Part A or Part B (as applicable) of Schedule 17.

Commencement Date means the date on which all Conditions Precedent have been satisfied or waived.

Commercially Sensitive Information means information identified in or of the type referred to in Schedule 2.
Commonwealth means the Commonwealth of Australia.

Compensation Event has the meaning given in clause 24.2.

Completion Documents means:

(a) the TLS Deed;
(b) the MF Works Deed;
(c) a Parent Guarantee given by the Guarantor in the form set out in Schedule 16;
(d) a parent guarantee given by the Guarantor in the form set out in Schedule 21 to the TLS Deed;
(e) a certified copy of the Subcontract between the Supplier and CRRC Changchun Railway Vehicles Co. Ltd;
(f) the Escrow Agreement required pursuant to paragraph 3.1 of Schedule 3;
(g) a Collateral Warranty Deed Poll given by CRRC Changchun Railway Vehicles Co. Ltd in the form set out in Part A of Schedule 17;
(h) evidence that the Supplier has the required Accreditation for all Delivery Phase Activities;
(i) evidence of the Supplier’s AEO status;
(j) a deed of indemnity in the form set out in Schedule 28; and
(k) any other document that the parties agree in writing from time to time is a Completion Document.

Conditions Precedent means the conditions set out in Schedule 1.

Configuration Management Plan means the Project Plan of that name.

Confirmed means, in relation to a document that must be submitted for Review, that the document has been submitted for Review and has been returned marked by the Reviewing Party with a statement 'No comment' in accordance with the Review Procedures or is deemed under the Review Procedures to have been returned marked 'No comment'. Confirmed Document and Confirmed Delivery Program will be interpreted accordingly.

Confirmed Technical Document means a Technical Document that is a Confirmed Document.

Consumable means a consumable Spare or any other consumable materials required to support the maintenance, repair or overhaul of any Asset.

Contamination has the meaning given in the TLS Deed.

Continuous Production Fleet means:

(a) the Initial Fleet; and
(b) if RailCorp (or TfNSW on behalf of RailCorp) elects pursuant to clause 20.3 to purchase any or all of the Option Sets pursuant to that clause, those Option Sets.

Contract Information means Existing Contract Information and New Contract Information.

Control has the meaning given in the Corporations Act.
Controlling Entity means an entity that Controls another entity.

Corporations Act means the Corporations Act 2001 (Cth).

CPI Indexed means, with respect to an amount, the amount must be adjusted in accordance with the indexation process detailed in clause 1.15.

Crew has the same meaning as the expression Train Crew.

CTIP Shore has the meaning given in SPR Appendix 14.

Cure Plan means a Draft Cure Plan or an Approved Cure Plan.

Customers means passengers and all other users and potential users of:

(a) the Network; or

(b) services and facilities associated with the Network.

Danger Zone means the danger zone as defined by the Network Rules.

Date for Provisional Acceptance means, in respect of any Set, the date for Provisional Acceptance of that Set as set out in, or as determined in, Schedule 9, as may be adjusted under this deed.

Date of Final Acceptance of a Set means the date identified by TfNSW's Representative in a Final Acceptance Certificate as the date on which Final Acceptance of the Set was achieved.

Date of Fleet Acceptance means:

(a) in respect of the Continuous Production Fleet, the date identified by TfNSW's Representative in a Fleet Acceptance Certificate as the date on which Fleet Acceptance was achieved; and

(b) in respect of the Non-continuous Production Fleet, the date identified by TfNSW's Representative in a Fleet Acceptance Certificate as the date on which Fleet Acceptance was achieved.

Date of Provisional Acceptance of a Set means the date identified by TfNSW's Representative in a Provisional Acceptance Certificate as the date on which Provisional Acceptance of the Set was achieved.

Day One Clause means each of clauses 1 (Interpretation), 2 (Conditions Precedent), 3 (Objectives, primary obligations and risk allocation), 4.1 (TfNSW's Representative), 4.2 (Appointees of TfNSW's Representative), 4.3 (Directions by TfNSW's Representative), 4.5 (Supplier's Representative), 4.6 (Liability for actions of Supplier's Representative), 7.3(a)(i) (Authorised Engineering Organisation), 7.11 (Key Personnel), 9 (Information Documents), 16 (Project Security), 33 (Representations and warranties), 34 (Dispute resolution), 35 (Records, reporting obligation and privacy), 36 (Disclosure, confidentiality, probity and publicity), 37 (Restrictions on Dealings), 38 (Change in ownership / Control), 39 (Subcontracting), 43 (Notices), 45.2 (Taxes other than GST and duties), 46 (General), Schedule 8 (Dispute Resolution Procedures) and Schedule 14 (Project Security).

Deed of Disclaimer means the Deed Poll titled 'Schedule D6 Deed of Disclaimer', executed by the Supplier on 28 July 2016 in favour of TfNSW and RailCorp.

Default Notice has the meaning given in clause 26.2.

Default Rate means, in respect of a period, a rate equivalent to per annum above the Bank Bill Rate for that period.
Defect means any:

(a) defect, deficiency, shrinkage, fault or omission in an Asset;

(b) other aspect of an Asset which is not in accordance with the requirements of this deed; or

(c) physical damage to an Asset resulting from any such defect, deficiency, shrinkage, fault, omission or non-compliance.

Defect Liability Bond means each Project Bond described in paragraph 2.2(a) of Schedule 14.

Delay LDs has the meaning given to it in clause 15.8.

Delay LDs Cap has the meaning given in clause 32.3(a).

Deliverable means any works, product, software, documentation (including Technical Documents and Technical Packages) or any other item (excluding any Asset) or any service to be provided by or on behalf of the Supplier pursuant to a Project Agreement.

Delivery Milestone means a milestone described in Table 1.2, Table 2.3 or Table 2.4 of Schedule 11.

Delivery Phase means the period from the Commencement Date until the Date of Final Acceptance of the last Set.

Delivery Phase Activities means all things or tasks which the Supplier is, or may be, required to do to comply with its obligations under this deed to design, develop, manufacture, test, commission, supply and deliver the Assets.

Delivery Program means the Program of the Delivery Phase Activities, as updated from time to time in accordance with section 2.1.2 of the SPR.

Delivery Schedule means Schedule 9.

Design Books means the designs for the Assets prepared by the Supplier as part of the Proposal and incorporated into SPR Appendix 12.

Design Development Process means the process for development of the Technical Documents in accordance with the Design Development Requirements.

Design Development Requirements means the requirements described in section 3 of the SPR.

Design Life of an Asset means the period of serviceable use for which it has been designed or any longer period specified in the SPR or this deed (as applicable).

Detailed Design means the design presented at the Detailed Design Review.

Detailed Design Review or DDR means the review conducted in accordance with section 3.5 of the SPR.

Discriminatory Change in Law means a Change in Law the terms of which apply to the:

(a) Project, and not to other rolling stock or rolling stock maintenance projects procured by the State;

(b) Supplier, and not to other persons; or

(c) Maintenance Facility Site, and not to other land.
Dispute means any dispute, difference or controversy under or in connection with any Project Agreement or the Project.

Dispute Resolution Procedures means the procedures for hearing and resolving Disputes set out in clause 34 and Schedule 8.

Disputed Amount has the meaning given in clause 19.7.

Draft Cure Plan has the meaning given in clause 26.3(a).

Draft Minor Defect Rectification Plan means the plan submitted by the Supplier to TfNSW in accordance with clause 14.2(c).

Draft Mitigation Plan has the meaning given in clause 26.4(a).

DTRS Significant Contract means the Significant Contract for digital train radio referred to in paragraph 2 of Schedule 5.

Escrow Agent means an escrow agent approved by TfNSW.

Escrow Agreement means a deed substantially in the form set out in Schedule 19.

Escrow Information means all Source Code for any computer program, computer interface or train operating system screen included in or required for any Asset or Deliverable and includes any software applications required for access to the same.

ETCS has the meaning given in SPR Appendix 14.

Existing Contract Information means any designs, drawings, specifications, documents, software, information, data, methods of working, inventions or any other material or process that:

(a) exists at the Commencement Date; or

(b) is produced after the Commencement Date independently of the Project Agreements,

and which is provided in connection with, is used in the design, development, construction, testing, operation or maintenance of or forms part of any Asset or Deliverable.

Final Acceptance means, in respect of any Set, that the Set complies with the Final Acceptance Criteria applicable to that Set.

Final Acceptance Certificate means, in respect of a Set, a certificate in the form set out in Form 2 in Schedule 22 issued by TfNSW certifying that the Set has achieved Final Acceptance.

Final Acceptance Criteria means, in respect of a Set, the criteria for the issue of a Final Acceptance Certificate relating to it, as set out in Schedule 10.

Final Frequent Breaches Notice means a notice given under clause 26.7(c).

Final Persistent Breach Notice means a notice given under clause 26.6(c).

Financial Year means a period which commences on 1 July and ends on the next 30 June.

First Set Spares List means the list of Spares and Special Tools relevant to the first Set, as set out in the column entitled "First Set Spares List" in the table set out in Schedule 26.

Fleet means:
Fleet Acceptance means:

(a) in respect of the Continuous Production Fleet, that the Continuous Production Fleet complies with the Fleet Acceptance Criteria; and

(b) in respect of the Non-continuous Production Fleet, that the Non-continuous Production Fleet complies with the Fleet Acceptance Criteria.

Fleet Acceptance Certificate means:

(a) in respect of the Continuous Production Fleet, a certificate in the form set out in Form 3 of Schedule 22 certifying that the Continuous Production Fleet has achieved Fleet Acceptance; and

(b) in respect of the Non-continuous Production Fleet, a certificate in the form set out in Form 3 of Schedule 22 certifying that the Non-continuous Production Fleet has achieved Fleet Acceptance.

Fleet Acceptance Criteria means the criteria for the issue of a Fleet Acceptance Certificate as set out in Schedule 10.

Fleet Acceptance Sunset Date (Continuous Production) means, in respect of the Continuous Production Fleet, the date that is three years after the Date of Provisional Acceptance of the last Set in the Continuous Production Fleet.

Fleet Acceptance Sunset Date (Non-continuous Production) means, in respect of the Non-continuous Production Fleet, the date that is three years after the Date of Provisional Acceptance of the last Set in the Non-continuous Production Fleet.

Fleet Gateway has the meaning given in SPR Appendix 14.

Force Majeure Event means each of the following events:

(a) lightning, earthquake, cyclone, natural disaster, landslide, mudslide, fire and explosion;

(b) a flood which might be expected to occur once or less in every 50 years;

(c) war, invasion, act of foreign enemies, hostilities (whether war is declared or not), civil war, rebellion, revolution, insurrection or military or usurped powers, martial law or confiscation by order of any Authority;

(d) a "terrorist act" (as defined in section 3 of the Terrorism Insurance Act 2003 (Cth) as at the date of this deed);

(e) ionising radiations or Contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel; or

(f) a failure of supply of any Utility Service to the Maintenance Facility and Maintenance Facility Site;

(g) Industrial Action within Australia affecting the Project which has been caused by the party that is not the Affected Party; or

(h) state wide or industry wide Industrial Action within Australia excluding any such Industrial Action caused by the Affected Party or its Associates.
which:

(i) is beyond the reasonable control of the Affected Party and its Associates; and

(ii) prevents or delays the Affected Party from performing any of its obligations under this deed (other than an obligation to pay money) where that cause or the consequences of the cause:

(i) has not resulted from the Affected Party breaching a term of any of the Project Agreements; and

(ii) if the Affected Party is the Supplier, could not have been prevented, avoided, remedied or overcome by the Supplier or its Associates taking those steps which a prudent, experienced and competent designer, constructor and maintainer of rolling stock and rolling stock maintenance facilities (as applicable) would have taken.

Frequent Breaches means breaches described in clause 26.7(a), regardless of whether those breaches constitute a Supplier Event of Default.

Frequent Breaches Notice means a notice given under clause 26.7(a).

General Change in Law means a Change in Law other than:

(a) a Change in Law with respect to Tax;

(b) a Discriminatory Change in Law;

(c) a Change in Railway Law; and

(d) a Change in Disability Law.

General Liability Cap has the meaning given in clause 32.1.

Good Industry Practice means that degree of skill, care, prudence, foresight and practice which would reasonably be expected of an expert, skilled and experienced person, engaged in the same or a similar type of undertaking as that of the Supplier or its Associates, as the case may be, under the same or similar circumstances as the implementation of the Project.

Graffiti includes any writing, drawing, painting, street mural, spray painting or other defacement upon any surface of, or in, a Set or the Maintenance Facility Site.

GST has the meaning given in the GST Act.


GST Amount has the meaning given in clause 45.1(c).

GST Supplier has the meaning given in clause 45.1(c).

Guarantor means Downer EDI Limited ABN 97 003 872 848.

Help Desk has the meaning given in SPR Appendix 14.

ICT has the meaning given in SPR Appendix 14.

Importation GST means GST payable pursuant to sections 13-15 of the GST Act.

Incident means an event or occurrence actually or potentially affecting the operation of trains on the Network.
Incident and Security Management Plan means the Project Plan of that name.

Indemnified Party means:

(a) TfNSW;
(b) RailCorp;
(c) the State, including:
   (i) the Minister for Transport and Infrastructure;
   (ii) the Secretary of Transport for NSW; and
   (iii) any other person to whom the State delegates a right, power, function or duty from time to time;
(d) each other entity controlled by the Secretary of Transport for NSW;
(e) each NSW Rail Entity; and
(f) the Operator,
and each of their respective officers and employees.

Independent Expert means:

(a) for the purpose of clause 15.5, one of the persons identified in paragraph 3 of Schedule 8; and

(b) otherwise, an independent expert appointed in accordance with paragraph 1.4(a) of Schedule 8.

Independent Expert Determination Agreement has the meaning given in paragraph 1.4(f) of Schedule 8.

Independent Expert Determination Rules has the meaning given in paragraph 1.4(h) of Schedule 8.

Indicative Network Access Rights means, in respect of each Network Access Year, the Network Access Rights specified for that period in the Verification Plan.

Indirect or Consequential Loss means any loss of opportunity, loss of contract, loss of profit, loss of anticipated profit, loss of business, loss of business opportunities or revenue, loss of goodwill, loss of use or loss of production or any failure to realise anticipated savings.

Industrial Action means industrial action of any description including industrial action involving:

(a) the performance of work in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work, the result of which is a restriction or limitation on, or a delay in, the performance of work;

(b) a ban, limitation or restriction on the performance of work, or acceptance of or offering for work; and

(c) a failure or refusal by any person employed or engaged by the Supplier or its Associates to attend for work.

Information Documents means any information, data, document or material (in any format or medium including any electronic form and whether oral or written) which is:
Transport for NSW (a) referred to in Schedule 6;

(b) issued or made available by, or on behalf of, TfNSW or the State to the Supplier in connection with the RFI, the Procurement Process, the Project Activities or the Project (including anything issued or made available through TfNSW's website) and which at the time of issue (or being made available) was expressly classified or stated to be an "Information Document";

(c) issued or made available by, or on behalf of, TfNSW or the State to the Supplier in connection with the RFI, the Procurement Process, the Project Activities or the Project (including anything issued or made available through TfNSW's website), but which did not form part of the RFI or the Request for Proposals (as applicable), regardless of whether or not it was expressly classified or stated to be an "Information Document"; or

(d) referred to, or incorporated by reference, in an Information Document unless such information, data, document or material is otherwise expressly stated to form part of this deed,

whether issued or made available:

(e) on, before or after the date of submission of the Proposal (including any such information, data, document or material made available as part of the RFI); or

(f) on, before or after the date of execution of this deed,

other than any information, data, document or material which TfNSW is obliged by the terms of this deed to provide to the Supplier and the Supplier is expressly obliged by the terms of this deed to rely on.

Interface Protocol has the meaning given in the TLS Deed.

Initial Fleet means the initial fleet of Sets described in Schedule 9.

Initial Fleet Contract Value is the amount set out in Table 1.1 of Schedule 11, being the Nominal cost of all Sets in the Initial Fleet and the Spares and Special Tools as set out in the Initial Fleet Spares List.

Initial Fleet Set Price means the individual Nominal price per Set as set out in Table 1.1 of Schedule 11.

Initial Project Plans has the meaning given in clause 8.2(b).

Initial Fleet Spares List means the list of Spares and Special Tools relevant to the Initial Fleet, as set out in the column entitled "Initial Fleet Spares List" in the table set out in Schedule 26.

Insolvency Event means, in relation to an entity, the occurrence of any of the following events:

(a) an application is made (other than for a frivolous or vexatious reason) for its winding up and, where an application has been made for the dismissal or withdrawal of the application for winding up within 10 Business Days, the application is not dismissed or withdrawn within 30 Business Days;

(b) an order is made for its winding up, except for the purpose of a reconstruction, amalgamation, merger or consolidation on terms approved by TfNSW before that order is made where the reconstruction, amalgamation, merger or consolidation is implemented in accordance with the terms of the approval;
it passes a resolution for its winding up, except for the purpose of a reconstruction, amalgamation, merger or consolidation on terms approved by TfNSW before that resolution is passed where the reconstruction, amalgamation, merger or consolidation is implemented in accordance with the terms of that approval;

(d) a receiver, receiver and manager, provisional liquidator, trustee for creditors or in bankruptcy or analogous person is appointed to it, or the holder of a Security Interest takes (or appoints an agent to take) possession of, any property of the entity;

(e) it or any other person appoints an administrator to the entity, or takes any step to do so;

(f) it:

(i) suspends payment of its debts (other than as the result of a failure to pay a debt or claim which is the subject of a good faith dispute);

(ii) ceases or threatens to cease to carry on all or a material part of its business;

(iii) is or states that it is insolvent and/or is unable to pay its debts as and when they fall due;

(iv) is taken to fail to comply with a statutory demand in accordance with section 459F of the Corporations Act;

(g) it enters into a readjustment or rescheduling of its indebtedness or makes a general assignment for the benefit of or a composition with its creditors; or

(h) any analogous or similar act or procedure to those referred to above is done or entered into or applied, voluntarily or involuntarily to the entity.

Insurance means the insurances required to be effected and maintained under this deed.

Insurance Proceeds means the insurance proceeds described in clause 30.13(a).

Insurance Proceeds Account means the account referred to in clause 30.13(b).

Intellectual Property Register means the register described in paragraph 1.4 of Schedule 3.

Intellectual Property Rights means all intellectual property rights including the following rights:

(a) patents, copyright, rights in circuit layouts, registered designs, trade marks and any right to have confidential information kept confidential; and

(b) any application or right to apply for registration of any of the rights referred to in paragraph (a),

whether created or coming into existence before, on or after the date of this deed.

Interface Activities means any activities undertaken by Interface Parties at the Maintenance Facility Site.

Interface Party means the Operator, any other contractor engaged by TfNSW, the Operator or another NSW Rail Entity who undertakes Interface Activities at the Maintenance Facility Site or on the Network. It does not include the Supplier or any of its Subcontractors (other than where that Subcontractor is engaged directly by TfNSW, the Operator or another NSW Rail Entity to undertake work that is not under, out of or in connection with the Project Activities).
Investigative Authority means any Authority authorised to undertake investigative action under the Rail Safety National Law, Rail Safety National Regulations or the Transport Safety Investigations Act 2003 (Cth). It includes ONRSR, the Independent Transport Safety Regulator, the Australian Transport Safety Bureau and the Office of Transport Safety Investigations.

ISCA means the Infrastructure Sustainability Council of Australia.

Labour Index means Average Weekly Earnings, New South Wales index (Persons; Full Time; Adult; Ordinary time earnings; New South Wales; ABS Catalogue No. 6302.0 Table 13A).

Law means legislation of the State or the Commonwealth of Australia, including delegated legislation and any document or policy enforceable under such legislation or delegated legislation.

Legal Requirements includes:

(a) Laws;

(b) any decision or requirement, or any similar form of decision or determination (or any official interpretation or administration of any of the foregoing), by any Authority; and

(c) the requirements and conditions of Approvals.

Licensed Intellectual Property means all Intellectual Property Rights and trade secrets and know how comprised in or related to the Project, the Assets and the Deliverables, including the Contract Information.

Life Cycle Cost means the total cost to TfNSW, RailCorp, the Operator and NSW Rail Entities of supply, ownership, operation, maintenance and disposal (both direct and indirect) of the Assets over their Design Life.

Longstop Milestone means, in respect of each Set, the issuance by TfNSW’s Representative of a Provisional Acceptance Certificate for the Set before the date that is 3 months after the Date for Provisional Acceptance for that Set.

Loss means:

(a) any cost, expense (including legal expenses on an indemnity basis), loss, charge, fee, payment (including payment made under any indemnity), damage, liability or other amount; and

(b) without being limited by paragraph (a) and only to the extent not prohibited by law, any fine or penalty,

whether direct, indirect or consequential (including financial or pure economic loss), present or future, fixed, ascertained or unascertained, actual or contingent howsoever sustained, whether in contract, tort, statute or otherwise and, for the avoidance of doubt, it includes Indirect or Consequential Loss.

Maintenance Facility has the meaning given in the TLS Deed.

Maintenance Facility Equipment has the meaning given in the TLS Deed.

Maintenance Facility Licence has the meaning given in the TLS Deed.

Maintenance Facility Site has the meaning given in the TLS Deed.

Maintenance Services has the meaning given in the TLS Deed.

Mandatory Requirements means:
(a) Legal Requirements;
(b) Rail Industry Standards current as at the date of this deed; and
(c) any Change in Rail Industry Standards with which the Supplier is required to comply pursuant to a Variation in the circumstances contemplated by clause 23.6(c)(i),
or any of them.

Materials means any and all equipment, plant, materials, fixtures, furniture, machinery, goods, parts and other items incorporated into or to be incorporated into any Asset.

MDBI has the meaning given in the TLS Deed.

Mediation Cut Off Date has the meaning given in paragraph 1.7(a) of Schedule 8.

MF Completion has the same meaning as "Completion" in the MF Works Deed.

MF Mobilisation Date has the meaning given in the TLS Deed.

MF Works means the works to be undertaken or procured by the Supplier in the Maintenance Facility Site pursuant to the MF Works Deed.

MF Works Activities all things or tasks which the Supplier (as the “Contractor” under the MF Works Deed) is, or may be, required to do to comply with its obligations under the MF Works Deed, including the design, construction, commissioning and hand-over of the MF Works and the provision of temporary works, testing, construction plant and Maintenance Facility Equipment.

MF Works Deed means the "Medium Works Contract" between the Supplier and TfNSW for the provision of the MF Works.

MF Works Delay Event means that the Supplier has not achieved MF Completion in circumstances where:

(a) the original Date for Completion in the MF Works Deed has passed;
(b) the Supplier has been granted an extension of time pursuant to clause 10.10 of the MF Works Deed; and
(c) Minimum Operating Standards for Available Sets has the meaning given in the TLS Deed.

Minor Defect means a Defect which:

(a) in relation to a Set, does not prevent the Set from satisfying the Minimum Operating Standards for Available Sets; and
(b) in relation to an Asset or Deliverable, does not amount to a failure of an Asset or Deliverable to:
   (i) comply with a Mandatory Requirement; or
   (ii) be fit for purpose,
   and in relation to which TfNSW’s Representative determines that the Supplier has reasonable grounds for not promptly rectifying.

Minor Defect Rectification Plan means a plan approved by TfNSW in accordance with clause 14.2(d).
Mitigation Plan means a Draft Mitigation Plan or an Approved Mitigation Plan.

Moneys Owing means all moneys identified as "Moneys Owing" in any Project Agreement which the Supplier, alone or with any other person, at any time is or becomes actually liable to pay to, or for the account of, TfNSW (alone or with any other person) or any TfNSW Associate on any account whatsoever under, or in relation to, any Project Agreement or at law (including by way of principal or interest, fees, costs, charges, expenses, indemnity or damages).

Moral Rights means the right of integrity of authorship (that is, not to have a work subjected to derogatory treatment), the right of attribution of authorship of a work, and the right not to have authorship of a work falsely attributed which rights are created by the Copyright Act 1968 (Cth) and if the works are used in any jurisdiction other than Australia, any similar right capable of protection under the laws of that jurisdiction.

Network has the same meaning as the expression Sydney Metropolitan Network.

Network Access Information means, in respect of a Network Access Right:

(a) the activities the Supplier proposes to carry out during that Network Access Right (including whether persons or equipment will intrude into the Danger Zone and, where applicable, the side of the Set on which the activities will be carried out);

(b) the location or route to be utilised;

(c) the duration (start and end times) of the Network Access Right;

(d) the periods within which the Supplier wishes to utilise the Network Access Right; and

(e) such other details as TfNSW, the Operator or a relevant NSW Rail Entity may reasonably require from time to time.

Network Access Right means:

(a) a Work on Track Authority; or

(b) a Train Run Entitlement.

Network Access Year means:

(a) the 12 month period starting on 1 October 2017; and

(b) each subsequent 12 month period thereafter, up to and including the 12 month period in which the later of the:

(i) Date of Fleet Acceptance in respect of the Continuous Production Fleet; and

(ii) Date of Fleet Acceptance in respect of the Non-continuous Production Fleet,

occurs.

Network Rules means the rules and procedures issued by the Operator from time to time to mandate the requirements for the safe operation of the Network.

New Contract Information means all designs, drawings, specifications, documents, software, information, data, methods of working, inventions or any other material or process created, written, or developed or brought into existence by or on behalf of the Supplier or any of its Subcontractors (whether alone or jointly with any other person) in the performance of the work.
done under this deed and includes any Contract Information which forms part of a Deliverable, but excludes Existing Contract Information.

Nominal means, in respect of a cost or amount, that the stipulated cost or amount already allows for all and any effects of inflation.

Non-continuous Production Fleet means RailCorp (or TfNSW on behalf of RailCorp) elects pursuant to clause 20.4 to purchase any or all of the Option Sets pursuant to that clause, those Option Sets.

Notice has the meaning given in clause 43.

Notice of Arbitration has the meaning given in paragraph 1.7(d) of Schedule 8.

Notice of Dispute has the meaning given in paragraph 1.1(b) of Schedule 8.

Notice of Objection has the meaning given in clause 38.2(b)(ii).

Notifiable Incident means any incident requiring notification to an Authority or regulator under the WHS Law and/or the Rail Safety National Law.

NSW Rail Entity means RailCorp, the Operator, NSW Trains and any other Authority in New South Wales that owns or operates railway infrastructure or rolling stock.

NSW Rail Policies and Standards means a code of conduct, policy or standard relating to the conduct of the Project Activities as issued or published by the Operator, TfNSW or a NSW Rail Entity from time to time. The expression includes:

(a) standards and policies issued by the Asset Standards Authority;

(b) at the date of this deed, all such codes, policies and standards comprised in, or referred to in, the SPR or which are relevant to the Project Activities; and

(c) any amendment or replacement of any of them, from time to time.

NSW Trains means the body corporate known by that name which was constituted as a body corporate under the Transport Administration (General) Regulation 2005 (NSW) and all present and future iterations of that body corporate which continue in existence under the Transport Administration (General) Regulation 2013 (NSW) or any other legislation or another entity appointed to undertake some or all of the functions of that body.

ONRSR means the Authority or other person having jurisdiction in New South Wales from time to time for the purposes of regulation of rail safety and, at the date of this deed, is the Office of the National Rail Safety Regulator.

Open Book Basis means the provision of any pricing, costing and other information required on an open book basis to enable an assessment of actual costs and profit margins, including a breakdown of all relevant preliminaries, offsite and onsite overheads, insurances, labour, equipment, Materials, subcontract costs, margins and, to the extent relevant, discount rates used to calculate present values all in a clear and transparent manner, including provision of reasonably available source documents required to verify the pricing and costs.

Operations and Maintenance Manual means the manual of that name described in section 2.17.2 of the SPR.

Operations Functions means the functions and responsibilities of TfNSW, the Operator and other NSW Rail Entities as passenger transport operators on the Network and elsewhere or as the owners or managers of rail infrastructure or rolling stock.

Operative Provisions means the operative provisions of this deed, being clauses 1 to 46 excluding all schedules and appendices.
Operator means Sydney Trains or such other entity that may be appointed from time to time to operate some or all of the railway passenger services on the Sydney Metropolitan Network.

Option means any of the Variations listed in Schedule 23.

Option Fleet means all of the Option Sets that RailCorp (or TfNSW on behalf of RailCorp) elects to purchase pursuant to clause 20.

Option Fleet (Continuous Production) Contract Value is the sum of the Option Fleet Set Prices for Option Sets purchased in accordance with clause 20.3, plus the Option Fleet Spares Price.

Option Fleet (Non-Continuous Production) Contract Value is the sum of the Option Fleet Set Prices for Option Sets purchased in accordance with clause 20.4, plus the remobilisation cost referred to in Table 2.2 of Schedule 11, and the Option Fleet Spares Price.

Option Fleet Contract Value is the sum of the Option Fleet (Continuous Production) Contract Value and the Option Fleet (Non-continuous Production) Contract Value.

Option Fleet Set Price means:

(a) for Option Sets purchased pursuant to clause 20.3, the individual Nominal price per Option Set as set out in Table 2.1 of Schedule 11; and

(b) for Option Sets purchased pursuant to clause 20.4, the amount calculated in accordance with paragraph 2.2 of Schedule 11.

Option Fleet Spares List means the list of Spares and Special Tools as set out in the column entitled "Option Fleet Spares List(s)" in the table set out in Schedule 26.

Option Fleet Spares Price means the Nominal cost of all Spares and Special Tools identified in an Option Set Notice, calculated by reference to the prices set out in the Option Fleet Spares List.

Option Set FX Base Date means 10:15 am on 18 May 2016, being the date when any applicable foreign currency exchange rates were priced.

Option Set Notice has the meaning given in clause 20.2.

Option Set Order Date means, in respect of each Option Set, the date identified in the column entitled "Option Set Order Date" in the relevant table set out in paragraph 2 of Schedule 9.

Option Set refers to each of the Sets identified as Option Sets in paragraph 2 of Schedule 9.

Original Bond has the meaning given in paragraph 2.4(b) of Schedule 14.

Other Costs are the costs referred to in paragraph 2.3 of Schedule 12.

Other Site has the meaning given in the TLS Deed.

Other Rail Industry Standards means:

(a) all rules, standards, policies, codes of practice or guidelines relating to design of any Asset or Deliverable or the performance of the Project Activities that are referred to in the SPR or which are relevant to the Project Activities; and

(b) any amendment or replacement of any of them, from time to time.

It excludes NSW Rail Policies and Standards.
Panel of Mediators means a panel of qualified mediators nominated at the request of the parties by the President of the Resolution Institute (or by whichever entity subsequently replaces that entity, from time to time).

Parent Guarantee means a deed substantially in the form set out in Schedule 16.

PDCS means TfNSW's web based 'TeamBinder' project data and collaboration system, or such other electronic project data and collaboration system notified by TfNSW's Representative under clause 43.1(b).

Performance Monitoring System or PMS has the meaning given in the TLS Deed.

Permitted Purpose includes any of the following:

(a) completing the design, development, construction, manufacture, testing, commissioning, supply and delivery of;

(b) upgrading;

(c) modifying;

(d) converting;

(e) rebuilding;

(f) performing life extension works to;

(g) testing and monitoring the performance of;

(h) performing alterations to;

(i) maintaining;

(j) using and operating;

(k) repairing;

(l) refurbishing;

(m) replacing; and

(n) overhauling,

any Asset or Deliverable, including for the purpose of conducting a tender to engage, and engaging, a third party to do any of the things listed in this definition, but not including the manufacture of entire Sets.

Persistent Breach has the meaning set out in clause 26.6(a), regardless of whether the breach constitutes a Supplier Event of Default.

Persistent Breach Notice means a notice given under clause 26.6(a).

Personal Information means personal information (as that term is defined in the PPIPA) that is collected, used, disclosed or otherwise handled by the Supplier in the course of or for the purpose of performing its obligations under this deed.

Personnel of an entity, includes all officers, employees, contractors, agents, advisers and consultants of the entity and of the Associates of the entity.

PPIPA means the Privacy and Personal Information Protection Act 1998 (NSW).
PPSA means the *Personal Property Securities Act 2009* (Cth).

Predicted Mass means being the predicted mass of a Set in kilograms.

Prescribed Notice has the meaning given in clause 42.2.

Price Base Date means 30 June 2016.

Privacy Management Plan means a privacy management plan required by section 33 of the PPIPA.

Privacy Obligations has the meaning given in clause 35.8(a).

Probity Entity means the Supplier, any of the Supplier’s Associates, or any of their Personnel.

Probity Event includes any event or thing which occurs before, on or after the date of this deed which:

(a) has a material adverse effect on the character, integrity or honesty of a Probity Entity;

(b) relates to any Probity Entity and has or may have a material adverse effect on the public interest or public confidence, in the Project; or

(c) involves a material failure of a Probity Entity:

(i) to achieve or maintain reasonable standards of ethical behaviour; or

(ii) to avoid conflicts of interest which will have a material adverse effect on the ability of the Probity Entity to carry out and observe its obligations in connection with the Project.

Probity Investigation means any probity or criminal investigation to report on or assess the character, integrity, experience or honesty of a person or entity, including:

(a) investigations into commercial structure, business and credit history, prior contract compliance or any criminal records or pending charges;

(b) interviews of any person or research into any relevant activity that is or might reasonably be expected to be the subject of criminal or other regulatory investigation; and

(c) any involvement of the person or entity in a specified Probity Event.

Proceed at Risk has the meaning given in paragraph 7.2(a) of the Review Procedures.

Proceed at Risk Notice has the meaning given in 7.2(b)(ii) of the Review Procedures.

Procurement Process means the request for proposal process conducted by TfNSW for the selection of a supplier to enter into the Project Agreements and to undertake the Project Activities.

Program means a document setting out the times at which activities under the Project Agreements will occur, and includes the Delivery Program and the Verification Program.

Progress Payment means each progress payment described in paragraph 1.2 of Schedule 11 to be paid or procured to be paid by TfNSW to the Supplier comprising:

(a) each instalment of the Initial Fleet Contract Value identified in Table 1.2 of Schedule 11; and
(b) each instalment of the Option Fleet Contract Value identified in Table 2.3 and Table 2.4 of Schedule 11 (as applicable).

**Project** means:

(a) the design, development, manufacture, testing, commissioning, supply and delivery of new passenger Sets for the Sydney Metropolitan Network;

(b) equipping, maintaining and operating a Set maintenance facility dedicated to the maintenance of those Sets in accordance with the MF Works Deed and the TLS Deed;

(c) maintenance of the Sets and other related Assets in accordance with the TLS Deed; and

(d) the Interface Activities,

and all other works, services or matters pertaining to each of the above, from time to time.

**Project Activities** means all things or tasks which the Supplier is, or may be, required to do to comply with its obligations under the Project Agreements, including the Delivery Phase Activities, the TLS Phase Activities and the MF Works Activities.

**Project Agreement** means each of:

(a) this deed;

(b) each Collateral Warranty Deed Poll executed or required to be executed under this deed;

(c) the Maintenance Facility Licence;

(d) each Parent Guarantee;

(e) the Escrow Agreement;

(f) each Significant Contractor Escrow Agreement;

(g) the TLS Deed;

(h) the MF Works Deed; and

(i) any other document that the parties agree in writing from time to time is a Project Agreement.

**Project Bond** means each of the bonds to be provided by the Supplier to TfNSW under clause 16 and each Renewing Bond and each Replacement Bond that replaces a Project Bond from time to time.

**Project Management Plan** means the Project Plan of that name.

**Project Plan** means each plan, system or strategy listed in section 2 of the SPR, including all subsidiary plans, Programs and supporting documents and information.

**Project Security** means each security required to be provided by the Supplier to TfNSW under clause 16.1.

**Proposal** means the proposal provided by the Supplier in response to the Request for Proposals for the Project Activities dated 2 August 2016. It also includes any amendments or additions to the proposal after that date.
**Provisional Acceptance** means, in respect of a Set, that the Set complies with the Provisional Acceptance Criteria for that Set.

**Provisional Acceptance Certificate** means, in respect of a Set, a certificate in the form set out in Form 1 in Schedule 22 issued by TfNSW’s Representative:

(a) certifying that the Set has achieved Provisional Acceptance; and

(b) listing any Minor Defects.

**Provisional Acceptance Criteria** means, in respect of a Set, the criteria set out in Schedule 10 relating to that Set.

**Public Disclosure Obligations** has the meaning given to it in clause 36.6.

**Qualified Subcontractor** means, in respect of a proposed Subcontractor, that the proposed Subcontractor:

(a) is reputable and:

   (i) capable of performing any relevant obligations in respect of; and

   (ii) has, or has access to, sufficient experience, expertise or ability to perform that part of,

   the Project Activities which are the subject of the applicable Significant Contract Documents to the standard required under this deed;

(b) is solvent and has sufficient financial capacity to implement any relevant part of the Project Activities;

(c) does not have any interest or duty which conflicts in a material way with the interests of the Project and is not involved in any business or activity which is incompatible with, or inappropriate in relation to, the Project; and

(d) has the technical capability and the qualifications, skills and experience including holding all Approvals required to perform the obligations of the Supplier to be subcontracted to at least the standards required by this deed.

**Qualified Worker** means a worker certified under the Rail Safety National Law or by any NSW Rail Entity as competent to carry out the relevant task.

**Qualifying Change in Law** means:

(a) a Discriminatory Change in Law;

(b) a Change in Railway Law;

(c) a Change in Disability Law; or

(d) a General Change in Law which requires the Supplier to modify the Sets.

**Qualifying Cause** has the meaning given in clause 24.1.

**quarter** means any calendar quarter commencing on 1st January, 1st April, 1st July or 1st October in any year.

**Quarter End** means the last day of each quarter.

**Rail Corridor** means the RailCorp Land between the fence-lines either side of the rails or, if there are no fences, the RailCorp Land within 15 metres of the outermost rails.
Rail Industry Standards means either or both of:

(a) NSW Rail Policies and Standards; and

(b) Other Rail Industry Standards.

Rail Infrastructure Facilities has the same meaning as in the Transport Administration Act 1988 (NSW) and includes "rail infrastructure" as that term is defined in the Rail Safety National Law.

Rail Safety National Law means:

(a) the Rail Safety National Law 2012 (NSW) No 82a; and

(b) the Rail Safety National Regulations.

Rail Safety National Regulations means the regulations made under the Rail Safety National Law or the Rail Safety (Adoption of National Law) Act 2012 (NSW).

RailCorp Land means all land owned, leased, occupied or used by RailCorp (and includes any land owned or leased by RailCorp and occupied or used by the Operator) and includes any easements or licences or other legal or beneficial interest in land used in relation to the operation of the Railway. It does not, however, include the Maintenance Facility Site.

RailCorp’s Facilities means all railway track, railway stations, civil works, associated track structures, signalling systems, power supply systems, train control systems, communication systems, equipment, nodes, conduits, ducting, cable, cable support structures and other plant, equipment, buildings or facilities owned, leased, occupied or used by RailCorp (including any railway track, railway stations, civil works, associated track structures, signalling systems, power supply systems, train control systems, communication systems, equipment, nodes, conduits, ducting, cable, cable support structures and other plant, equipment, buildings or facilities owned, leased by RailCorp and occupied or used by the Operator) on, or in relation to, or in any way comprising, any RailCorp Land, and for the avoidance of doubt, includes all Rail Infrastructure Facilities.

Railway means the guided system for transportation of passengers or freight or both (whether or not passengers, freight or both are being transported) on a railway track within the Rail Corridor.

RCTI has the meaning given in clause 45.1(h)(i).

Recipient has the meaning given in clause 45.1(c).

Recovery Plan means a plan that complies with the requirements of clause 15.6(a).

Recurrent Defect means a Defect in an Asset or sub-system of an Asset which:

(a) has the same cause and which, in any rolling 12 month period, affects either:

   (i) 6 or more Sets; or

   (ii) 6 or more of the same sub-systems of any type of Asset; or

(b) TfNSW reasonably believes will, or is reasonably likely to, fulfil the criteria described in paragraph (a) with the passing of time.

Recurrent Defect Rectification Plan has the meaning given in clause 14.3(c).

Rejection Certificate means a certificate issued by TfNSW’s Representative under clause 14.1(g), substantially in the form set out in Form 4 in Schedule 22.
Related Body Corporate has the same meaning as in the Corporations Act.

Release Date means, in respect of a Project Bond, the date specified in paragraph 2.1(b) in Schedule 14 for release of a Project Bond by TfNSW.

Relevant Source Code means all Source Code for any computer program or computer included in or required for any Asset or Deliverable.

Remedial Direction means a direction given by TfNSW's Representative which is directed towards remedying a breach or non-compliance with this deed or addressing the consequences of such a breach or non-compliance.

Remedy means, in respect of a Supplier Event of Default, to remedy or cure the Supplier Event of Default or otherwise overcome the consequences of the Supplier Event of Default.

Renewing Bond has the meaning given in paragraph 2.4(b) of Schedule 14.

Replacement Bond has the meaning given in paragraph 2.5(b) of Schedule 14.

Reputable Insurer means an insurance company having the Required Insurer Rating.

Request for Proposals means the 'Request for Proposals' document issued by TfNSW to various shortlisted parties including the Supplier on 13 May 2016 and it includes all addenda and other supplementary documents to that document.

Required Availability has the meaning given in the TLS Deed.

Required Bond Rating means a credit rating given by Standard and Poor's Australia of at least A- or A3 by Moody's Investors Service, Inc (or an equivalent rating if no rating is provided by Standard and Poor's Australia or Moody's Investors Service, Inc).

Required Insurer Rating means a financial security rating given by Standard and Poor's Australia of at least A- or A3 by Moody's Investors Service, Inc (or an equivalent rating if no rating is provided by Standard and Poor's Australia or Moody's Investors Service, Inc).

Required Reliability has the meaning given in the TLS Deed.

Review of a document means the review of that document in accordance with the Review Procedures.


Review Procedures means the procedures for Review of Submitted Documents described in Schedule 7.

Reviewing Party has the meaning given in the Review Procedures.

RFI means the Request for Information issued by TfNSW on 23 December 2015 in connection with the Project.

Safe Notice means an authorised notice distributed to give advice in addition to that provided in:

(a) the published rules issued by the relevant NSW Rail Entity to mandate the requirements for safe operation in the Network;

(b) the procedures issued by the relevant NSW Rail Entity for the safe conduct of work on the Network; or
(c) publications issued by the relevant NSW Rail Entity to prescribe special safe working arrangements for a location or area.

**Safety Accreditation Strategy** means the strategy of that name described in the Authorisation and Accreditation Plan which meets the requirements of section 2.2 of the SPR.

**Safety Interface Agreement** means an interface agreement, as defined in the Rail Safety National Law, to which the Supplier is, or is required to be, a party.

**Safety Issue** means any safety issue or incident and includes a near miss and a Notifiable Incident.

**Safety Management Plan** means the Project Plan of that name.

**Schedule of Rates** means Schedule 12.

**Secured Party** has the meaning given in clause 42.1.

**Security Interest** means any:

(a) security for payment of money, performance of obligations or protection against default (including a mortgage, bill of sale, charge, lien, pledge, trust, power or title retention arrangement, right of set-off, assignment of income, garnishee order or monetary claim and flawed deposit arrangements);

(b) 'security interest' as defined in the PPSA; and

(c) thing or preferential interest or arrangement of any kind giving a person priority or preference over claims of other persons or creditors with respect to any property or asset,

and includes any agreement to create any of them or allow them to exist.

**Set** means a group of 8 Cars capable of operating as a train in accordance with this deed as more particularly described in SPR Appendix 2, and

(a) **Set 1 or first Set** means the first set to achieve Provisional Acceptance;

(b) **Set 2** means the second set to achieve Provisional Acceptance, and so on; and

(c) **last Set** means the last set to achieve Provisional Acceptance.

**Set-borne Telemetry System** has the meaning given in SPR Appendix 14.

**Set Price** means:

(a) in respect of a Set forming part of the Initial Fleet, the Initial Fleet Set Price; and

(b) in respect of any Option Set, the Option Fleet Set Price.

**Significant Contract** means a Subcontract of the kind specified in Schedule 5.

**Significant Contract Document** means, in respect of each Significant Contractor:

(a) the Significant Contract between the Supplier and the Significant Contractor or between Significant Contractors (as relevant);

(b) if required by TfNSW, a Collateral Warranty Deed Poll in favour of TfNSW and RailCorp;
guarantees or other security in respect of the proposed Significant Contractor's obligations under the Significant Contract, in form and substance reasonably satisfactory to TfNSW; and

if the Significant Contractor has produced or will or may produce Relevant Source Code in the performance of its obligations under its Significant Contract, a Significant Contractor Escrow Agreement between the Significant Contractor, TfNSW, RailCorp and an Escrow Agent.

**Significant Contractor** means the Subcontractor appointed under a Significant Contract.

**Significant Contractor Escrow Agreement** means a deed substantially in the form set out in Schedule 20.

**Source Code** means, in respect of a computer program, the human readable code of that computer program, and includes associated software including scripts and applets (collectively comprised in a complete copy of all of the foregoing in executable code) and all documentation necessary to operate, maintain and modify the executable code copy of that computer program including all technical documentation and specifications in respect of that computer program.

**Spare** means any replacement item which is required to maintain, repair or overhaul any Set or other Asset, including for the replacement of any part, either on a scheduled basis related to time or distance travelled, or as a result of actual or suspected Defect or damage.

**Spare Driver Trailer Car** means a new spare driver trailer Car to be delivered by the Supplier in accordance with paragraphs 1.3(b) and 1.3(c) of Schedule 10 and section 8 of SPR Appendix 02.

**Special Tools** means the special tools set out in Schedule 26 that includes tools, facilities and equipment specifically required for the operation and maintenance of the Sets.

**SPR** means the Scope and Performance Requirements contained in Exhibit 1.

**State** means the State of New South Wales.

**Subcontract** means a contract under which a Subcontractor is engaged to perform any part of the Project Activities.

**Subcontractor** includes a contractor, a supplier of goods or services or a consultant or any of them, and of any tier, involved in performing the Project Activities. It excludes the Supplier.

**Submitted Document** means a document that has been submitted for Review.

**Supplier Event of Default** means a material breach of this deed by the Supplier, including those events referred to in clause 26.1.

**Supplier Related Problem** has the meaning given in the TLS Deed.

**Supplier Group** means the Supplier and any Related Body Corporate identified as a member of the Supplier Group in Schedule 4, and any Related Body Corporate which becomes a member of the Supplier Group while the Supplier is carrying out its obligations under this deed.

**Supplier Termination Event** means any of the events listed in clause 27.1.

**Supplier's Representative** means the person appointed by the Supplier from time to time in accordance with clause 4.5.

**Surviving Clauses** has the meaning given in clause 46.6(a).
Sydney Metropolitan Network or Network means that part of the rail network described in ASA TS TOC.3 2015 issue 2 as used by Sydney Trains to provide passenger services in the metropolitan area.

Sydney Trains means the body corporate known by that name which was constituted as a body corporate under the Transport Administration (General) Regulation 2005 (NSW) and all present and future iterations of that body corporate which continue in existence under the Transport Administration (General) Regulation 2013 (NSW) or any other legislation or another entity appointed to undertake some or all of the functions of that body corporate.

System Definition Review or SDR means the review of the system definition conducted in accordance with section 3.3 of the SPR.

Systems Engineering Management Plan means the Project Plan of that name described in section 2.11.1 of the SPR.

System Verification Review has the meaning given in section 3.7 of the SPR.

Target Contractual Close Date means the date which is 20 Business Days from the date of this deed, or such later date as is agreed by TfNSW in writing, in its absolute discretion.

Tax means any present or future tax, levy, impost, deduction, charge, duty, compulsory loan or withholding, including the GST, (together with any related interest, penalty, fine or expense in connection with any of them) levied or imposed by any Authority and Taxes has a corresponding meaning.

Technical Dispute Matter means a Dispute or an issue or matter in relation to a Dispute about:

(a) an instruction by TfNSW's Representative under clause 1.11(b) in respect of an ambiguity, discrepancy or inconsistency between any of the documents comprising the Project Agreements and a Technical Document;

(b) the results of:
   (i) the outcome of a Verification Activity; or
   (ii) an Unplanned Verification Activity;

(c) whether a Set meets:
   (i) the Provisional Acceptance Criteria; or
   (ii) the Final Acceptance Criteria;

(d) whether the Continuous Production Fleet meets the Fleet Acceptance Criteria;

(e) whether the Non-continuous Production Fleet meets the Fleet Acceptance Criteria

(f) the existence of Minor Defects identified in a Provisional Acceptance Certificate issued in accordance with clause 14.1(f);

(g) required rectification work identified in a Rejection Certificate;

(h) comments provided by a Reviewing Party in respect of a Technical Document, under paragraph 5 of Schedule 7;

(i) whether there has been a change in a TfNSW Policy, Rule or Procedure; or

(j) any other matter which the parties mutually determine, pursuant to paragraph 1.3(a) of Schedule 8, is a Technical Dispute Matter.
Technical Dispute Panel means the panel of experts described in paragraph 2 of Schedule 8.

Technical Documents means all technical documents associated with the specification, design, development, manufacture, verification, operation, maintenance, and disposal of an Asset or Deliverable which the Supplier or any other person requires, or is required to create, as part of, or for the purposes of, performing the Project Activities under the Project Agreements. It includes all technical documents whether they are Existing Contract Information or New Contract Information.

Technical Package means a technical package or component of the works relating to a discrete subsystem of a Set or other Asset or a particular discipline (including any design or subcontract discipline) as permitted under the Design Development Requirements and described in the Systems Engineering Management Plan.

Technical Report means a report described in section 3.9 of the SPR.

Termination Payment means a termination payment calculated in accordance with Schedule 15.

TfNSW Policy, Rule or Procedure has the meaning given in the TLS Deed.

TfNSW’s Representative means the person appointed by TfNSW from time to time in accordance with clause 4.1.

TfNSW Supplied Items means the items set out in Schedule 25.

TfNSW Termination Event has the meaning given in clause 27.5.

Third Party Claim has the meaning given in clause 31.4(a).

Timetable has the meaning given in the TLS Deed.

TLS Deed means the deed entitled "Sydney Growth Trains Project - TLS Deed" between TfNSW, RailCorp and the Supplier, dated on or about the date of this deed.

TLS Phase has the meaning given in the TLS Deed.

TLS Phase Activities has the meaning given in the TLS Deed.

Tool means any tool required for the maintenance, installation, commissioning or testing of an Asset.

Trade Mark Materials means any materials on which the Trade Marks appear or are proposed to appear.

Trade Marks means the trade marks notified by TfNSW to the Supplier from time to time.

Train Control means the control and regulation of rail traffic operating on the Network to ensure the safe and efficient operation of the Network.

Train Controller means a Qualified Worker who authorises and may issue occupancies and proceed authorities, and who manages Train Paths and mechanical control to ensure the safe and efficient transit of rail traffic in the Network.

Train Crew or Crew means a Train Driver or any other person with the skills, training and authorisation to operate, or support the operation of, the Sets.

Train Driver or Driver mean a person with the skills, training and authorisation to operate the Sets.
Train Operating Condition Waiver or TOC Waiver means a notice of changes or exceptions to the requirements specified in the Train Operating Conditions Manual.

Train Operating Conditions Manual or TOC Manual means the manual issued by TfNSW from time to time that prescribes the minimum operating requirements for trains and track vehicles in the Network.

Train Order means an instruction issued by a Train Controller in Train Order Territory to direct the movement of a Set.

Train Order Territory means the portions of rail line where the Train Order system of safe working is used.

Train Path means a series of track segments over a particular time interval through which a Set can travel and may include stopping points and other set down or changeover points.

Train Run means a particular trip by a Set on a Train Path for Verification Activity purposes.

Train Run Entitlement means a right to use the Network for the purpose of conducting a Train Run.

Training means the training referred to in section 2 of the SPR.

Transport Administration Act means the Transport Administration Act 1988 (NSW).

Unplanned Verification Activity means a verification activity required by TfNSW under clause 13.12.

User means:

(a) TfNSW's Personnel;
(b) Operator's Personnel;
(c) Customers;
(d) NSW Rail Entities; and
(e) any other persons or bodies identified as a User by TfNSW's Representative in the course of the Design Development Process.

User Group means a group of Users or a body representing Users as identified in the Project Plans or nominated by TfNSW's Representative for the purposes of consulting with a NSW Rail Entity and the Supplier about the Technical Documents in accordance with the Design Development Process.

Utility Service means any service, facility or item of infrastructure, including water, electricity, gas, ethane, fuel, telephone, drainage, sewerage, railway, industrial waste disposal and electronic communications service.

Vandalism means any malicious, reckless or deliberate damage to any part of a Set by any person other than the Supplier or its Associates, excluding Graffiti.

Variation means any variation to:

(a) the Delivery Phase Activities;
(b) the TLS Phase Activities (other than a change to the Required Availability);
(c) the MF Works Activities;
(d) a Set; or

(e) the Minimum Operating Standards for Available Sets,

including any change, addition, reduction, increase, decrease, omission, deletion, demolition or removal to or from them but, subject to clause 15.5(g)(ii), excluding any increase or decrease in the number of Sets to be designed, manufactured and commissioned by the Supplier under this deed.

Variation Costs means, in relation to a Variation, the direct costs and loss of revenue reasonably arising out of or in connection with the Variation (including any increased design costs, construction costs, manufacturing costs, commissioning costs, maintenance costs or through life support costs), after deducting all cost savings and increases in revenue arising out of or in connection with the Variation (including any savings in relation to design costs, construction costs, manufacturing costs, commissioning costs, maintenance costs or through life support costs).

Variation Order has the meaning given in clause 21.4.

Variation Savings means in relation to a Variation, the amount of Variation Costs if a negative number.

Verification Activity means a verification activity, and Verification Activities means any and all verification activities:

(a) required by the SPR;

(b) identified in the Verification Plan; or

(c) which are otherwise reasonably required for the Supplier to perform its obligations under this deed, including any additional verification of an Asset:

(i) that has previously failed a Verification Activity; or

(ii) after the maintenance or repair of the Asset.

For the avoidance of doubt, it includes Unplanned Verification Activities.

Verification Plan means the Project Plan of that name.

Verification Procedure means the procedure used for Verification Activities which meets the requirements in section 2.16.3 of the SPR.

Verification Program means the Program of the Verification Activities which meets the requirements of clause 13.2(e)(i) and section 2.16.2 of the SPR.

Verification Report means a report (including supporting documentation) on the conduct of a Verification Activity which is provided in accordance with clause 13.11 and which meets the requirements of section 2.16.4 of the SPR.

WHS means work health and safety.


WHS Law means all statutes, regulations and other subordinate legislation or codes of practice in force or that came into force after the Commencement Date in New South Wales in respect of WHS including, the WHS Act and any regulations made thereunder, including the WHS Regulation and all other regulations made under the WHS Act.

WHS Obligations has the meaning given in clause 7.5(a).
WHS Regulation means the Work Health and Safety Regulation 2011 (NSW).

Work on Track Authority means any one of the following authorities to perform work on or in the vicinity of the Network:

(a) an advertised formal authority from the Operator to occupy a closed defined portion of track for a specified period;

(b) a formal authority from a relevant NSW Rail Entity for Qualified Workers and their equipment to occupy a defined portion of track for a specified period; or

(c) a formal authority from a relevant NSW Rail Entity for non-exclusive occupancy of track by Qualified Workers within specified limits.

1.2 Schedule definitions

The definitions in the Schedules apply in this deed unless the relevant term is defined differently in the Operative Provisions, in which case the definition in the Operative Provisions applies.

1.3 Interpretation

In this deed:

(a) headings and subheadings are for convenience only and do not affect interpretation,

and the following rules apply in interpreting this deed, unless the context makes it clear that a rule is not intended to apply:

(b) person includes an individual, the estate of an individual, a corporation, an authority or agency, an association or a joint venture (whether incorporated or unincorporated), a partnership, a trust and other entity;

(c) a reference to a party is to a party to this deed, and a reference to a party to a document includes that party’s executors, administrators, successors and permitted assigns, including persons taking by way of novation or statutory transfer;

(d) a reference to a document or instrument (including this deed) is to that document or instrument as varied, novated, ratified or replaced from time to time;

(e) a reference to any Authority, institute, association or body is:

(i) if that Authority, institute, association or body is reconstituted, renamed or replaced or if the powers or functions of that Authority, institute, association or body are transferred to another organisation, deemed to refer to the reconstituted, renamed or replaced organisation or the organisation to which the powers or functions are transferred, as the case may be; and

(ii) if that Authority, institute, association or body ceases to exist, deemed to refer to the organisation which serves substantially the same purposes or object as that Authority, institute, association or body;

(f) a reference to a statute includes its delegated legislation and a reference to a statute or delegated legislation or any section or provision of either of these includes:

(i) all ordinances, by-laws, regulations of and other statutory instruments (however described) issued under the statute or delegated legislation; and
any consolidations, amendments, re-enactments and replacements;

(a word importing the singular includes the plural (and vice versa), and a word indicating a gender includes every other gender;

a reference to:

(a) a party, schedule, exhibit, attachment, appendix or annexure is a reference to a party, schedule, exhibit, attachment, appendix or annexure to or of this deed;

(b) this deed includes all schedules, exhibits, attachments, appendices and annexures to it, including the SPR; and

(c) a reference to the SPR includes all SPR Appendices;

(i) a reference:

(a) in the Operative Provisions to a clause is a reference to a clause of the Operative Provisions; and

(b) in a schedule, exhibit, attachment, annexure or appendix to a paragraph or annexure, is a reference to a paragraph or annexure of that schedule, exhibit, attachment, annexure or appendix, unless stated otherwise;

if a party is obliged to do something it must do so at its own cost unless expressly provided otherwise in this deed;

any agreement, representation, warranty or indemnity by two or more parties (including where two or more persons are included in the same defined term) binds them jointly and severally, except to the extent that such agreement, representation, warranty or indemnity is in respect of, or related to, any obligation of TfNSW or RailCorp to pay or procure payment to the Supplier in connection with this deed;

any agreement, representation, warranty or indemnity in favour of two or more parties (including where two or more persons are included in the same defined term) is for the benefit of them jointly and severally, except to the extent that such agreement, representation, warranty or indemnity is in respect of, or related to, any obligation of TfNSW or RailCorp to pay or procure payment to the Supplier in connection with this deed, in which case the agreement, representation, warranty or indemnity is for the benefit of the Supplier jointly;

any reference to:

(a) the Project Activities;

(b) an Asset;

(c) the Deliverables;

(d) the Project Plans;

(e) the SPR;

(f) the Technical Documents; or

(g) any other document or thing,

or any part of any of them:

(h) being fit for its purpose or for its intended purpose; or
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(ix) as having an intended use,

(or any similar reference) will be read as referring to the purpose, intended purpose or intended use having regard to any purpose, intended purpose or intended use stated in, contemplated by or ascertainable from:

A. this deed and the other Project Agreements;
B. any document provided by TfNSW to the Supplier on or before the date of this deed;
C. to the extent relevant for determining the purpose, intended purpose or intended use in connection with a Variation, any document provided by TfNSW to the Supplier specifically in connection with the Variation; or
D. the Request for Proposals;

(n) if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;

(o) the letters MF are an acronym for Maintenance Facility when used as part of a defined term;

(p) the meaning of general words is not limited by specific examples introduced by including, for example or similar expressions;

(q) a reference to A$, $A, dollar or $ is to Australian currency;

(r) a word or expression defined in the Corporations Act has the meaning given to it in the Corporations Act;

(s) a reference to time is to Sydney, Australia time;

(t) a month means a calendar month;

(u) a reference to construction includes development, manufacture, supply, installation, integration, testing and commissioning;

(v) a reference to any standard, code, guideline or specification is a reference to the version stated in this deed or, if no version is stated, the version of that standard, code, guideline or specification from time to time;

(w) any reference to information will be read as including information, representations, statements, data, samples, bore logs, calculations, assumptions, deductions, determinations, drawings, design, specifications, models, plans and other documents in all forms including the electronic form in which it was generated; and

(x) any obligation of the Supplier under this deed with respect to a Project Plan, will be read as an obligation with respect to the version of the relevant Project Plan last Confirmed by the Supplier to TfNSW’s Representative under clause 8.

1.4 Rights and benefits of TfNSW

(a) Unless expressly stated otherwise, or as the context otherwise requires, each promise by the Supplier (whether by way of warranty, representation, indemnity, undertaking or other form of obligation or promise) is to be taken to be in favour of TfNSW and to create a right or benefit of TfNSW.

(b) The rights and benefits of TfNSW provided for under this deed and the other Project Agreements are intended to be for, and are held by TfNSW for, the benefit of
TfNSW in its own right to support the discharge of its duties in relation to, and liabilities arising from, the performance of the Operations Functions, and also for the benefit of:

(i) RailCorp as the owner of the Assets; and

(ii) the Operator and the NSW Rail Entities to support the discharge of their respective duties in relation to, and liabilities arising from, the performance of the Operations Functions.

1.5 Benefits held on trust

(a) (Benefit of indemnities): TfNSW holds as trustee and agent for the Indemnified Parties the benefit of:

(i) each indemnity and release given by the Supplier under this deed in favour of the Indemnified Parties;

(ii) each Project Security required to be provided by the Supplier pursuant to clause 16.1; and

(iii) each right in each Project Agreement to the extent that such right is expressly stated to be for the benefit of an Indemnified Party.

(b) (Supplier’s acknowledgment): The Supplier acknowledges the existence of such trusts and consents to:

(i) TfNSW:

A. having recourse to the Project Security, or otherwise enforcing the Project Security, as trustee and agent for and on behalf of the Indemnified Parties; and

B. exercising rights in relation to, or otherwise enforcing such indemnities, releases and other rights on behalf of, the Indemnified Parties;

(ii) TfNSW and RailCorp having recourse to the Project Security, or otherwise enforcing the Project Security, as if the Project Security had been given directly to and for the benefit of the Indemnified Party as a named obligee; and

(iii) each Indemnified Party exercising rights in relation to, or otherwise enforcing the indemnities, releases and other rights as if they were a party to this deed.

(c) (Deemed authority): To the extent that TfNSW does not have actual authority from an Indemnified Party to act as trustee and agent on behalf of the Indemnified Party as contemplated in this clause 1.5, then as between TfNSW and the Supplier, TfNSW will be deemed to have sought and obtained that authority to act as trustee and agent for that Indemnified Party.

1.6 Transfer of functions

The Supplier:

(a) acknowledges that TfNSW or RailCorp may be reconstituted, renamed, dissolved, replaced or restructured and that some or all of the powers, functions, assets, liabilities or responsibilities of either of them may be transferred to or vested in another entity;
(b) without limitation to clause 1.6(a), the Supplier acknowledges that some or all of the powers, functions, assets, liabilities or responsibilities of TfNSW may be transferred to or vested in the Operator;

(c) agrees to do anything (including execute any document), and must procure that its Associates do anything (including execute any document), required to give full effect to any of the matters contemplated in clauses 1.6(a) and 1.6(b); and

(d) shall have no Claim or entitlement to payment of any costs arising from any of the above.

1.7 Nothing to affect rights

Nothing in this deed or any other Project Agreement in any way limits, derogates from or affects any right, power, privilege or immunity in whatever form that TfNSW, RailCorp or any Authority or any other person has or may have under or by virtue of any law and no action for breach of this deed or any Project Agreement will lie against TfNSW or RailCorp for the exercise of any such right, power, privilege or immunity.

1.8 Approvals and consents

(a) TfNSW’s Representative may, in making any decision or exercising any function under this deed, in its discretion:

(i) rely upon and adopt as TfNSW’s Representative’s own opinion, advice from TfNSW or any other person;

(ii) act in accordance with any instruction or direction given to TfNSW’s Representative by TfNSW;

(iii) utilise any information as to rates, costs or margins that the Supplier may have provided to TfNSW prior to or subsequent to entering into this deed;

(iv) rely upon TfNSW’s Representative’s own assessment; or

(v) use a combination of the methods described in clauses 1.8(a)(i) to 1.8(a)(iv) above.

(b) All approvals, consents, decisions or exercises of discretion required (whether expressly or impliedly) or able to be given or made by TfNSW (in its own capacity or on behalf of RailCorp):

(i) relating to the satisfaction of a Condition Precedent pursuant to the terms of this deed;

(ii) about whether to purchase any Option Sets under clause 20; or

(iii) sought in relation to or in connection with, or referable to or determinative of the occurrence of, any Supplier Event of Default or Supplier Termination Event,

may be given, not given, made, not made, exercised, not exercised, withheld or conditioned by TfNSW in its absolute discretion and the Supplier acknowledges that TfNSW and TfNSW’s Representative, in granting any approval or consent or making any decisions or exercising any discretion under or in connection with this deed in relation to such matters, will not assume any duty of care, responsibility or liability to the Supplier or any other person and will not be taken to have agreed that any matter that is the subject of any approval, consent, decision or exercise of a discretion is in compliance with the Project Agreements or the SPR.
1.9 Resolution of ambiguities within this deed

(a) The following order of precedence applies in the event of any ambiguity, discrepancy or inconsistency in, or between, the documents comprising this deed:

(i) if the ambiguity, discrepancy or inconsistency is in or between the SPR and the rest of this deed, the documents will be given precedence in the following order:
   A. this deed (excluding the SPR); and
   B. the SPR;

(ii) to the extent clause 1.9(a)(i) does not apply to or resolve the ambiguity, discrepancy or inconsistency, the document or provision which prescribes or requires the highest standard of performance or more onerous obligation on the Supplier consistent with all Mandatory Requirements will take precedence;

(iii) to the extent clauses 1.9(a)(i) and 1.9(a)(ii) do not apply or resolve the ambiguity, discrepancy or inconsistency and the ambiguity, discrepancy or inconsistency relates to the required quality or standard of an Asset or Deliverable or of the performance of any Delivery Phase Activities, the Supplier must comply with the highest quality or standard specified or perform the more onerous obligation; and

(iv) to the extent clauses 1.9(a)(i) to 1.9(a)(iii) do not apply or resolve the ambiguity, discrepancy or inconsistency and the ambiguity, discrepancy or inconsistency is between figured and scaled dimensions, figured will prevail over scaled dimensions.

(b) The documents comprising this deed are to be regarded as mutually explanatory and anything contained in one but not the others will be equally binding as if contained in all of them.

(c) If an ambiguity, discrepancy or inconsistency of the type described in clause 1.9(a) is discovered by either party, that party must notify the other party as soon as reasonably practicable. TfNSW's Representative will, as soon as reasonably practicable, instruct the Supplier as to the interpretation to be followed so as to resolve the ambiguity, discrepancy or inconsistency in accordance with the rules set out in clause 1.9(a).

1.10 Resolution of ambiguities between Project Agreements

(a) The following order of precedence applies in the event of any ambiguity, discrepancy or inconsistency between the documents comprising the Project Agreements:

(i) the document or provision which prescribes or requires the highest standard of compliance or more onerous obligation on the Supplier consistent with all Mandatory Requirements will take precedence;

(ii) to the extent clause 1.10(a)(i) does not apply to or resolve the ambiguity, discrepancy or inconsistency, the ambiguity, discrepancy or inconsistency relates to the required quality or standard of any or of the performance of any of the Delivery Phase Activities, the Supplier must comply with the highest quality or standard specified or perform the more onerous obligation; and

(iii) to the extent clauses 1.10(a)(i) and 1.10(a)(ii) do not apply to or resolve the ambiguity, discrepancy or inconsistency and the ambiguity,
discrepancy or inconsistency is between figured and scaled dimensions, figured will prevail over scaled dimensions.

(b) If an ambiguity, discrepancy or inconsistency of the type described in clause 1.10(a) is discovered by either party, that party must notify the other party as soon as reasonably practicable. TfNSW's Representative will, as soon as reasonably practicable, instruct the Supplier as to the interpretation to be followed so as to resolve the ambiguity, discrepancy or inconsistency in accordance with the rules set out in clause 1.10(a).

1.11 Resolution of ambiguities between Project Agreement and Technical Documents

(a) If there is any ambiguity, discrepancy or inconsistency between any of the documents comprising the Project Agreements and a Technical Document:

(i) where the ambiguity, discrepancy or inconsistency is between the provisions of a document comprising the Project Agreement and any part of the Technical Documents, the higher standard, quality or quantum will prevail, but if this does not resolve the ambiguity, discrepancy or inconsistency, the Project Agreement will prevail; and

(ii) where the ambiguity, discrepancy or inconsistency is between figured and scaled dimensions, figured dimensions will prevail.

(b) If an ambiguity, discrepancy or inconsistency of the type described in clause 1.11(a) is discovered by either party, that party must notify the other party as soon as reasonably practicable. TfNSW's Representative will, as soon as reasonably practicable, instruct the Supplier as to the interpretation to be followed so as to resolve the ambiguity, discrepancy or inconsistency in accordance with the rules set out in clause 1.11(a).

1.12 No Claim

Any direction given by TfNSW's Representative in accordance with clause 1.9(c), 1.10(b) or 1.11(b) will not:

(a) entitle the Supplier to make any Claim arising out of or in connection with the direction;

(b) relieve the Supplier from or alter its liabilities or obligations whether under any Project Agreement or otherwise according to law; or

(c) prejudice or limit TfNSW's rights against the Supplier whether under a Project Agreement or otherwise according to law.

1.13 No bias against drafter

No provision of this deed is to be interpreted to the disadvantage of a party because that party (or its representative) drafted that provision.

1.14 Excluding liability

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

Unless otherwise expressly provided, a reference to "CPI Indexed" after a monetary amount in a Project Agreement means that the amount will be indexed for movements in the consumer price index in accordance with the following formula:

\[ A \text{ (CPI Indexed)} = A \times \frac{CPI_{Q-1}}{CPI_{\text{base}}} \]

Where:

- \( A \) means the monetary amount originally specified;
- \( CPI_{Q-1} \) means the Consumer Price Index All Groups weighted average for the eight capital cities published by the Australian Bureau of Statistics for the Quarter End following the date that occurs 3 months before the relevant calculation date; and
- \( CPI_{\text{base}} \) means the Consumer Price Index All Groups weighted average for the eight capital cities published by the Australian Bureau of Statistics for the Quarter End ending 30 June 2016, being 108.6.

If either:

(i) the Consumer Price Index All Groups weighted average for the eight capital cities ceases to be published quarterly; or

(ii) the method of calculation of the Consumer Price Index All Groups weighted average for the eight capital cities substantially alters,

then the Consumer Price Index All Groups weighted average for the eight capital cities is to be replaced by the nearest equivalent index as selected in good faith by TfNSW’s Representative and any necessary consequential amendments are to be made.

1.16 Authorities

(a) The Project Agreements will not in any way unlawfully restrict or otherwise unlawfully affect the unfettered discretion of the Operator, TfNSW or any other NSW Rail Entity to exercise any of its statutory functions, duties or powers pursuant to any law.

(b) The Supplier acknowledges that, without limiting clause 1.16(a), anything the Operator, TfNSW or any other NSW Rail Entity does, fails to do or purports to do pursuant to its functions and powers under any law will be deemed not to be an act or omission by the Operator, that NSW Rail Entity or TfNSW (including a breach of contract) under or in connection with the Project Agreements and will not entitle the Supplier to make any Claim against TfNSW, the Operator or the NSW Rail Entity.

(c) Clauses 1.16(a) and 1.16(b) do not limit any liability which any NSW Rail Entity, the Operator or TfNSW would have had to the Supplier under the Project Agreement as a result of a breach by that NSW Rail Entity, the Operator or TfNSW of a term of the Project Agreement but for clauses 1.16(a) and 1.16(b).

(d) The Supplier acknowledges that:

(i) there are many Authorities (other than the NSW Rail Entities) with jurisdiction over aspects of the Delivery Phase Activities, the Network and other areas affected by the Delivery Phase Activities;
such Authorities may from time to time exercise their statutory functions and powers in such a way as to disrupt, interfere with or otherwise affect the Delivery Phase Activities; and

except to the extent expressly stated otherwise in this deed, the Supplier bears the risk of all occurrences of the kind referred to in clause 1.16(d)(ii) and will not be entitled to make, and TfNSW, the Operator and the NSW Rail Entities will not be liable upon, any Claim arising out of or in any way in connection with such occurrences.

1.17 **Reasonable endeavours**

If TfNSW and/or RailCorp are required under the terms of this deed to exercise best or reasonable endeavours, the Supplier acknowledges that:

(a) TfNSW and RailCorp will only be obliged to bring about the relevant outcome to the extent that it is reasonably able to do so, having regard to its resources and other responsibilities;

(b) TfNSW and RailCorp cannot guarantee the relevant outcome; and

(c) TfNSW and RailCorp, by undertaking to exercise best or reasonable endeavours, do not agree to:

(i) interfere with or influence the exercise by any person of a statutory power or discretion;

(ii) exercise a power or discretion or otherwise act in a manner that promotes the objectives and expected outcomes of the Project Agreements if TfNSW or RailCorp regards that exercise as not in the public interest;

(iii) develop policy or legislate by reference only or predominantly to the interests of the Project Agreements;

(iv) procure legislation in the future in a manner that is only consistent with the objectives and expected outcomes of the Project Agreements; or

(v) act in any other way that TfNSW or RailCorp regards as not in the public interest.

2. **Conditions Precedent**

2.1 **Agreement of no effect until Conditions Precedent satisfied**

(a) Subject to clause 2.4, this deed has no effect unless and until each of the Conditions Precedent are satisfied, or waived by TfNSW under clause 2.2, on or before the Target Contractual Close Date.

(b) Within two Business Days of a party becoming aware that any Condition Precedent has been satisfied, that party shall notify the other party.

(c) If the fulfillment of any of the Conditions Precedent requires or would be assisted by the conduct of a party, that party must use all reasonable endeavours to ensure that the condition is fulfilled. Neither TfNSW or RailCorp have any obligation to incur any expense in relation to those endeavours.
2.2 Waiver of conditions

A Condition Precedent is waived only if TfNSW notifies the Supplier of that waiver in writing. TfNSW may stipulate conditions of waiver in any such notice.

2.3 Termination for failure of Conditions Precedent

(a) The Supplier agrees and acknowledges that the Conditions Precedent are for the benefit of TfNSW. The Supplier must satisfy all of the Conditions Precedent on or before the Target Contractual Close Date.

(b) Unless each of the Conditions Precedent has been satisfied by the Supplier, or waived by TfNSW by notice to the Supplier, by 2.00pm on the Target Contractual Close Date:

(i) TfNSW may give Notice to the Supplier that this deed will be taken to have been terminated on the Target Contractual Close Date;

(ii) if TfNSW gives a Notice under clause 2.3(b)(i):

A. this deed will be of no further force or effect; and

B. no party will be entitled to bring any Claim against the other under or in respect of this deed or in respect of the reimbursement of costs and expenses or otherwise in connection with this deed and the Delivery Phase Activities, other than any Claim in relation to a breach of any Day One Clause.

2.4 Day One Clauses

The Day One Clauses commence on the date of this deed.

3. Objectives, primary obligations and risk allocation

3.1 Project objectives

TfNSW’s strategic objectives for the Project are to achieve the following outcomes:

(a) support the NSW Government’s state priority objective of maintaining or improving reliability of public transport services, including providing safe and high quality rail services to customers;

(b) substantially mitigate fleet reliability and availability risks associated with the staged introduction of the Sydney Metro North West integration timetable in October 2017 and October 2018;

(c) improve reliability performance of the fleet and reduce the cost of maintaining the fleet;

(d) improve the customer experience by creating a fully air conditioned suburban fleet;

(e) achieve value for money through both the construction and commissioning phase and whole of life maintenance of the fleet; and

(f) achieve the above objectives whilst minimising financial, delivery and rail operational risks to government.
3.2 Supplier’s primary obligations

On the terms and conditions of the Project Agreements, the Supplier:

(a) must design, develop, manufacture, test, commission, supply and deliver the Sets and other related Assets under this deed; and

(b) will design, procure, supply, install, commission and integrate the MF Works under the MF Works Deed;

(c) will provide the TLS Phase Activities under the TLS Deed;

(d) will provide the Required Reliability and Required Availability under the TLS Deed; and

(e) must provide and, as appropriate, maintain all personnel, equipment and facilities necessary for the effective conduct and management of the Supplier’s obligations under this deed.

3.3 TfNSW’s primary obligations

On the terms and conditions of the Project Agreements, TfNSW agrees:

(a) to procure payment for the Assets; and

(b) to provide the Supplier with access, or procure that access is provided for the Supplier:

(i) pursuant to the MF Works Deed, to the Maintenance Facility Site, for the performance of the MF Works Activities; and

(ii) pursuant to the TLS Deed, to the Maintenance Facility Site for the performance of the TLS Phase Activities.

3.4 RailCorp’s primary obligations

On the terms and conditions of this deed, RailCorp agrees to purchase the Sets and all Spares and Special Tools supplied by the Supplier under this deed.

3.5 Project risks

Except as expressly stated otherwise in the Project Agreements, the Supplier accepts all risks associated with the Project Activities, and will not be entitled to make any Claim against TfNSW or RailCorp arising out of or in connection with those risks.

3.6 Rights do not affect risk allocation

(a) TfNSW has various rights under this deed and the other Project Agreements which are designed to give TfNSW the ability to monitor the performance of the Supplier’s obligations. Those rights include:

(i) the right to Review Project Plans, Technical Documents, Programs, Verification Reports, and other documents which the Supplier must submit to TfNSW for Review;

(ii) rights to inspect, monitor or audit the Project Activities;

(iii) the right to notify the ASA of any non-conformance in the performance of the Project Activities that relates to the authorisation granted by the ASA; and
(iv) rights to attend Verification Activities.

(b) Neither the exercise of, nor the failure to exercise, such rights will:

(i) relieve the Supplier from, or alter or affect, the Supplier's liabilities, obligations or responsibilities whether under any Project Agreement or otherwise according to law;

(ii) prejudice or limit TfNSW's rights, or the rights of the Operator or any other NSW Rail Entity, against the Supplier whether under any Project Agreement or otherwise according to law; or

(iii) without limiting clause 3.6(b)(ii), preclude TfNSW, the Operator or any other NSW Rail Entity, from subsequently asserting that the Supplier has not fulfilled its obligations whether under any Project Agreement or otherwise according to law.

(c) Without limiting clause 3.6(b):

(i) neither TfNSW, the Operator or any other NSW Rail Entity nor TfNSW's Representative assumes or owes any duty of care to the Supplier to review, (or if it does review it, in reviewing), any Submitted Document for errors, omissions or compliance with this deed;

(ii) no Review of, comments upon, or notice in respect of, or any failure to Review, comment upon or give any notice in respect of, any document or any other direction, act or omission of TfNSW, the Operator, any other NSW Rail Entity or TfNSW's Representative will:

A. relieve the Supplier from, or alter or affect, the Supplier's liabilities, obligations or responsibilities whether under any Project Agreement or otherwise according to law;

B. prejudice or limit TfNSW's, the Operator's or any other NSW Rail Entity's rights against the Supplier whether under any Project Agreement or otherwise according to law;

C. constitute an instruction to accelerate, disrupt, prolong or vary any of the Project Activities (unless expressly directed in writing); or

D. affect the time for the performance of TfNSW's or RailCorp's obligations;

(iii) the Supplier will not be relieved from compliance with any of its obligations under any Project Agreement or from any of its liabilities whether under any Project Agreement or otherwise according to law as a result of:

A. compliance with any Project Plan;

B. any audits or other monitoring by TfNSW, the Operator, any other NSW Rail Entity or TfNSW's Representative of the Supplier's compliance with any Project Plan; or

C. any failure by TfNSW, the Operator, any other NSW Rail Entity, TfNSW's Representative or anyone acting on behalf of TfNSW, to detect any non-compliance including where any failure arises from any negligence on the part of TfNSW, the Operator, any other NSW Rail Entity, TfNSW's Representative or any other person;
(iv) neither TfNSW, the Operator, any other NSW Rail Entity nor TfNSW's Representative assumes or owes any duty of care to the Supplier to inspect, or if it does so inspect, the Project Activities, the Assets or the Deliverables for errors, omissions or compliance with the requirements of any Project Agreement; and

(v) any inspection of the Project Activities (or lack of inspection) by or on behalf of TfNSW, the Operator, any other NSW Rail Entity or TfNSW's Representative will not in any way:

A. relieve the Supplier from, or alter or affect, the Supplier's liabilities, obligations or responsibilities whether under any Project Agreement or otherwise according to law; or

B. prejudice or limit TfNSW's rights, or the rights of the Operator or any other NSW Rail Entity, against the Supplier whether under any Project Agreement or otherwise according to law.

3.7 No Claim regarding TLS Phase Activities or MF Works Activities

Except to the extent expressly stated otherwise in this deed, the Supplier shall not be entitled to, and must not make, any Claim, including any claim:

(a) for an extension of time to the Date for Provisional Acceptance of a Set; or

(b) regarding the responsibility for a Defect,

against TfNSW or RailCorp in respect of any damage, expense, Loss or Claim brought against, suffered or incurred by the Supplier arising out of or in any way in connection with any act or omission of the Supplier or any of the Supplier's Associates relating to the TLS Phase Activities or the MF Works Activities.

4. Governance

4.1 TfNSW's Representative

(a) TfNSW must appoint and retain a natural person to be TfNSW's Representative under the Project Agreements.

(b) TfNSW may at any time by notice to the Supplier replace TfNSW's Representative with another person.

(c) TfNSW's Representative:

(i) may exercise all the powers, duties, discretions and authorities to be exercised by TfNSW's Representative under all Project Agreements and does so as the agent of TfNSW (and not as an independent certifier, assessor or valuer); and

(ii) will have the full power and authority to act for and on behalf of and to bind TfNSW under all the Project Agreements.

4.2 Appointees of TfNSW's Representative

(a) TfNSW's Representative may:

(i) by notice to the Supplier, appoint persons to exercise any of the functions of TfNSW's Representative under any of the Project Agreements. The notice of appointment shall set out the functions that may be exercised by the appointee. The Supplier acknowledges and
agrees that a purported exercise by TfNSW's Representative's appointee of a function outside of those functions delegated to the appointee and notified to the Supplier is not binding on TfNSW;

(ii) not appoint more than one person to exercise a specific function at any one time;

(iii) revoke any appointment under clause 4.2(a)(i) by notice to the Supplier; and

(iv) continue to exercise a function under a Project Agreement despite appointing another person to exercise the function under clause 4.2(a)(i) (provided that any directions of TfNSW's Representative take precedence over those of any appointees to the extent of any inconsistency).

(b) All references in a Project Agreement to TfNSW's Representative include a reference to an appointee under this clause 4.2.

4.3 Directions by TfNSW's Representative

(a) If, pursuant to a provision of a Project Agreement enabling TfNSW's Representative to give directions, TfNSW's Representative gives a direction, the Supplier must comply with the direction.

(b) TfNSW's Representative may give a direction requiring the Supplier:

(i) to comply with an obligation imposed on the Supplier by or in relation to a Project Agreement;

(ii) to take a step which will support the compliance by the Supplier with an obligation imposed on the Supplier by or in relation to a Project Agreement; or

(iii) to decline or cease to take a step which may prejudice the Supplier's ability to comply with an obligation imposed on the Supplier by or in relation to a Project Agreement.

(c) TfNSW's Representative may, as part of the direction or subsequent to the direction, prescribe a date by which the direction must be complied with.

(d) Despite any other provision of this deed, TfNSW's Representative may give a direction orally but must confirm it in writing as soon as practicable.

4.4 TfNSW's Representative's right to inspect

(a) The Supplier must itself, and must procure that its Subcontractors, permit TfNSW's Representative and its nominees on reasonable notice, at any time, to access their respective premises in order to carry out an inspection or audit as contemplated under clause 4.4(b).

(b) After giving notice under clause 4.4(a), TfNSW is entitled to audit, inspect, examine, copy and (subject to clause 13) test:

(i) the materials, goods, workmanship and work methodology employed at any place where the Project Activities are being, have been, or are to be carried out, and all related documentation, systems and certification; or

(ii) the suitability of and/or the Supplier's compliance with:

A. the Project Plans; and
B. the obligations of the Supplier under this deed:

(c) The Supplier must, at its own cost:

(i) make available suitable management representatives and guides to enable TfNSW's Representative and nominees to perform the audits, inspections, examinations or tests required in an efficient and effective manner;

(ii) provide all necessary access to all records and documentation reasonably required for the audits, inspections, examinations or tests; and

(iii) make available suitable office facilities, with telephone, internet and photocopying facilities.

(d) If at any time, pursuant to an audit, inspection, examination or test under this clause 4.4, TfNSW's Representative determines that a Project Plan or the Supplier's performance of any aspect of the Project Activities does not comply with the requirements of this deed, TfNSW's Representative may notify the Supplier of the details of the non-conformance and issue a Remedial Direction.

(e) The Supplier must permit TfNSW to conduct further audits, inspections, examinations or tests to verify whether the Supplier has complied satisfactorily with the Remedial Direction.

4.5 Supplier's Representative

(a) The Supplier must appoint and retain a natural person to be the Supplier's Representative under the Project Agreements.

(b) The Supplier's Representative:

(i) may exercise all the powers, duties, discretions and authorities to be exercised by the Supplier's Representative under all Project Agreements and does so as the agent of the Supplier; and

(ii) must have the full power and authority to act for and on behalf of and to bind the Supplier under all the Project Agreements.

(c) The Supplier must ensure that the Supplier's Representative has full authority to execute the directions of TfNSW's Representative without delay.

(d) On reasonable notice from TfNSW's Representative, the Supplier's Representative must attend any ad hoc or regular meetings required by TfNSW's Representative and must provide reports and make any presentations that TfNSW's Representative reasonably requests, to either:

(i) demonstrate the Supplier's compliance with any Project Plan or any other system required to comply with this deed; or

(ii) discuss other matters of importance to the conduct or progress of the Supplier's Activities.

(e) TfNSW may direct the replacement of the Supplier's Representative if, in TfNSW's Representative's opinion:

(i) the Supplier's Representative is not performing, or is not reasonably competent or capable to properly perform, the duties of the Supplier's Representative; or
4.6 Liability for actions of Supplier's Representative

The Supplier is bound by and deemed to have knowledge of:

(a) notices or documents signed by the Supplier's Representative;

(b) matters within the knowledge of the Supplier's Representative; and

(c) acts, omissions and defaults of the Supplier's Representative, whether or not the Supplier's Representative was acting within the scope of its authority at the time of the act, omission or default.

4.7 TfNSW's obligations limited

(a) The Supplier must give TfNSW's Representative reasonable advance notice if the Supplier requires any information, materials, documents or instructions from TfNSW's Representative or TfNSW under this deed.

(b) The Supplier acknowledges and agrees that, unless expressly provided to the contrary in this deed:

(i) neither TfNSW nor TfNSW's Representative will be obliged to provide any information, materials, documents or instructions requested by the Supplier under clause 4.7(a); and

(ii) if TfNSW does not provide the relevant information, materials, documents or instructions, the Supplier will not be entitled to:

A. delay the progress of any part of the Project Activities; or

B. make any Claim against TfNSW.

4.8 No legal effect

Section 4 of the SPR describes the governance bodies established by the parties for the purpose of the Project. The governance bodies referred to in section 4 of the SPR are consultative and advisory bodies only and nothing which occurs during a meeting of such bodies will:

(a) affect the rights or obligations of either party under the Project Agreements;

(b) entitle a party to make any Claim against the other;

(c) relieve a party from, or alter or affect, a party's liabilities or responsibilities whether under a Project Agreement or otherwise according to law;

(d) prejudice a party's rights against the other whether under a Project Agreement or otherwise according to law; or

(e) be construed as a direction by a party to do or not do anything.

5. Mandatory Requirements and Approvals

5.1 Mandatory Requirements

The Supplier must:
perform (and procure any Subcontractors to perform) the Delivery Phase Activities in accordance with; and

(b) ensure that:

(i) the Sets on Provisional Acceptance; and

(ii) all Spares and Special Tools provided under clause 12.3,

are in accordance with,

all applicable Mandatory Requirements.

5.2 Supplier to obtain Approvals

(a) Except to the extent expressly stated otherwise in this deed, the Supplier must:

(i) obtain (or procure) and maintain all Approvals required for the Supplier or its Associates to perform the Delivery Phase Activities;

(ii) comply with, carry out and fulfil, and ensure its Subcontractors comply with, carry out and fulfil, the requirements of all such Approvals;

(iii) not cause TfNSW, the Operator or any other NSW Rail Entity to fail to comply with, carry out or fulfil the requirements of any Approval that TfNSW, the Operator or the NSW Rail Entity is expressly or impliedly under the terms of the Approval required to comply with, carry out or fulfil;

(iv) pay all fees, effect all Insurances, provide any security and execute any undertakings or agreements or any other document required by any relevant Authority in respect of any Approval which the Supplier must obtain, maintain or comply with (and ensure that the Supplier's Subcontractors do likewise in relation to any Approvals which they must obtain, maintain or comply with in connection with the Delivery Phase Activities).

(b) The Supplier indemnifies TfNSW, the Operator and each other NSW Rail Entity against any Loss suffered by any of them arising out of or in any way in connection with a failure by the Supplier to comply with its obligations under this clause 5.2.

5.3 Supplier to assist TfNSW

The Supplier must provide TfNSW, the Operator and all other relevant NSW Rail Entities with all reasonable assistance to enable each of them to:

(a) comply with all applicable Mandatory Requirements; and

(b) obtain or satisfy or fulfil the conditions and requirements in respect of any:

(i) Approvals which are obtained by any of them; or

(ii) conditions and requirements of Approvals which are required to be satisfied or fulfilled by them,

relating to the Delivery Phase Activities and the Project.
5.4 Communications with Authorities

Except to the extent directed otherwise by TfNSW’s Representative, the Supplier must give TfNSW’s Representative copies of all documents (including notices, orders or directions) and details of all other communications relating to the Project Activities that are:

(a) received by the Supplier or the Supplier’s Associates from an Authority (including Approvals and other notices in connection with the Rail Safety National Law, the Rail Safety National Regulations or any Accreditation held by the Supplier or its Associates) as soon as possible after they are received by the Supplier or the Supplier’s Associate; or

(b) given by the Supplier or the Supplier’s Associate to an Authority at the time that those documents are given to the Authority.

5.5 Submission of documents

If the Supplier (or an Associate) is required under this deed to prepare for submission, or submit, any documents to an Authority to obtain an Approval, or pursuant to an Approval, the Supplier must:

(a) provide TfNSW’s Representative with a copy of those documents for Review before they are submitted to the Authority;

(b) consider any comments made by TfNSW on Review of the documents; and

(c) if the documents are to be submitted by TfNSW or the Operator, deliver a final version of the documents to TfNSW or the Operator (as applicable) in order to enable TfNSW or the Operator (as applicable) to submit the relevant document to the Authority on time.

5.6 Supplier to comply with notices from Authority

The Supplier must comply with any requirement, notice, order or direction received from or given by any Authority in connection with the Project Activities, including any infringement notice, fine or penalty.

6. Rail Safety

6.1 Acknowledgement by the Supplier

The Supplier acknowledges that:

(a) the Operator and the NSW Rail Entities (each an Accredited Person) may need to obtain variations to existing Accreditations (if any) in accordance with the requirements of the Rail Safety National Law and the Rail Safety National Regulations in order to facilitate delivery of the Project (Accreditation Variations);

(b) a failure to obtain, or delay in obtaining, the Accreditation Variations will have a significant adverse impact on the ability of the Accredited Persons to fulfil the Operations Functions;

(c) at the date of this deed, ONRSR’s requirements in relation to the Accreditation Variations are not yet fully known, and are likely to evolve over time;

(d) the process for obtaining the Accreditation Variations will be an iterative one, and will require the Supplier to cooperate flexibly and responsively with the Accredited Persons;

(e) ONRSR will require the safety management systems of the Accredited Persons to:
(i) cover all relevant aspects of the Project Activities; and

(ii) include measures to address safety risks arising from the Project Activities and their interfaces with related activities of the Accredited Persons including appropriate measures regarding competency, communication, risk management and continuous improvement; and

(f) it is in the interests of the Accredited Persons, the Supplier and ONRSR for Accreditation Variation Applications to be coordinated effectively.

6.2 Coordination of Accreditation Variation Applications

Having regard to the acknowledgements by the Supplier in clause 6.1, the Supplier must:

(a) deal with TfNSW's Representative as the single point of contact for the Supplier in providing input to Accreditation Variation Applications;

(b) subject to clause 6.2(a), cooperate in good faith with and do all things reasonably necessary to enable and assist the Accredited Persons to obtain all relevant Accreditation Variations, including by:

(i) preparing and submitting to TfNSW's Representative;

A. all Accreditation Variation Documents;

B. all supporting documentation and certificates referred to in clause 6.3(b); and

C. any other information and documentation that TfNSW's Representative may reasonably require in connection with the Accreditation Variation,

in a timely manner and when directed by TfNSW's Representative (subject to reasonable prior notice being given by TfNSW's Representative) and in a form reasonably required by TfNSW's Representative; and

(ii) responding to queries or requests by TfNSW's Representative within the periods reasonably required by TfNSW's Representative; and

(c) not do, or omit to do, anything which may hinder or delay an Accredited Person from obtaining an Accreditation Variation.

6.3 Supplier to prepare documents

(a) The Supplier must develop and submit to TfNSW's Representative for Review, draft and final Accreditation Variation Documents that are in accordance with:

(i) the Supplier's Safety Accreditation Strategy;

(ii) the Rail Safety National Law;

(iii) the safety management systems of the Accredited Persons (as the case may be);

(iv) any requirements of ONRSR for the Accreditation Variation Document; and

(v) the other requirements of any Project Agreement.
(b) Each Accreditation Variation Document submitted by the Supplier for Review must be accompanied by:

(i) supporting documentation in such form as TfNSW may reasonably require which demonstrates how the Accreditation Variation Document complies with the requirements of clause 6.3(a); and

(ii) a certificate from an appropriately qualified person issued on behalf of the Supplier stating that the Accreditation Variation Document complies with the requirements of clause 6.3(a).

(c) If ONRSR rejects or requires changes to, or further information in respect of, an Accreditation Variation Application, the Supplier must, if requested by TfNSW's Representative, promptly make the necessary changes to the Accreditation Variation Documents and/or provide the further information.

6.4 Continuing obligation

From the Commencement Date, the Supplier must (and must ensure that the Supplier's Subcontractors):

(a) cooperate with the Accredited Persons, and do everything reasonably necessary to enable each of them to:

(i) maintain any Accreditation; and

(ii) comply with their other obligations under the Rail Safety National Law and in relation to rail safety, to the extent that their Accreditation or rail safety obligations are affected by the Project Activities;

(b) not do, or omit to do, anything which may:

(i) cause an Accredited Person to breach any term of its Accreditation; or

(ii) cause the Accreditation of an Accredited Person to be suspended or cancelled; and

(c) give ONRSR access to such premises and information as ONRSR lawfully requests to fulfil its functions with respect to the Project and the Project Activities, within the time requested.

6.5 Supplier's rail safety obligations

In carrying out the Delivery Phase Activities:

(a) the Supplier must (and to the extent the Delivery Phase Activities are performed by any Subcontractor, it must ensure that the Subcontractor does):

(i) hold any necessary Accreditation to carry out any railway operations (as defined in the Rail Safety National Law) that are comprised in or form part of the Delivery Phase Activities; and

(ii) comply with the conditions of that Accreditation; and

(b) the Supplier must (and, to the extent the Delivery Phase Activities are performed by any Subcontractors, it must ensure that the Subcontractors) act as a rail transport operator and comply with any obligations of a rail transport operator they have under the Rail Safety National Law and Rail Safety National Regulations,
and to the extent that any Subcontractor is engaged in or in connection with the Delivery Phase Activities in circumstances where subsection 62(1)(b) of the Rail Safety National Law applies, the Supplier must ensure that it is able to comply at all times with its obligations under this clause.

6.6 Supplier's Personnel
The Supplier must ensure that all the Supplier's Personnel:

(a) are competent to carry out the work for which they are engaged for the purposes of section 117 of the Rail Safety National Law; and

(b) comply with their obligations under the Rail Safety National Law.

6.7 TfNSW to cooperate
TfNSW must provide all reasonable cooperation to the Supplier:

(a) in connection with the Supplier's obligations under clause 6.2 and clause 6.3; or

(b) that the Supplier reasonably requires to obtain any Accreditation, or a variation to its Accreditation, or to fulfil its obligations under the Rail Safety National Law, in connection with the Delivery Phase Activities,

by making available relevant information in its possession or control (or procuring another Accredited Person to make available information in its possession or control) if reasonably requested to do so by the Supplier, but only to the extent that the information is not readily available to the Supplier from another source.

6.8 Cooperation with Investigative Authorities
The Supplier must:

(a) give all Investigative Authorities such access to premises and information as the Investigative Authority lawfully requests, within the time requested;

(b) cooperate with and respond to any other lawful requests made by any Investigative Authority, within the time requested; and

(c) not hinder or delay any Investigative Authority in carrying out its duties.

6.9 Supplier's obligations not limited
The obligations of the Supplier under this clause 6 are in addition to and are not intended to limit the other obligations of the Supplier under this deed or pursuant to any Legal Requirements, including the Supplier's obligations under clauses 5, 7 and 8.

6.10 Alert Events
(a) The Supplier must notify TfNSW's Representative immediately upon becoming aware of any matter that may cause an Alert Event.

(b) If the Supplier becomes aware of an Alert Event occurring, the Supplier must, at its cost:

(i) immediately inform TfNSW's Representative of the Alert Event;

(ii) keep TfNSW's Representative informed about the Alert Event; and
(iii) provide TfNSW’s Representative with sufficient information to enable TfNSW’s Representative to assess the nature of the Alert Event and the likely effect of the Alert Event on:

A. the Railway, RailCorp’s Facilities and any RailCorp Land;
B. the safety of the Operator’s passengers, station patrons or representatives of TfNSW or the Operator; and
C. the operation of the Railway.

(c) If any Alert Event causes:

(i) the Railway, RailCorp’s Facilities and any RailCorp Land;
(ii) the safety of the Operator’s passengers, station patrons or representatives of TfNSW or the Operator; or
(iii) the operations of the Railway,

then to be at risk (as determined by TfNSW in its absolute discretion), the Supplier must:

(iv) immediately co-operate with TfNSW requests in respect of the Alert Event (including by ceasing to carry out that part of the Project Activities in respect of which the Alert Event applies and, if applicable, ceasing any Network Access Rights or vacating the Rail Corridor); and
(v) at its cost assist TfNSW and/or the Operator to take such action as TfNSW directs is necessary to avert any danger and ameliorate the risk.

(d) Neither TfNSW’s rights nor the Supplier’s liabilities or obligations, whether under this deed or otherwise according to law, in respect of Alert Events, will be limited by the terms of this clause 6.10.

6.11 Safety Interface Agreements

The Supplier must:

(a) subject to clause 6.11(b) enter into Safety Interface Agreements with Interface Parties where required by the Rail Safety National Law; and
(b) prior to execution of any Safety Interface Agreement, submit a draft of the Safety Interface Agreement to TfNSW for Review.

7. Supplier’s general obligations

7.1 SPR

In the performance of the Delivery Phase Activities, the Supplier must comply with the SPR.

7.2 All work included

Except as stated in this deed, the Supplier has allowed for the provision of all work, materials and equipment necessary for the performance of the Delivery Phase Activities, whether or not expressly mentioned in this deed. All such work and materials:

(a) must be undertaken and provided by the Supplier at its own cost;
(b) form part of the Delivery Phase Activities and shall not constitute a Variation; and
(c) will not entitle the Supplier to make a Claim except as expressly provided for in this deed.

7.3 Authorised Engineering Organisation

(a) The Supplier must:

(i) obtain prior to the Commencement Date; and

(ii) maintain at all times during the performance of the Delivery Phase Activities,

AEO authorisation from the Asset Standards Authority for all the engineering services defined in SPR Appendix 8.

(b) The Supplier acknowledges that the Asset Standards Authority will assess, and is the body empowered to grant, AEO status to the Supplier to carry out the Delivery Phase Activities in accordance with SPR Appendix 8, including on the basis of the procedures of, and undertakings given by, the Supplier and the Supplier's Subcontractors as set out in the Project Plans referred to in clause 8.

7.4 Work health and safety

(a) The Supplier must, and must ensure that the Supplier's Personnel, carry out the Delivery Phase 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.

(b) The Supplier must, and must (as relevant) ensure that the Supplier's Personnel carrying out the Delivery Phase Activities under this deed in Australia:

(i) comply with all Mandatory Requirements and other requirements of this deed for work health, safety and rehabilitation management;

(ii) without limiting clause 7.4(b)(i), comply with their respective obligations under the WHS Law;

(iii) without limiting clauses 7.4(b)(i) and 7.4(b)(ii), comply with their obligations under the WHS Law to consult, cooperate and coordinate activities with all other persons who have a WHS duty in relation to the same matter;

(iv) at all times, identify and exercise all necessary precautions to ensure the health and safety of all persons including the Supplier's Personnel, TfNSW's Personnel, the Operator's Personnel and members of the public who may be affected by, or by the performance or purported performance of, the Delivery Phase Activities;

(v) pay all fees and charges payable under the WHS Law in connection with the provision of the Delivery Phase Activities;

(vi) where the Supplier is engaged, appointed or declared to act in a specific capacity for the purposes of the WHS Law, comply with and discharge the obligations under the WHS Law that are applicable to that engaged, appointed or declared capacity;

(vii) when attending, and prior to carrying out the Delivery Phase Activities at any site owned or managed by TfNSW, the Operator or any other NSW
Rail Entity, complete (at the Supplier's cost) any WHS induction process/training provided by TfNSW, the Operator or the NSW Rail Entity and thereafter comply with all Mandatory Requirements relating to WHS and rehabilitation management at those sites;

(viii) when TfNSW's Personnel or the Operator's Personnel attend a site managed or controlled by the Supplier, provide:

A. TfNSW, the Operator or the relevant Associate with sufficient information regarding any hazards or risks associated with the sites or the Delivery Phase Activities which may affect TfNSW's Personnel or the Operator's Personnel; and

B. the Personnel themselves with site induction training, and sufficient information, training and supervision to ensure that they are able to carry out their work without risk to health or safety arising from the sites or the Delivery Phase Activities;

(ix) comply with any reasonable directions on WHS given by TfNSW's Representative;

(x) comply with any directions on a Safety Issue by any relevant Authority or by TfNSW's Representative within any timeframe specified;

(xi) immediately notify TfNSW's Representative and the relevant Authorities of any Notifiable Incident and promptly notify TfNSW of any other Safety Issue;

(xii) notify TfNSW's Representative as soon as possible of any visit to any site or premises at which the Supplier is carrying out the Delivery Phase Activities of any union or union official investigating WHS concerns or of any visit by an Authority for any reason;

(xiii) provide TfNSW's Representative with copies of all notices and correspondence (including from an Authority, union, union official or health and safety representative) concerning WHS Law within two Business Days of the date on which any such notice or correspondence was either dispatched or received;

(xiv) unless otherwise directed by TfNSW's Representative, conduct an investigation into the circumstances of a Safety Issue promptly after the Safety Issue occurs;

(xv) unless otherwise directed by TfNSW's Representative, promptly notify TfNSW of the outcome of an investigation into any Safety Issue;

(xvi) if requested, promptly provide to TfNSW's Representative any documents related to or created in respect of an investigation into a Safety Issue;

(xvii) do all things necessary to assist TfNSW and refrain from doing anything that may impede TfNSW in discharging its obligations under the WHS Law;

(xviii) institute systems to obtain regular written assurances from each Significant Contractor about their ongoing compliance with WHS Law as applicable including the due diligence obligations contained therein;

(xix) provide TfNSW's Representative with the written assurances referred to in clause 7.4(b)(xviii), together with written assurances from the Supplier.
about the Supplier's ongoing compliance with the WHS Law as applicable;

(xx) provide TfNSW's Representative with a written report of all work health, safety and rehabilitation matters as TfNSW's Representative may require from time to time;

(xxi) cooperate and coordinate with all Interface Parties and TfNSW to ensure that all parties are able to comply with their respective obligations under the WHS Law;

(xxii) exercise a duty of utmost good faith to TfNSW, RailCorp and the Operator in carrying out the Delivery Phase Activities to enable TfNSW, RailCorp and the Operator to discharge their respective duties under the WHS Law;

(xxiii) ensure that it does not do anything or fail to do anything that may cause TfNSW, RailCorp or the Operator to be in breach of the WHS Law; and

(xxiv) ensure that each Subcontract includes provisions equivalent to this clause 7.4.

(c) The Supplier must liaise, cooperate and confer with TfNSW, RailCorp, the Operator and any other party nominated by TfNSW, as and when reasonably required by TfNSW or the Operator or if required for the proper performance of the Supplier's obligations under this deed, for the purpose of:

(i) ensuring that the Delivery Phase Activities can be performed safely and without risk to health; and

(ii) eliminating or minimising the risk to WHS which may arise from the design or manufacture of the Sets.

(d) Without limiting the Supplier's obligations in this clause 7.4, the Supplier must ensure that the Delivery Phase Activities occurring outside of the Commonwealth of Australia are performed consistently with all applicable laws and legal requirements in those jurisdictions in which the Delivery Phase Activities are being performed.

(e) Without limiting any duties or obligations under the Rail Safety National Law, the Supplier must ensure, so far as is reasonably practicable, that the Sets are designed to be, manufactured to be, and are, without risks to the health and safety of persons:

(i) who use the Sets for a purpose for which they are designed or manufactured;

(ii) who store the Sets;

(iii) who carry out any reasonably foreseeable activity in relation to the Sets for a purpose for which they are designed or manufactured or for the proper storage, decommissioning, dismantling or disposal of the Sets;

(iv) who are in the vicinity of and are exposed to the Sets; and

(v) whose health or safety may be affected by a use or activity referred to in this clause 7.4(e).

7.5 WHS audit

(a) Without limiting TfNSW's rights to conduct an audit under any other term of this deed, the Supplier must conduct itself, or allow TfNSW or another third party
appointed by TfNSW to conduct, audits of the Supplier's (and any Subcontractor's) compliance with its health and safety obligations:

(i) under this clause 7; and
(ii) under all applicable WHS Laws,

(WHS Obligations) from time to time as required by TfNSW.

(b) If the Supplier is required to conduct an audit under clause 7.5(a), it must do so within the time reasonably required by TfNSW's Representative, and promptly provide a report to TfNSW on the outcome of the audit.

(c) If TfNSW conducts an audit under clause 7.5(a), the Supplier must give TfNSW and TfNSW's Personnel (including internal and external auditors and advisers) full access at all reasonable times and on reasonable notice to:

(i) data, records and other information in the possession or control of the Supplier or any of its Associates reasonably required by TfNSW to conduct the audit; and

(ii) the Supplier's Personnel for the purposes of obtaining information for the audit.

(d) If an audit identifies any breach of the WHS Obligations, the Supplier must, within a reasonable time, given the nature of the breach, and at its own cost, do all things necessary to remedy that breach and provide to TfNSW documented evidence of the corrective actions taken.

7.6 Preventions of nuisance and interference

In performing the Delivery Phase Activities, the Supplier must:

(a) prevent nuisance and unreasonable noise, dust, vibration and disturbances; and

(b) not interfere with the passage of people and vehicles, access to any premises, car parks, roads or pedestrian ways or the operations or activities carried out on or adjacent to the Maintenance Facility Site, except to the extent and for such period that such interference is required for purposes of public health or safety or is not reasonably avoidable.

7.7 Industrial relations

(a) The Supplier must, in performing the Delivery Phase Activities, report to TfNSW any grievance or dispute relating to industrial relations or WHS matters that may impact the carrying out of the Delivery Phase Activities within 24 hours of it becoming aware of the grievance or dispute, and provide TfNSW with full and regular updates about the steps being taken to resolve such grievance or dispute.

(b) The Supplier must comply with all applicable:

(i) statutory obligations;

(ii) court and tribunal orders, directions, decisions and contract determinations; and

(iii) industrial instruments (including awards and enterprise agreements, whether registered or unregistered),

and will ensure the Supplier's Personnel in connection with the Delivery Phase Activities are paid and receive at least the minimum wages and conditions as
provided for by the applicable order, industrial instrument, contract determination or other relevant statutory obligation.

(c) The Supplier must take reasonable steps to resolve Industrial Action which adversely affects, or has the potential to adversely affect, the carrying out of the Delivery Phase Activities.

(d) The Supplier must take reasonable steps to prevent or bring to an end any unprotected Industrial Action which is happening, is threatened, impending or probable, or is being organised, and which may impact the carrying out of the Delivery Phase Activities, including by pursuing legal action where possible.

7.8 Supply of Training

(a) The Supplier must submit all training packages and manuals to TfNSW for Review, and otherwise comply with its obligations as set out in section 2 of the SPR.

(b) All Training provided by the Supplier must be suitable and sufficient to enable TfNSW, the Operator any other NSW Rail Entities, their employees and other relevant persons under the authority of TfNSW, the Operator or any other NSW Rail Entity to safely and efficiently use the Sets or any other Assets for their intended purposes.

7.9 Cooperation and coordination with Interface Parties

(a) The Supplier:

(i) acknowledges that:

A. the Delivery Phase Activities may interface with the Interface Activities; and

B. Interface Parties may require the Supplier to provide information to them to coordinate the Interface Activities with the Delivery Phase Activities and this must be provided in a timely manner by the Supplier;

(ii) must fully cooperate with the Interface Parties, and do everything reasonably necessary to:

A. facilitate the Interface Activities, including providing Interface Parties with such assistance as may be directed by TfNSW's Representative;

B. ensure the effective coordination of the Delivery Phase Activities with the Interface Activities;

C. carefully coordinate and interface the Delivery Phase Activities with the Interface Activities; and

D. perform the Delivery Phase Activities so as to minimise any interference with or disruption or delay to the Interface Activities;

(iii) must be responsible for coordinating the Delivery Phase Activities, including work sequencing, testing and commissioning, safety and industrial relations matters with those affecting, and influenced by, Interface Parties' Personnel and work;

(iv) must attend coordination meetings chaired by TfNSW's Representative with Interface Parties and others at such times as may be reasonably
required by TfNSW's Representative, to review current and future issues;

(v) must promptly advise TfNSW's Representative if the Supplier becomes aware of any matter arising out of the liaison with Interface Parties that may have an adverse effect upon the Delivery Phase Activities; and

(vi) if required by Law, must enter into a Safety Interface Agreement.

(b) TfNSW will not be liable upon any Claim by the Supplier arising out of or in any way in connection with the Interface Parties carrying out Interface Activities.

7.10 Personnel

(a) The Supplier must ensure that the Supplier's Personnel engaged in or in connection with the Delivery Phase Activities are:

(i) competent, experienced, appropriately qualified and obtain and maintain any applicable or appropriate qualifications and training; and

(ii) to the extent required by any Mandatory Requirement, are qualified and trained to meet the requirements of the Supplier's Accreditation and this deed.

(b) If requested by TfNSW at any time, the Supplier must provide records and any other relevant evidence of qualifications, training and certification of the Supplier's Personnel.

(c) The Supplier must pay all wages, salaries, benefits and entitlements and all income, payroll, sales and similar taxes, in relation to all Supplier's Personnel whether or not the liability results from the Supplier entering into the Project Agreements.

(d) The Supplier must, at all times, have and maintain personnel with sufficient skills to properly perform and manage the Delivery Phase Activities including all required activities related to programming, budgeting, inspecting, fault finding, repairing and maintaining for safety and serviceability.

(e) Any of the Supplier's Personnel involved with the Delivery Phase Activities who are present in Australia may, at the direction of TfNSW, be subjected to selective or random sample testing as required by TfNSW in relation to alcohol or drugs. The testing and any costs of testing are the responsibility of the Supplier and the Supplier must have procedures in place to facilitate this requirement.

(f) If the result from any testing of any person exceeds any of the cut off levels prescribed in TfNSW's alcohol and drugs policy and procedures from time to time or if a person refuses to undertake a test, then that person is not to continue work and must be immediately removed from any work site by the Supplier until TfNSW's Representative notifies the Supplier that the person may return.

(g) If, in TfNSW's opinion, any of the Supplier's Personnel:

(i) do not have the necessary qualifications or Approvals;

(ii) do not otherwise display the level of competence necessary to carry out the Delivery Phase Activities safely or in accordance with the requirements of the Project Agreements; or

(iii) act in a manner materially detrimental to safety or TfNSW's public image and reputation,
TfNSW may require the Supplier to order the relevant Personnel to cease performing the Delivery Phase Activities.

(h) TfNSW's Representative may, acting reasonably, direct the Supplier to remove any person from the performance of the Delivery Phase Activities.

(i) The Supplier must ensure that any person the subject of a direction under clause 7.10(g) or clause 7.10(h) is not again involved in the performance of the Delivery Phase Activities.

7.11 Key Personnel

The Supplier must:

(a) employ those personnel specified in paragraph 2 of Schedule 4 in the positions specified in paragraph 2 of Schedule 4;

(b) if no name has been specified for a particular position in paragraph 2 of Schedule 4, promptly employ in that position a person:

(i) possessing at least the experience, ability and expertise required in relation to the relevant job, as set out in the "Position Description Attributes" section of paragraph 2 of Schedule 4; and

(ii) approved by TfNSW's Representative (such approval not to be unreasonably withheld);

(c) subject to clause 7.11(d), not replace any person in a position specified in paragraph 2 of Schedule 4 without the prior written approval of TfNSW's Representative; and

(d) if any person in a position specified in paragraph 2 of Schedule 4 dies, becomes seriously ill or resigns from the employment of the Supplier, replace, him or her with a person:

(i) possessing at least the experience, ability and expertise required in relation to the relevant job, as set out in the "Position Description Attributes" section of paragraph 2 of Schedule 4; and

(ii) approved by TfNSW's Representative (which approval must not be unreasonably withheld, except in the case of the Supplier's Representative).

7.12 Supplier Documentation

The Supplier warrants that the documentation required to be supplied and maintained by the Supplier under this deed:

(a) will sufficiently, adequately and accurately document the Project, the operation of the Project and any interfaces with the Project;

(b) will be sufficient, adequate and accurate so as to enable the Operator or a NSW Rail Entity to operate and maintain the Assets and otherwise carry out the Operations Functions; and

(c) will be fit for its purposes.
7.13 Transport planning

(a) The Supplier acknowledges that the State or any Authority may make policy decisions in relation to the development and implementation of transport planning in New South Wales as it sees fit. Nothing in the Project Agreements restricts this.

(b) The Supplier must participate as reasonably required by any NSW Rail Entities in the development and implementation of transport planning. This participation may involve:

(i) attending meetings, consultation forums and other similar events;

(ii) reviewing and contributing to the development of proposals and strategies put forward by the State or other transport operators and stakeholders;

(iii) providing comments on the impact of proposals and strategies on the Project; and

(iv) cooperating in good faith in the implementation of TfNSW’s public transport policy objectives, as notified to the Supplier.

(c) The Supplier will have no entitlement to make any Claim against any NSW Rail Entity or the State with respect to any consequence of the State, a NSW Rail Entity or any Authority exercising, or not exercising, any right or power in relation to the development and implementation of transport planning in New South Wales, except as expressly provided in this deed.

8. Project Plans

8.1 Purpose

The intended purposes of the Project Plans are:

(a) to demonstrate to TfNSW that the Supplier has the understanding, capacity and capability at all times to perform the Project Activities safely and in accordance with the requirements of the Project Agreements;

(b) to ensure that the Assets and Deliverables comply with the requirements of this deed;

(c) to define responsibilities, resources and processes for planning, performing and verifying that the Project Activities satisfy the requirements of the Project Agreements; and

(d) to allow TfNSW to understand how the Supplier will achieve the performance outcomes and objectives specified in this deed and otherwise fulfil its obligations under the Project Agreements.

8.2 Initial Project Plans

(a) The Supplier must develop, submit for Review and implement Project Plans in accordance with the requirements of this deed and the SPR.

(b) Initial versions of certain Project Plans are included in SPR Appendix 11 (Initial Project Plans).

(c) The Supplier must submit initial versions of the remaining Project Plans for Review at the times required by SPR Appendix 7.
Updated Project Plans

The Supplier may update its Project Plans from time to time but must:

(a) review and, if necessary, update each Project Plan to take account of events or circumstances which will, or may, affect the Project Activities relevant to the Project Plan, including:

(i) Variations;

(ii) Changes in Law; and

(iii) any breach or potential breach of the warranty in clause 8.4;

(b) without limiting clause 8.3(a), update each Project Plan at the times required by SPR Appendix 7;

(c) promptly submit each updated Project Plan to TfNSW’s Representative for Review;

(d) not update any Project Plan in a manner which makes TfNSW’s obligations under any Project Agreement more onerous or increases any liability or potential liability of TfNSW or its Associates in connection with the Project; and

(e) ensure that any updated Project Plans:

(i) impose standards, levels of service, scope and requirements that are equal to, greater than or higher than those imposed by; and

(ii) provide an equal or greater level of detail than, the previous versions of the Project Plans.

Fitness for purpose

The Supplier warrants that each Project Plan will at all times be fit for purpose.

Review of Project Plans

TfNSW’s Representative may (but is not obliged to) Review any Project Plan submitted under this clause 8.

TfNSW may request updates

If, at any time:

(a) any Project Plan does not comply with the requirements of the Project Agreements; or

(b) the Supplier has not updated any Project Plan in accordance with the requirements of clause 8.3(a) or clause 8.3(b).

TfNSW’s Representative may by notice request that the Supplier amend or update the Project Plan specifying:

(c) the reasons why the Supplier must update the plan (or why the Project Plan does not comply with this deed); and

(d) the time within which the Supplier must update the plan (which must be reasonable, having regard to the amount of work required).
and the Supplier must:

(e) amend or update the Project Plan as requested by TfNSW to comply with the requirements of the Project Agreements; and

(f) submit the amended or updated Project Plan to TfNSW for Review within the time specified under clause 8.6(d).

8.7 Permitted use, implementation and compliance

Without limiting any other provision of this deed, the Supplier:

(a) subject to clause 8.7(b), must implement and comply with, and ensure that the Supplier's Subcontractors comply with, the Initial Project Plans; and

(b) must:

(i) implement and comply with each Project Plan; and

(ii) not use any plan unless it is a Project Plan, which is a Confirmed Document.

9. Information Documents

9.1 Supplier investigations

(a) The Supplier warrants, and for all purposes it will be deemed to be the case, that prior to the date of this deed, the Supplier:

(i) examined:

A. this deed (including the SPR) and the Project Agreements;

B. the Maintenance Facility Site and its surroundings;

C. Other Sites proposed to be used by the Supplier in the performance of the Delivery Phase Activities, and their surroundings;

D. the Information Documents;

E. any other information, data, document or material that was made available in writing by TfNSW or any other person on TfNSW's behalf to the Supplier or its Associates; and

F. all information, data, documents and material otherwise available regarding the Project Activities and the Assets;

(ii) was given the opportunity prior to submitting its Proposal to itself undertake, and to request others to undertake, tests, enquiries and investigations:

A. relating to the subject matter of the Information Documents and any other information, data, document or material that was made available in writing by TfNSW or any other person on TfNSW's behalf to the Supplier or its Associates and, for this purpose, was given all access that was reasonably required; and
B. for design purposes and otherwise;

(iii) has undertaken its own independent review and evaluation of the suitability and accuracy of, the information referred to in clauses 9.1(a)(i) and (ii) without any reliance on TfNSW;

(iv) examined, and relied solely upon its own assessment, skill, expertise and enquiries in respect of, all information relevant to the risks, contingencies and other circumstances having an effect on its Proposal and its obligations under the Project Agreements;

(v) satisfied itself as to the correctness and sufficiency of its Proposal and that it has made adequate allowance for the costs of complying with all of its obligations under the Project Agreements and of all matters and things necessary for the due and proper performance and completion of the Project Activities;

(vi) informed itself of all matters relevant to the employment of labour and all industrial matters at the Maintenance Facility Site and all Other Sites the Supplier proposes to use for the performance of the Delivery Phase Activities;

(vii) had a sufficient opportunity to obtain and obtained all the necessary legal and other technical advice in relation to the terms of this deed, the Deed of Disclaimer, the Information Documents, the site conditions, as well as the risks, contingencies and other circumstances having an effect on its Proposal, the performance of its obligations and its potential liabilities under this deed; and

(viii) undertook sufficient site visits, tests, enquiries and investigations, had sufficient information and obtained a sufficient understanding of the risks involved to enable it to make an informed decision about whether or not to enter into this deed and assume the obligations and potential risks and liabilities which it imposes on the Supplier.

9.2 Information Documents

(a) Without limiting clause 9.3 or the warranties and acknowledgements in any Deed of Disclaimer, the Supplier acknowledges and agrees that neither TfNSW, its Associates nor any other person acting on behalf of or associated with any of them:

(i) has verified, or has any obligation to verify, the accuracy, adequacy, efficacy, suitability, reliability, completeness or current application of:

A. the Information Documents; or

B. any other information, data, document or material that was made available in writing by TfNSW or any other person on TfNSW's behalf to the Supplier or its Associates; or

(ii) warrants, guarantees, assumes any duty of care or other responsibility for or makes any representation about the accuracy, adequacy, efficacy, suitability, reliability, completeness or current application of:

A. the Information Documents;

B. any other information, data, document or material that was made available in writing by TfNSW or any other person on TfNSW's behalf to the Supplier or its Associates;

C. any of the Project Agreements;
D. any transaction or arrangement contemplated under any of the Project Agreements;

E. any other matter relevant to the Supplier's decision to enter into the Project Agreements; or

F. any other drawings, plans, design specifications, reports or other information or data which relate, directly or indirectly, to the Project Activities.

(b) Without limiting clause 9.3 or the warranties and acknowledgements in any Deed of Disclaimer, the Supplier acknowledges and agrees that:

(i) the Information Documents, and all Intellectual Property Rights in the Information Documents, will remain the property of TfNSW or any of its Associates (as the case may be);

(ii) the Information Documents did not constitute an invitation, offer or recommendation by or on behalf of TfNSW or any of its Associates;

(iii) whether or not an Information Document or any part thereof forms a schedule or appendix to this deed, the Information Document or part thereof does not form part of this deed and clause 9.3 applies to the Information Document or part thereof; and

(iv) where an Information Document or any part thereof forms a schedule or appendix to this deed, it does so only for the purposes of identification of that document or part thereof.

9.3 Supplier warranty

(a) The Supplier:

(i) warrants that it did not in any way rely upon:

A. any Information Document;

B. any other information, data, representation, statement, document or material made or provided by TfNSW or any other person on behalf of TfNSW to the Supplier or its Associates or any other information, data, representation, statement, document or material for which TfNSW is responsible or may be responsible whether or not obtained from TfNSW or anyone on behalf of TfNSW; or

C. the accuracy, adequacy, efficacy, suitability, completeness or current application of such Information Document or other information, data, representation, statement, document or material,

for the purposes of entering into the Project Agreements or carrying out the Delivery Phase Activities but nothing in this paragraph will limit or otherwise affect the Supplier's obligations under the Project Agreements;

(ii) warrants that:

A. it enters into the Project Agreements and has agreed to satisfy the requirements in the Project Agreements based on its own evaluations, investigations, interpretations, deductions, information and determinations;
the Supplier and any of its Associates have relied absolutely on their own opinion and professional advice based upon their own independent analysis, assessment, investigation and appraisal in deciding to enter into the Procurement Process and to enter into the Project Agreements; and

C. neither the Supplier nor any of its Associates have relied in any way on the skill or judgment of TfNSW, any Associates of TfNSW or any person acting on behalf of or associated with any of them in deciding to enter into the Procurement Process and the Project Agreements;

(iii) acknowledges and agrees that no statement, representation, term, warranty, condition, promise or undertaking made, given or agreed to by TfNSW, its Associates or any person acting on behalf of or associated with any of them in any prior negotiation, arrangement, understanding or agreement is of any effect except to the extent expressly set out or incorporated in any of the Project Agreements;

(iv) agrees that the acknowledgments under this clause 9.3 are in addition to and, to the extent not inconsistent, do not replace the terms and conditions already agreed to or accepted by the Supplier, any of the Supplier's Associates, or the Supplier's Personnel when receiving the Information Documents;

(v) acknowledges that it is aware that TfNSW and RailCorp entered into this deed relying upon:

A. the warranties, acknowledgements and agreements in clauses 9.3(a)(i) to (iv); and

B. the warranties and acknowledgements in the Deed of Disclaimer and the Proposal; and

(vi) acknowledges and agrees that it will not be relieved of any liability or responsibility under any Project Agreement because of the provision by the Supplier of any documents or any other data or information to TfNSW prior to the date of this deed.

9.4 Liability

The Supplier releases and indemnifies TfNSW and RailCorp from and against:

(a) any Claim against TfNSW or RailCorp by, or liability of TfNSW or RailCorp to, any person; or

(b) (without being limited by clause 9.4(a)) any Loss incurred by TfNSW or RailCorp, arising out of or in any way in connection with:

(c) the provision of, or the purported reliance upon, or use of, the Information Documents to or by the Supplier or any other person to whom the Information Documents are disclosed by the Supplier or a failure by TfNSW or RailCorp to provide any information to the Supplier;

(d) any breach by the Supplier of clauses 9.1 to 9.3; or

(e) the Information Documents being relied upon or otherwise used in the preparation of any information or document, including any Information Document which is "misleading or deceptive" or "false and misleading" (within the meaning of those terms in sections 18 and 29 (respectively) of the Australian Consumer Law in
10. Maintenance Facility Site

The Supplier acknowledges and agrees that it is given access to the Maintenance Facility Site:

(a) to perform the MF Works Activities pursuant to the MF Works Deed; and

(b) pursuant to the Maintenance Facility Licence granted in accordance with the TLS Deed:

(i) to conduct Verification Activities under this deed; and

(ii) to perform the TLS Phase Activities pursuant to the TLS Deed.

11. Design

11.1 Design

The Supplier must design the Assets and Deliverables in accordance with:

(a) the Design Development Requirements;

(b) the SPR;

(c) all Mandatory Requirements;

(d) all Approvals;

(e) the Systems Engineering Management Plan;

(f) any Variation directed by TfNSW; and

(g) all other requirements under the Project Agreements.

11.2 Purpose of integrated Design Development Process

The Supplier acknowledges and agrees that:

(a) the purpose of the Design Development Process is to:

(i) optimise the design of the Sets, Asset Information System, Performance Monitoring System and the Asset Management System; and

(ii) develop, refine and finalise all the Technical Documents through to Confirmed Document status in accordance with the Design Development Requirements and the terms of this deed;

(b) due to the nature of the Delivery Phase Activities, the Design Development Process will be progressive and will involve, amongst other things, appropriate consultation with User Groups;

(c) the Design Development Process is a consultative process between the Supplier, TfNSW and User Groups;

(d) the Supplier has sole responsibility to manage and coordinate, and must provide all resources required for the conduct of, the Design Development Process;
(e) TNSW is relying on the skill, expertise and judgement of the Supplier in the development of the Technical Documents;

(f) the Supplier has sole responsibility to ensure that the Technical Documents are fit for purpose and conform in all other respects with the SPR and with the Supplier’s other obligations under this deed; and

(g) the Design Development Process does not of itself constitute a Variation or entitle the Supplier to make any Claim arising out of or in connection with the Design Development Process.

11.3 Design Books

(a) The Supplier acknowledges that prior to the date of this deed it prepared the Design Books. The Supplier agrees that it bears absolutely all risks howsoever they may arise as a result of the use by the Supplier of, or the reliance by the Supplier upon, the Design Books in performing the Delivery Phase Activities and that the use and reliance on the Design Books will not limit any of its obligations under this deed.

(b) The Supplier is responsible for, and assumes the risk of, any Loss it suffers or incurs arising out of or in connection with:

(i) the design, manufacture and supply of the Assets in accordance with the Design Books costing more than or taking longer than anticipated; and

(ii) any differences between the Design Books and the Assets, works or other Deliverables that are actually required to satisfy the requirements of this deed (ignoring for this purpose any differences which are the subject of a Variation Order) and irrespective of any assumptions, projections, estimates, contingencies or otherwise that the Supplier may have made in relation to the Design Books.

(c) The Supplier warrants that:

(i) if the Assets are designed and constructed in accordance with the Design Books, the Assets will satisfy the requirements of this deed (but nothing in this clause 11.3(c)(i) affects or limits clauses 11.3(a) or 11.3(b), which will prevail to the extent of any inconsistency); and

(ii) the Detailed Design of the Assets, as developed in accordance with this deed, will, subject to clause 11.3(d), be consistent with the design of the Assets set out in the Design Books.

(d) The Supplier:

(i) must not depart from the Design Books in the development of the Detailed Design without the prior written consent of TfNSW’s Representative;

(ii) acknowledges and agrees that TfNSW’s Representative may refuse to provide the consent referred to in clause 11.3(d)(i) if, in TfNSW’s Representative’s reasonable opinion, a departure proposed by the Supplier to the designs of the Assets set out in the Design Books is not consistent with the design intent in the Design Books, including if the departure may:

A. increase Life Cycle Costs of the Assets; or

B. reduce the performance of the Assets including:

   1) capacity;
2) quality of the Customer experience and amenity;
3) quality of the Crew amenity;
4) safety;
5) aesthetics, cleanliness, condition and visible features;
6) Design Life;
7) maintainability;
8) durability, including resistance to Graffiti and Vandalism;
9) reliability;
10) whole of life performance;
11) environmental performance;
12) sustainability performance;
13) functional performance; or
14) security.

11.4 Design warranties

The Supplier warrants that:

(a) it has checked and carefully considered and understands the SPR and the Information Documents and that:

(i) it has satisfied itself as to the completeness, correctness, accuracy, appropriateness, suitability and adequacy of the SPR;

(ii) it has satisfied itself that there are no omissions, ambiguities, discrepancies or inconsistencies in or between the documents comprising the SPR;

(iii) the SPR is proper, adequate and fit for its intended purpose including for the purpose of enabling the Supplier to carry out the Delivery Phase Activities in accordance with, and to ensure that the Assets and all other Deliverables comply with, this deed;

(iv) it will be fully and exclusively responsible and liable for all risks howsoever they may arise as a result of the use by the Supplier of, or reliance upon, the SPR; and

(v) the use of, or reliance upon, the SPR does not affect any of its obligations under this deed or entitle the Supplier to make any Claim against TfNSW arising out of or in any way in connection with the SPR;

(b) the Technical Documents will:

(i) satisfy the requirements of the SPR and the other requirements of this deed; and
be fit for purpose including the purpose of enabling the Supplier to complete its design, development, procurement, manufacturing, testing, commissioning, supply, construction and operations obligations under this deed, including by ensuring that upon Provisional Acceptance, each Set will be fit for purpose and be designed for its Design Life; and

(c) the warranties given in this clause 11.4 will not be affected by the termination (for any reason) of this deed.

11.5 Preparation, submission and Review of Technical Documents

(a) The Supplier must prepare and submit Technical Documents to TfNSW for Review which:

(i) are required to fully evidence that:

A. contract requirements (including Variations) and all Supplier derived system requirements:

1) are satisfied by the design of the Assets and the Deliverables;

2) will be and have been implemented by the manufacture and/or construction of the Assets; and

3) in each case, have been verified;

B. Defects have been investigated and rectified;

C. hazards and risks in relation to, or in connection with, the Project Activities have been mitigated so far as is reasonably practicable;

D. configuration changes have been fully implemented;

E. the objectives for Reviews of Technical Documents identified in the SPR have been achieved; and

F. Project Plan commitments have been undertaken;

(ii) are listed as Technical Documents for submission in the Systems Engineering Management Plan;

(iii) are required to operate the Assets;

(iv) are updated or amended, having previously achieved a Confirmed Document status; or

(v) are otherwise required to be submitted to TfNSW for Review and/or approval by this deed.

(b) The Supplier must submit the Technical Documents for Review:

(i) in accordance with the Systems Engineering Management Plan and the Review Procedures; and

(ii) in each case:

A. on or before the time required in the Systems Engineering Management Plan and the Review Procedures; and
B. where no specific time is provided, allowing a reasonable time period to enable TfNSW to Review the Submitted Documents without any delay to the progress of the Delivery Phase Activities.

(c) The Supplier acknowledges and agrees that the incorporation of TfNSW's comments into any Technical Documents shall not:

(i) constitute a "Variation Proposal" under clause 21.1 or a "Variation Order" under clause 21.4;

(ii) constitute a Qualifying Cause or Compensation Event or entitle the Supplier to an extension of time or otherwise entitle the Supplier to make any other Claim under this deed; or

(iii) otherwise entitle the Supplier to be reimbursed for any costs and expenses incurred or otherwise compensated in any form or manner.

12. Manufacture and Supply

12.1 Performance of Delivery Phase Activities

The Supplier must:

(a) design, develop, manufacture, test, commission, supply and deliver:

(i) the Initial Fleet:

(ii) if RailCorp (or TfNSW on behalf of RailCorp) elects pursuant to clause 20 to purchase any or all of the Option Sets, the Option Sets; and

(iii) undertake all other Delivery Phase Activities,

all in accordance with:

(b) the SPR;

(c) the Technical Documents prepared by the Supplier in accordance with the requirements of this deed;

(d) any Variation Order; and

(e) the other requirements of the Project Agreements.

The Supplier accepts full responsibility for all means, methods and techniques used in the performance of the Delivery Phase Activities.

12.2 Manufacture and supply warranty

The Supplier warrants that:

(a) the Delivery Phase Activities will be carried out in accordance with the Confirmed Technical Documents;

(b) work carried out in accordance with the Technical Documents will satisfy the requirements of this deed;

(c) the Delivery Phase Activities will be completed in accordance with, and satisfy the requirements of, this deed;
(d) the Sets will:
   (i) upon Provisional Acceptance; and
   (ii) in each case, thereafter at all relevant times throughout their Design Life,
   be safe and fit for their intended purposes; and

(e) the Supplier has taken into account and made proper allowance for:
   (i) all of the risks (other than risks which, pursuant to this deed, it does not bear) in relation to the Delivery Phase Activities and made full allowance for those risks in the Initial Fleet Contract Value and the Option Fleet Contract Value; and
   (ii) all matters which might impact upon the Supplier's ability to complete the Delivery Phase Activities or to complete the Delivery Phase Activities within any particular time, cost or quality constraints.

12.3 Spares
The Supplier must supply and deliver:
(a) the Spares and Special Tools listed in the First Set Spares List to the Maintenance Facility Site or other location approved in writing by TfNSW's Representative as a condition precedent to Provisional Acceptance of the first Set;
(b) the Spares and Special Tools listed in the Initial Fleet Spares List and the Spare Driver Trailer Car to the Maintenance Facility Site or other location approved in writing by TfNSW's Representative as a condition precedent to Provisional Acceptance of the last Set in the Initial Fleet; and
(c) if RailCorp (or TfNSW on behalf of RailCorp) elects pursuant to clause 20 to purchase any or all of the Option Sets, the Spares and Special Tools listed in the Option Set Notice to the Maintenance Facility Site or other location approved in writing by TfNSW's Representative as a condition precedent to Provisional Acceptance of the last Set in the Option Fleet.

12.4 Workmanship
In performing the Delivery Phase Activities, the Supplier must use workmanship:
(a) of at least the standard set out in the SPR, or to the extent a standard is not set out in the SPR, of a standard consistent with Good Industry Practice for work of a similar nature to the relevant Delivery Phase Activities; and
(b) which is fit for its intended purpose.

12.5 Materials
In performing the Delivery Phase Activities, the Supplier must use Materials which:
(a) comply with the requirements of the SPR, or if not fully described in the SPR, are consistent with Good Industry Practice for work of a similar nature to the relevant Delivery Phase Activities;
(b) are free from defects and other imperfections; and
(c) are safe and fit for their intended purpose.
12.6 TfNSW Supplied Items

(a) TfNSW must make available the TfNSW Supplied Items to the Supplier:
   (i) at its own cost;
   (ii) at the respective places referred to in Schedule 25; and
   (iii) by the respective date referred to in Schedule 25.

(b) The Supplier:
   (i) agrees that, in respect of TfNSW Supplied Items, the:
       A. Supplier:
          1) warrants that it has reviewed the SPR and any relevant specification, and made whatever other enquiries and investigations it considers necessary relating to each of the TfNSW Supplied Items and is satisfied that they satisfy and will allow the Supplier to satisfy the requirements of this deed;
          2) will not be entitled to make, and neither TfNSW nor RailCorp will be liable upon, any Claim arising out of or in any way in connection with any TfNSW Supplied Item; and
          3) is not relieved from and remains liable for complying with, all of its obligations under this deed, despite TfNSW making available the TfNSW Supplied Items; and
       B. Sale of Goods Act 1923 (NSW) does not apply to TfNSW's obligations under clause 12.6(a) and TfNSW makes no representation as to the quality, performance, merchantability or fitness of the TfNSW Supplied Items; and
   (ii) must:
       A. at its own cost and risk, transport each TfNSW Supplied Item from the respective place referred to in Schedule 25 to the Maintenance Facility Site; and
       B. as part of the Delivery Phase Activities, incorporate the TfNSW Supplied Items into the Sets.

(c) TfNSW and the Supplier agree that:
   (i) any failure by TfNSW to make available a TfNSW Supplied Item to the Supplier:
       A. at the respective places referred to in Schedule 25; or
       B. by the respective dates referred to in Schedule 25,
       will not prevent Provisional Acceptance from being achieved in respect of a Set; and
any defect, deficiency or fault in a TfNSW Supplied Item will not be a Defect in a Set, and will not prevent Provisional Acceptance from being achieved in respect of a Set.

13. Verification

13.1 Obligation to conduct Verification Activities

The Supplier must carry out the Verification Activities in accordance with the Verification Plan.

13.2 Notice of Verification Activities

(a) Before conducting a Verification Activity, the Supplier must give TfNSW's Representative notice of the time, date and place of the Verification Activity. If TfNSW's Representative does not exercise the right to attend, the Verification Activity may nevertheless proceed.

(b) Notice of Verification Activities under clause 13.2(a) or required under a Verification Program must be given not less than 20 Business Days prior to conducting the Verification Activity (unless otherwise agreed in writing by TfNSW's Representative).

(c) The Supplier must provide for Review:

(i) the Verification Procedures associated with the Verification Activity not less than 20 Business Days prior to conducting the Verification Activity; and

(ii) the Confirmed Verification Procedures associated with the Verification Activity not less than five Business Days prior to conducting the Verification Activity.

(d) The Supplier may postpone a Verification Activity in respect of which it has given TfNSW's Representative notice in accordance with clause 13.2(a). If the Supplier postpones a Verification Activity in accordance with this clause, the Supplier must give TfNSW's Representative at least five Business Days' notice of the rescheduled date, time and place of that Verification Activity.

(e) The Supplier must give TfNSW's Representative:

(i) a Verification Program which must also specify the date and time of each Verification Activity to be conducted for the following 25 Business Day period; and

(ii) an updated Verification Program each week during the period that the Supplier is carrying out Verification Activities.

(f) The Supplier will be deemed to have failed a Verification Activity if it fails to give TfNSW's Representative the required notice of when the Verification Activity will be conducted.

13.3 Verification Procedures and conduct of Verification Activities

The Supplier must:

(a) comply with the Verification Activities requirements set out in section 2.16 of the SPR;
(b) develop, utilise and maintain a failure reporting and corrective action system (FRACAS) for the systematic recording, investigation and correction of Defects or deficiencies observed in an Asset (including during the Verification Program); and

(c) ensure that the FRACAS includes at least the following features:

(i) a means of identifying and recording Defects;

(ii) a process for investigating and determining the primary cause of the Defect;

(iii) a process for determining appropriate corrective action to ensure that the Asset complies with the requirements of this deed; and

(iv) a process for updating all relevant Technical Documents (at least including the Asset Management Plan) to reduce the likelihood of a recurrence of the relevant Defect.

13.4 Process for determining Network Access Rights

(a) Subject to clauses 13.4 to 13.8, TfNSW must provide or procure a relevant NSW Rail Entity to provide, and the Supplier may utilise, the configurations of Network Access Rights agreed or determined by TfNSW in accordance with clauses 13.4(b) to 13.4(d) (Agreed Network Access Rights), for the purposes of the Verification Activities and commissioning the Sets.

(b) The Supplier must issue to TfNSW’s Representative:

(i) not less than 14 weeks before the start of each Network Access Year, a written request containing indicative Network Access Information in relation to the Network Access Rights which the Supplier wishes to utilise during that Network Access Year (Annual Access Forward Lookahead); and

(ii) not less than 14 weeks before the date on which the Supplier wishes to utilise any specific Network Access Right, a written request containing detailed confirmation of the Network Access Information in relation to the Network Access Rights which the Supplier wishes to utilise on that date (Specific Access Request).

(c) Within 25 Business Days of TfNSW’s Representative receiving a Specific Access Request, TfNSW’s Representative will determine possible Network Access Rights for the Supplier to utilise, having regard to:

(i) the Indicative Network Access Rights for the relevant period;

(ii) in the case of a Specific Access Request, whether it is consistent with the relevant Annual Access Forward Lookahead previously submitted under this clause;

(iii) the availability of Network Access Rights during the relevant period;

(iv) the matters detailed in the Supplier’s request; and

(v) any other factors TfNSW’s Representative (acting reasonably) considers relevant,

and will notify the Supplier of possible configurations for the Network Access Rights that are the subject of the relevant request.
(d) Within five Business Days of TfNSW’s Representative issuing a notice under clause 13.4(c) (or such other time as agreed in writing by the Supplier and TfNSW), TfNSW’s Representative and the Supplier must meet and endeavour to agree, in writing, suitable configurations for the Network Access Rights. If the parties cannot agree suitable configurations for the Network Access Rights the configurations will be determined by TfNSW’s Representative.

(e) Where the Supplier has complied with the requirements of clauses 13.4(b) to 13.4(d), the configurations for the Network Access Rights determined by TfNSW’s Representative must be at least as suitable for the activities which the Supplier proposes to carry out during the Network Access Rights as the Indicative Network Access Rights for the relevant period.

13.5 **TfNSW may cancel or change rights**

(a) TfNSW may cancel or change an Agreed Network Access Right at any time.

(b) If TfNSW does cancel or change an Agreed Network Access Right:

(i) TfNSW’s Representative must notify the Supplier of the cancellation or change; and

(ii) subject to clause 13.5(c), if the Agreed Network Access Right was the subject of a Specific Access Request, accepted under clause 13.4(d), the cancellation of, or a material change to, that Network Access Right will be a Compensation Event.

(c) The Supplier will not be entitled to make any Claim against TfNSW arising out of or in connection with the cancellation of, or a change to, an Agreed Network Access Right:

(i) other than as provided in clause 13.5(b)(ii); and

(ii) the Supplier will have no right to Claim under clause 13.5(b)(ii) to the extent that TfNSW procures equivalent Network Access Rights (having regard to the matters referred to in clauses 13.4(c)(i) to 13.4(c)(v)) and the Supplier is reasonably able to utilise those Network Access Rights.

13.6 **Additional Network Access Rights**

(a) The Supplier must minimise the need for Network Access Rights that are at different times than, on different dates from or in addition to, the Agreed Network Access Rights (**Additional Network Access Rights**).

(b) If the Supplier wishes to request any Additional Network Access Rights:

(i) as soon as reasonably practicable the Supplier must issue a written request to TfNSW’s Representative setting out the Network Access Information for each Additional Network Access Right requested; and

(ii) TfNSW will endeavour to procure any Additional Network Access Right requested by the Supplier, but will not be under any obligation to do so.

(c) TfNSW may cancel or change an Additional Network Access Right at any time.

(d) The Supplier releases and indemnifies TfNSW from all Claims by the Supplier and its Associates in connection with or arising out of:

(i) TfNSW’s delay or refusal to grant or procure an Additional Network Access Right; or
(ii) the cancellation of, or a change to, any Additional Network Access Right.

13.7 End of occupation

The Supplier must:

(a) cease to occupy the relevant part of the Network at the cessation of a Network Access Right or in the event of an emergency;

(b) immediately notify TfNSW's Representative and the Operator if the Supplier considers it may be late in vacating the Network; and

(c) indemnify TfNSW and each NSW Rail Entity for all Loss incurred by TfNSW or the relevant NSW Rail Entity as a result of the Supplier continuing to occupy the Network following the cessation of a Network Access Right.

13.8 Supplier unable to utilise

(a) The Supplier must promptly notify TfNSW if the Supplier expects it will not be able to utilise a Network Access Right which has been allocated to it.

(b) If the Supplier fails to utilise any Network Access Right (whether wholly or partially) for any reason other than due to an act or omission of TfNSW or its Associates, the Supplier must indemnify TfNSW and the NSW Rail Entities for all Loss incurred by TfNSW and the NSW Rail Entities, in connection with the Network Access Right, except where the Supplier requests the cancellation of the Network Access Right at least six weeks before the date on which the Network Access Right was to commence or within another period agreed (in writing) by TfNSW's Representative from time to time in TfNSW's Representative's absolute discretion.

13.9 Train Run preconditions

(a) The following preconditions must be satisfied before the Supplier can utilise a Train Run Entitlement:

(i) the Supplier's Incident and Security Management Plan must be a Confirmed Document;

(ii) the Supplier has demonstrated to the reasonable satisfaction of TfNSW an ability to implement its Incident and Security Management Plan;

(iii) the relevant Set has passed all Verification Activities in the Verification Plan that must be passed before utilising a Train Run Entitlement; and

(iv) the Supplier holds all Insurances required under this deed in relation to conduct of the proposed Verification Activity.

(b) The Supplier must, when utilising a Train Run Entitlement:

(i) ensure that the relevant Set complies with the TOC Manual as varied in accordance with any TOC Waiver;

(ii) where the Set is not included in the TOC Manual, obtain a valid TOC Waiver relevant for the activities to be undertaken;

(iii) comply with, and ensure that its Associates comply with, all Train Orders, all relevant TOC Waivers and all relevant Safe Notices;

(iv) prevent the relevant Set from being driven on any part of the Network that is outside the scope of the Train Run Entitlement; and
(v) notify the Train Controller:

A. as soon as the Supplier becomes aware of any changes in, or delays to, the Train Run or anything else which may affect Train Control; and

B. immediately if the Supplier or its Associates do not comply with a Train Order, or expect that they will not comply with a Train Order.

(c) If during a Train Run there is an Incident due to one or more Defects or any other acts or omissions of the Supplier or its Associates, the Supplier must:

(i) promptly assist TfNSW to remove the Set from the Network causing as little disruption to the Operations Functions as possible; and

(ii) if the Incident results in the cancellation of train services, then the Supplier must pay TfNSW [(CPI Indexed)] in relation to that Incident.

The amount referred to in clause 13.9(c)(ii) represents (and does not exceed) a reasonable and genuine pre-estimate of the Loss and damage which TfNSW will suffer or incur if one or more other train services is cancelled or disrupted due to an Incident during a Train Run (having regard to the times and locations at which Train Runs are expected to occur), and will be Moneys Owing. The parties agree that, as between TfNSW, RailCorp and the Supplier, this clause 13.9(c) is TfNSW’s, RailCorp’s and each other NSW Rail Entity’s sole monetary remedy in respect of any cancellation of train services arising from an Incident during a Train Run due to a Defect or any other act or omission of the Supplier or its Associates to which this clause applies.

(d) The Supplier acknowledges and agrees that:

(i) TfNSW cannot, and will not, guarantee any configuration for a Network Access Right (including an Agreed Network Access Right) as fixed;

(ii) TfNSW may be required to cancel or change a Network Access Right at short notice;

(iii) Interface Parties may perform Interface Activities during certain Network Access Rights;

(iv) TfNSW may be required to provide third parties with access to the Network at the same time as the Supplier has access to the Network, including for the performance of works on the Network;

(v) to the extent within the Supplier’s control, the Supplier must co-ordinate its activities with any Interface Parties and any others sharing the Network Access Right; and

(vi) during and in relation to all Network Access Rights the Supplier must comply with:

A. all Mandatory Requirements;

B. all Train Orders;

C. its Safety Management Plan; and

D. all directions of TfNSW’s Representative.
13.10 Mass verification

The Verification Plan must provide for Verification Activities to verify and demonstrate, to TfNSW's reasonable satisfaction, the Actual Mass for each Set.

13.11 Results of Verification Activities

(a) As soon as reasonably practicable after completion of a Verification Activity, and in any event not later than 10 Business Days after completion of a Verification Activity, the Supplier must submit a Verification Report to TfNSW's Representative for Review.

(b) If a Verification Activity has failed, the Supplier must:

(i) submit a FRACAS report as they are generated during the course of the Verification Activities;

(ii) carry out any necessary rectification work; and

(iii) when it believes it has completed all necessary rectification work, give TfNSW's Representative reasonable notice of the proposed re-conduct of the Verification Activities, and clauses 13.3 and 13.4 will reapply.

13.12 TfNSW's Representative may require additional Verification Activities

(a) At any time, on giving the Supplier reasonable notice, TfNSW's Representative may carry out, or direct the Supplier to carry out, additional Verification Activities in respect of any of the Assets (Unplanned Verification Activities). The Supplier must provide all reasonable assistance required by TfNSW's Representative in relation to the Unplanned Verification Activities.

(b) TfNSW's Representative may direct that any part of an Asset not be covered up or made inaccessible without TfNSW's Representative's prior written consent.

(c) On completion of Unplanned Verification Activities, the Supplier must promptly make good the work verified so that it fully complies with the Project Agreements.

13.13 Supplier remains responsible

(a) Neither TfNSW nor TfNSW's Representative assumes or owes any duty of care to the Supplier to observe, participate in or conduct any Verification Activity or inspection or, if it does observe, participate in or conduct any Verification Activity or inspection, to identify any non-compliance with the Project Agreements of any Asset verified.

(b) No observation of, participation in or conduct of any Verification Activity or inspection of an Asset or failure by TfNSW or TfNSW's Representative to observe, participate in or conduct any Verification Activity or inspection shall:

(i) lessen or otherwise affect the warranties given by the Supplier under this deed or otherwise relieve the Supplier from, or alter or affect, the Supplier’s liabilities, obligations or responsibilities; or

(ii) prejudice or limit TfNSW's rights against the Supplier, whether under any Project Agreement or otherwise according to law.
13.14 Costs of verification

(a) Subject to clause 13.14(b) and clause 13.14(c), each party must bear their own costs of and incidental to Verification Activities carried out under this clause 13.

(b) Except in the circumstances listed in clause 13.14(c), if TfNSW carries out, or directs the Supplier to carry out Unplanned Verification Activities, a Compensation Event will occur.

(c) TfNSW's reasonable incremental costs of and incidental to observing, participating in or conducting any Verification Activity will be Moneys Owing to the extent that the Verification Activity:

(i) involves retesting an Asset that has previously failed a Verification Activity (to the extent that retesting was not already specifically anticipated in the Verification Plan and the Verification Program);

(ii) is an Unplanned Verification Activity and the results of the Verification Activity show:

A. the work is not in accordance with this deed; or

B. that there is a Defect; or

(iii) is an Unplanned Verification Activity:

A. in respect of work covered up or made inaccessible without the prior written approval of TfNSW's Representative where that approval was required; or

B. in respect of work undertaken to correct or overcome a Defect.

14. Acceptance

14.1 Provisional Acceptance

(a) The Supplier must present each Set for Provisional Acceptance by TfNSW's Representative at the Maintenance Facility Site:

(i) no later than the date specified in the Delivery Program; and

(ii) in sufficient time for the Set to reach Provisional Acceptance no later than its Date for Provisional Acceptance.

(b) The Supplier must provide TfNSW's Representative with:

(i) a notice at least:

A. one month; and

B. five Business Days,

prior to the date on which the Supplier proposes to first present each Set for Provisional Acceptance advising of the proposed date and time on which the Supplier proposes to first present each Set for Provisional Acceptance; and

(ii) not less than five Business Days' notice of the date and time when it proposes to re-present a Set for Provisional Acceptance that has
previously been the subject of a Rejection Certificate under clause 14.1(g).

(c) Without prejudice to the generality of clauses 14.4 and 14.5, the Supplier may present a Set for Provisional Acceptance by TfNSW earlier than the date specified in the Confirmed Delivery Program but neither TfNSW or TfNSW’s Representative is obliged to undertake activities required to determine whether the Provisional Acceptance Criteria in respect of a Set have been met or issue a Provisional Acceptance Certificate in respect of a Set:

(i) before the relevant date specified in the Confirmed Delivery Program; or

(ii) less than five Business Days after the Set that was most recently presented for Provisional Acceptance,

unless otherwise agreed in writing by TfNSW’s Representative.

(d) The Supplier must provide TfNSW’s Representative with all additional documents, details and other information that TfNSW’s Representative may reasonably require in order to determine whether the Provisional Acceptance Criteria for the Set have been satisfied.

(e) TfNSW’s Representative must:

(i) determine whether the Provisional Acceptance Criteria for a Set has been met; and

(ii) notify the Supplier of that determination in accordance with clause 14.1(f) or clause 14.1(g) (as applicable),

within five Business Days after the later of:

(iii) the completion of all relevant TfNSW activities in relation to Provisional Acceptance; and

(iv) the date when the Supplier provides TfNSW’s Representative with all information required under clause 14.1(d).

(f) If TfNSW’s Representative is satisfied that a Set meets the Provisional Acceptance Criteria, TfNSW’s Representative will issue a Provisional Acceptance Certificate:

(i) identifying the Date of Provisional Acceptance of that Set; and

(ii) listing any Minor Defects.

(g) If TfNSW’s Representative is not satisfied that a Set meets the Provisional Acceptance Criteria, TfNSW’s Representative may issue a Rejection Certificate to the Supplier, identifying the items which must be rectified before the Set may be re-submitted for Provisional Acceptance.

(h) A Rejection Certificate issued under clause 14.1(g) is a Remedial Direction.

(i) Upon receipt of a Rejection Certificate:

(i) the Supplier must promptly rectify the items set out in the Rejection Certificate and any other rectification works that are necessary to ensure the Set meets the Provisional Acceptance Criteria; and

(ii) on satisfactory completion of all of those works:

A. give the notice required under clause 14.1(b)(ii);
14.2 Minor Defects

(a) As a condition precedent to Final Acceptance of any Set, the Supplier must:

(i) in respect of all Minor Defects identified in the Provisional Acceptance Certificate for that Set, have rectified those Minor Defects; and

(ii) in respect of those Minor Defects identified after the Date of Provisional Acceptance of that Set:

A. have rectified those Minor Defects; or

B. where TfNSW's Representative has approved a Minor Defect Rectification Plan in accordance with clause 14.2(d)(i), have diligently complied with, and must be continuing to diligently comply with, the requirements of the Minor Defect Rectification Plan.

(b) As a condition precedent to Fleet Acceptance of:

(i) the Continuous Production Fleet, the Supplier must have rectified all Minor Defects in the Continuous Production Fleet; and

(ii) the Non-continuous Production Fleet, the Supplier must have rectified all Minor Defects in the Non-continuous Production Fleet.

(c) If:

(i) any Minor Defects are identified in respect of a Set:

A. after the Date of Provisional Acceptance of that Set; and

B. before the Date of Final Acceptance of that Set; and

(ii) TfNSW's Representative has, in his or her absolute discretion, agreed, by written notice, that the Supplier cannot rectify those Minor Defects before the achievement of Final Acceptance,

the Supplier must provide TfNSW with a draft plan identifying its proposed schedule for the rectification of those Minor Defects to occur after the achievement of Final Acceptance (as applicable) (Draft Minor Defect Rectification Plan).

(d) TfNSW's Representative must, within 10 Business Days of receiving the Draft Minor Defect Rectification Plan in accordance with clause 14.2(c):

(i) approve the Draft Minor Defect Rectification Plan, in which case the Draft Minor Defect Rectification Plan will be deemed the Minor Defect Rectification Plan; or

(ii) reject the Draft Minor Defect Rectification Plan and provide written reasons for the rejection, in which case a Draft Minor Defect Rectification Plan must be resubmitted by the Supplier to TfNSW within five Business Days in accordance with clause 14.2(c)(ii) and the process this clause 14.2(d) shall re-apply.
(e) The Supplier must rectify all Minor Defects identified in each Minor Defect Rectification Plan in accordance with that Minor Defect Rectification Plan.

14.3 Recurrent Defects

(a) The Supplier must:

(i) monitor and assess the occurrence of any Recurrent Defects; and

(ii) within five Business Days of becoming aware of any Recurrent Defect, give notice of the Recurrent Defect to TfNSW.

(b) If a Recurrent Defect:

(i) in respect of the Continuous Production Fleet, becomes apparent before the earlier of:

A. the Date of Fleet Acceptance for the Continuous Production Fleet; or

B. the Fleet Acceptance Sunset Date (Continuous Production); or

(ii) in respect of the Non-continuous Production Fleet, becomes apparent before the earlier of:

A. the Date of Fleet Acceptance for the Non-continuous Production Fleet; or

B. the Fleet Acceptance Sunset Date (Non-continuous Production),

the Supplier must, subject to clause 14.3(c):

(iii) rectify that Recurrent Defect in all Assets that have suffered the Recurrent Defect;

(iv) undertake all necessary works to prevent the occurrence of the Recurrent Defect in any Assets that have not been affected by the Recurrent Defect; and

(v) undertake all other works that are reasonably necessary to enable all of the Assets to continue in operation in compliance with the terms of this deed pending the carrying out and completion of the rectification and other works,

in each case in accordance with a Recurrent Defect Rectification Plan that is Confirmed.

(c) Within 20 Business Days after the Supplier gives notice of a Recurrent Defect pursuant to clause 14.3(a)(ii), or the Supplier is notified of the existence of a Recurrent Defect by TfNSW’s Representative, the Supplier must submit to TfNSW for Review a draft plan (Recurrent Defect Rectification Plan) for complying with its obligations under clause 14.3(a) as soon as practicable. The Recurrent Defect Rectification Plan will be a Technical Document for the purposes of clause 11.5.

(d) If the Recurrent Defect Rectification Plan is Confirmed, the Supplier must as soon as reasonably practicable implement, and thereafter comply diligently with, the Confirmed Recurrent Defect Rectification Plan.
14.4 Final Acceptance and Fleet Acceptance

(a) If the Supplier considers that:

(i) any Set meets the Final Acceptance Criteria;
(ii) the Continuous Production Fleet meets the Fleet Acceptance Criteria; or
(iii) the Non-continuous Production Fleet meets the Fleet Acceptance Criteria,

it must notify TfNSW's Representative and provide TfNSW's Representative with all additional documents, details and other information reasonably required by TfNSW's Representative in order to determine whether the Final Acceptance Criteria or Fleet Acceptance Criteria (as relevant) have been met.

(b) TfNSW's Representative must:

(i) determine whether the:

A. Final Acceptance Criteria for the Set; or
B. Fleet Acceptance Criteria for:
   1) the Continuous Production Fleet; or
   2) the Non-continuous Production Fleet,

have been met; and

(ii) notify the Supplier of that determination in accordance with clause 14.4(c)(i) or clause 14.4(d)(i) (as applicable) within five Business Days after the later of:

A. the date of the Supplier's notice under clause 14.4(a); and
B. the date when the Supplier provides TfNSW's Representative with all information required under clause 14.4(a).

(c) If TfNSW's Representative is:

(i) satisfied that a Set meets the Final Acceptance Criteria, TfNSW's Representative must issue a Final Acceptance Certificate for that Set; or
(ii) not satisfied that a Set meets the Final Acceptance Criteria, TfNSW's Representative must issue a Rejection Certificate to the Supplier, identifying the items which must be rectified before the Set may be re-submitted for Final Acceptance.

(d) If TfNSW's Representative is:

(i) satisfied that:

A. the Continuous Production Fleet meets the Fleet Acceptance Criteria; or
B. the Non-continuous Production Fleet meets the Fleet Acceptance Criteria,

TfNSW's Representative must issue a Fleet Acceptance Certificate; or
(ii) not satisfied that:

A. the Continuous Production Fleet meets the Fleet Acceptance Criteria; or

B. the Non-continuous Production Fleet meets the Fleet Acceptance Criteria,

TfNSW's Representative must issue a Rejection Certificate to the Supplier, identifying the items which must be rectified before the Continuous Production Fleet or the Non-continuous Production Fleet (as the case may be) may be re-submitted for Fleet Acceptance.

(e) A Rejection Certificate issued under clause 14.4(c)(ii) or clause 14.4(d)(ii) is a Remedial Direction.

(f) Upon receipt of a Rejection Certificate:

(i) the Supplier must promptly rectify the items set out in the Rejection Certificate and any other rectification works that are necessary to ensure:

A. the Set meets the Final Acceptance Criteria; or

B. the:

1) Continuous Production Fleet meets the Fleet Acceptance Criteria; or

2) Non-continuous Production Fleet meets the Fleet Acceptance Criteria; and

(ii) on satisfactory completion of all of those works, give notice to TfNSW's Representative and resubmit:

A. the Set for Final Acceptance;

B. the Continuous Production Fleet for Fleet Acceptance; or

C. the Non-continuous Production Fleet for Fleet Acceptance, (as the case may be), and this clause 14.4 will reapply.

14.5 Effect of Certificates

(a) Subject to clause 14.5(b):

(i) a Provisional Acceptance Certificate is final and binding on the parties for the purposes only of establishing that Provisional Acceptance has occurred and the date on which it occurred;

(ii) a Final Acceptance Certificate is final and binding on the parties for the purposes only of establishing that Final Acceptance has occurred and the date on which it occurred; and

(iii) a Fleet Acceptance Certificate is final and binding on the parties for the purposes only of establishing that Fleet Acceptance has occurred and the date on which it occurred.

(b) Any certificate issued by TfNSW's Representative will not:
15. **Time**

15.1 **Commencement**

The Supplier must promptly commence performance of the Delivery Phase Activities following the Commencement Date.

15.2 **Dates for Completion**

The Supplier must:

(a) achieve Provisional Acceptance of each Set by the Date for Provisional Acceptance of the relevant Set; and

(b) consistent with its obligations under clause 15.2(a), continuously and diligently progress the Delivery Phase Activities.

15.3 **Acceleration by the Supplier**

If the Supplier chooses to accelerate progress of the Delivery Phase Activities then:

(a) TfNSW may assist the Supplier but will not be obliged to take any action to assist or enable the Supplier to:

(i) achieve Provisional Acceptance of any Set on or before the Date for Provisional Acceptance of that Set; or

(ii) complete any of the other Delivery Phase Activities at or before a particular time;

(b) the time for the performance of TfNSW’s or TfNSW’s Representative’s obligations will not be affected; and

(c) the Supplier will not be entitled to make any Claim against TfNSW in relation to that acceleration (or any failure or inability by the Supplier or TfNSW to accelerate).

15.4 **Delay**

(a) The Supplier must take all reasonable steps to:

(i) prevent the cause of any delay to the Delivery Phase Activities; and

(ii) avoid or minimise the consequences of any delay,

including any delay arising from completion of Interface Activities.

(b) If the Supplier becomes aware of any matter which will, is likely to, or has given rise to a delay in achieving Provisional Acceptance of any Set, then the Supplier must give TfNSW:
15.5 Look forward test

(a) Subject to clause 15.5(i), if, at any time TfNSW's Representative considers the Supplier will not, or it is reasonably likely that the Supplier will not, achieve a Longstop Milestone, TfNSW's Representative may appoint an Independent Expert to formally review the progress of the Delivery Phase Activities for the purposes of determining if the Supplier will achieve a Longstop Milestone.

(b) The Independent Expert must prepare a preliminary report within 30 Business Days (or any longer period agreed by TfNSW's Representative in writing) of their appointment giving a preliminary opinion (acting reasonably) of whether the Supplier will be able to achieve a Longstop Milestone.

(c) The Supplier:

(i) must provide all reasonable cooperation to the Independent Expert in the preparation of their report; and

(ii) must promptly on request by the Independent Expert (and in any case, no later than 10 Business Days after a request by the Independent Expert), provide the Independent Expert any information reasonably requested to enable the Independent Expert to prepare the preliminary report referred to in clause 15.5(b).

(d) If the Independent Expert determines in its preliminary report that the Supplier will not be able to achieve a Longstop Milestone, then within 10 Business Days of receipt of the Independent Expert's report, the Supplier must:

(i) notify TfNSW and the Independent Expert of any matters with which it disagrees with the Independent Expert's opinion together with reasons; and

(ii) to the extent it agrees, provide a Recovery Plan which demonstrates that a Longstop Milestone can be achieved.

(e) Within a further 10 Business Days of provision of a Recovery Plan (and any notice) under clause 15.5(d), the Independent Expert must give notice to TfNSW and the Supplier of their final opinion, taking into account any comments, as to whether or not the Supplier has satisfactorily addressed all delay concerns about its ability to achieve a Longstop Milestone.

(f) If the Independent Expert determines in its final report that the Supplier will be able to achieve a Longstop Milestone, then:

(i) the Supplier must implement and comply with its Recovery Plan; and

(ii) provided the Supplier complies fully with its obligations under clause 15.5(f)(i), TfNSW may not exercise its rights under clause 15.5(a) for a further period of three months.
(g) If the Independent Expert determines in its final report that the Supplier will not be able to achieve a Longstop Milestone, then:

(i) if the relevant Longstop Milestone relates to a Set in the Initial Fleet, a Supplier Termination Event subsists; or

(ii) if the relevant Longstop Milestone relates to a Set in the Option Fleet, TfNSW’s Representative may instruct a Variation by the issue of a "Variation Order" under clause 21.4, omitting the relevant Set or Sets from the Option Fleet.

(h) If TfNSW gives an instruction pursuant to clause 15.5(g)(ii):

(i) such an instruction will not invalidate, or amount to a repudiation of, this deed;

(ii) the Supplier must continue to perform the Project Activities in respect of the Sets not subject to the instruction;

(iii) the Variations Costs in respect of the Variation instructed under clause 15.5(g)(ii) will be deemed to be zero;

(iv) all amounts paid by TfNSW to the Supplier on account of the relevant Option Set will become due and payable immediately as Moneys Owing;

(v) the Supplier must: indemnify the Indemnified Parties in accordance with paragraph 1.3 of Schedule 15; and

(vi) the Supplier is not entitled to make any Claim against TfNSW or RailCorp for any Loss incurred by the Supplier arising out of or in connection with the instruction of a Variation by TfNSW’s Representative in the circumstances contemplated by 15.5(g)(ii).

(i) TfNSW’s Representative may not appoint an Independent Expert under this clause 15.5 more than once in any 3 month period.

15.6 Recovery Plan

(a) Each Recovery Plan which the Supplier must provide for Review pursuant to clause 15.4 or clause 15.5 must:

(i) describe the actions and measures which the Supplier will diligently pursue to remedy or mitigate all delay to the Delivery Phase Activities and to ensure (as applicable):

A. where the plan is required under clause 15.4, to the greatest extent practicable, the Supplier achieves Provisional Acceptance of each Set by the Date for Provisional Acceptance of that Set; or

B. where the plan is required under clause 15.5, to ensure a Longstop Milestone is achieved,

and to avoid, mitigate or minimise the consequences of the delay consistent with its obligations under clause 15.2; and

(ii) contain a proposed updated Delivery Program.

(b) The Supplier must implement and comply with its Recovery Plan subject to any comments on that plan provided by TfNSW on Review.
15.7 Action by TfNSW

Without prejudice to the generality of clauses 15.3 and 15.6:

(a) TfNSW is not obliged to test, inspect or witness any Verification Activity, or issue a Provisional Acceptance Certificate, in respect of a Set:

(i) before the relevant Date for Provisional Acceptance of that Set;

(ii) less than five Business Days after the Date of Provisional Acceptance of the Set that most recently achieved Provisional Acceptance; or

(iii) on any date prior to the date specified in the Verification Plan;

unless otherwise agreed in writing by TfNSW's Representative; and

(b) if the Supplier requests that:

(i) TfNSW's Representative test, inspect or witness a Verification Activity in respect of a Set on a date which is:

A. before the relevant Date for Provisional Acceptance of that Set;

B. in the case of a Set, less than five Business Days after the Date of Provisional Acceptance of the Set that most recently achieved Provisional Acceptance; or

C. otherwise different from the date specified in the Verification Plan; or

(ii) TfNSW takes any other steps under a Recovery Plan,

TfNSW's Representative may, in their discretion, agree (in writing) or refuse to do so, and:

(iii) if TfNSW's Representative agrees, TfNSW's incremental costs and expenses incurred in facilitating the Supplier's request will be Moneys Owing; or

(iv) if TfNSW's Representative refuses, the Supplier will not be entitled to claim any relief or make any Claim, including a claim for an extension of time, against TfNSW.
15.8 Supplier's obligation to pay Delay LDs

(a) If any Set fails to reach Provisional Acceptance by its Date for Provisional Acceptance, the Supplier must pay TfNSW liquidated damages (Delay LDs) (without the requirement for any further notice, certificate or demand) at the rate of per day per Set in respect of each day in the period between the Date for Provisional Acceptance and the Date of Provisional Acceptance of that Set, or earlier termination of this deed.

(b) Delay LDs will be cumulative, accrue daily and are Moneys Owing.

(c) The rate of Delay LDs referred to in clause 15.8(a) will be CPI Indexed.

(d) On termination of this deed for any reason, all Delay LDs accrued as at the date of termination will become due and payable immediately as Moneys Owing.

15.9 Subsequent extension of time

(a) If the Supplier has paid Delay LDs or if TfNSW has deducted or set-off Delay LDs in respect of a Set, under clause 15.8 or general damages under clause 32.5(c), and the relevant Date for Provisional Acceptance is extended under this deed for a Qualifying Cause, TfNSW must procure repayment to the Supplier any Delay LDs deducted or paid relating to the period of any such extension.

(b) The Supplier acknowledges and agrees that it is not entitled to make any Claim against TfNSW or RailCorp for any Loss incurred by the Supplier arising out of or in connection with the events contemplated in clause 15.9(a) and the Supplier's sole entitlement in relation to those events will be its entitlement under clause 15.9(a).

16. Project Security

16.1 Provision of Project Security by Supplier

The Supplier must provide the Project Security to TfNSW in accordance with Schedule 14.

16.2 No injunction

(a) TfNSW may make a demand or exercise its rights under any Project Security at any time in accordance with the terms of that Project Security and the other provisions of this deed and Schedule 14.

(b) The Supplier must not take any steps to injunct or otherwise restrain:

(i) the issuer of a Project Bond from paying TfNSW pursuant to the terms of the Project Bond;

(ii) TfNSW from making a demand under a Project Bond or a Parent Guarantee;

(iii) TfNSW or RailCorp from exercising any rights under:

A. any Collateral Warranty Deed Poll; or

B. any other Project Security; or

(iv) TfNSW from using the proceeds of a Project Bond or of any call on the Parent Guarantee.
16.3 **Proceeds of Project Bonds**

TfNSW may use the proceeds of any Project Bond to reimburse it for any Loss which may, or is likely to, be suffered or incurred by an Indemnified Party including as a consequence of an Insolvency Event in respect of the Supplier or any Guarantor under the Parent Guarantee, and in payment of any other moneys owing by the Supplier to TfNSW (including Moneys Owing) under this deed.

16.4 **No interest**

TfNSW is not obliged to pay or procure payment to the Supplier of interest on, or the proceeds of, any Project Security.

16.5 **No trust**

If TfNSW makes a demand under a Project Bond, it does not hold the proceeds on trust for the Supplier.

16.6 **Failure to provide Project Bonds**

If the Supplier fails to provide any Project Bond in accordance with its obligations under Schedule 14, that failure will be a Supplier Event of Default for the purposes of clause 26.1(i).

16.7 **Return of Project Bonds**

Subject to the provisions of clause 16.8, TfNSW must return a Project Bond to the Supplier within 10 Business Days of the Release Date for that bond.

16.8 **TfNSW's rights to retain Project Bonds**

Despite any other provision of any Project Agreement, TfNSW may continue to hold and have recourse to a Project Bond where a Project Agreement would otherwise require TfNSW to release it to the extent of any bona fide Claim by TfNSW under the Project Agreement whether before or after termination of the Project Agreement.

17. **Payment**

17.1 **Prices**

In consideration for the supply of each Set and all associated Assets and Deliverables and other associated Delivery Phase Activities, TfNSW will procure payment of the Set Price to the Supplier, as determined in accordance with Schedule 11.

17.2 **Prices fixed**

The Set Price (together with any additions or deductions expressly provided for by this deed):

(a) is a fixed price;

(b) includes an allowance for all costs, expenses, fees and charges incurred by the Supplier in performing the relevant Delivery Phase Activities;

(c) includes an allowance for all related items of work under this deed (including the supply of any labour, materials or other necessary items);

(d) includes an allowance for the Supplier's profit, attendance, preliminaries, supervision and all overheads in connection with the performance of all of its obligations under this deed;
will not be subject to any rise and fall in costs of materials or labour or otherwise,
foreign exchange adjustment or any other adjustment for any reason, except to the
extent expressly provided by this deed; and

subject to clause 45.2, includes all duties including stamp duty, Importation GST,
customs duty and import duty.

17.3 Progress Payments

(a) TfNSW must procure payment of Progress Payments to the Supplier in accordance
with Schedule 11 on the later of:

(i) the date specified for the relevant Delivery Milestone in the Delivery
Program as at the date of this deed; and

(ii) the date the Supplier achieves the Delivery Milestones.

(b) The parties acknowledge and agree that:

(i) Schedule 11 sets out the Progress Payments agreed to be payable on
the later of:

A. the date specified for the relevant Delivery Milestones in the
Delivery Program as at the date of this deed; and

B. the Supplier achieving the Delivery Milestones;

(ii) the Progress Payments for a Delivery Milestone (together with any
additions or deductions expressly provided for by this deed) are the
maximum cumulative payments that the Supplier may claim for achieving
that Delivery Milestone;

(iii) the Supplier is not entitled to make a payment claim under clause 19 for,
and TfNSW has no corresponding obligation to pay, any part of a
Progress Payment prior to the corresponding Delivery Milestone being
achieved by the Supplier; and

(iv) the value of the work completed by the Supplier at any time
will not be
subject to further assessment unless otherwise agreed in writing by
TfNSW.

17.4 Payment claims for Delivery Phase Activities

On satisfaction of each Delivery Milestone, the Supplier must provide TfNSW's Representative
with a payment claim under clause 19.1 for the relevant Progress Payment.

18. Payment of Workers and Subcontractors

18.1 Evidence of payment of workers and Subcontractors

The Supplier is not entitled to give TfNSW a payment claim under clause 19, and TfNSW's
Representative is not obliged to make any payment under clause 19, unless the Supplier has
provided TfNSW's Representative with:

(a) a statutory declaration, in the form set out in Form 5 in Schedule 22, together with
any supporting evidence which may be reasonably required by TfNSW's
Representative, duly signed by the Supplier's Representative, that, except to the
extent disclosed in the statutory declaration (such disclosure to specify all relevant
amounts, employees and Subcontractors):
(i) all employees of the Supplier have at the date of the payment claim been paid all moneys due and payable to them; and

(ii) all Subcontractors of the Supplier have been paid all moneys due and payable to them in respect of the Delivery Phase Activities;

(b) a statutory declaration in the form set out in Form 6 in Schedule 22 from each Significant Contractor which satisfies the requirements of clause 18.1(a) in relation to the employees and Subcontractors of that Significant Contractor;

(c) where:

(i) the payment claim includes any amount that relates, in part or whole, to Delivery Phase Activities carried out in New South Wales; or

(ii) the Supplier is required to be registered as an employer under the Payroll Tax Act 2007 (NSW),

the statutory declarations provided under clauses 18.1(a) and 18.1(b) must include:

(iii) a written statement covering the period covered by the relevant payment claim, for the purposes of, and which complies with, section 127 of the Industrial Relations Act 1996 (NSW), section 1758 of the Workers Compensation Act 1987 (NSW) and Schedule 2 Part 5 of the Payroll Tax Act 2007 (NSW), which is in the form approved by the Chief Commissioner of State Revenue pursuant to Part 5 of Schedule 2 of the Payroll Tax Act 2007 (NSW), which as at the date of this deed is the form set out in Form 7 in Schedule 22 and included as Annexure B of the statutory declarations; and

(iv) copies of all relevant certificates of currency in respect of workers compensation insurance which the Supplier has in place in connection with the Delivery Phase Activities.

18.2 Direct payment of worker or Subcontractor

(a) If a worker or a Subcontractor obtains a court order in respect of the moneys payable to him, her or it in respect of his, her or its employment on, materials supplied for, or work performed with respect to the Delivery Phase Activities, and produces to TfNSW the court order and a statutory declaration that it remains unpaid, TfNSW may (but is not obliged to) procure payment of the amount of the order and costs included in the order to the worker or Subcontractor, and the amount paid will be a debt due and payable from the Supplier to TfNSW upon demand.

(b) Nothing in this clause 18.2 limits or otherwise affects TfNSW's rights under section 175B(7) of the Workers Compensation Act 1987 (NSW), Schedule 2, Part 5 of the Payroll Tax Act 2007 (NSW) and section 127(5) of the Industrial Relations Act 1996 (NSW).

19. Payment Terms

19.1 Payment claims

The Supplier must submit to TfNSW, within five Business Days after the end of each month in which:

(a) subject to clause 19.1(b), the Supplier has achieved a Delivery Milestone; or
where the Supplier achieves a Delivery Milestone prior to the relevant date specified for that Delivery Milestone in:

(i) the Delivery Program as at the date of this deed; or

(ii) Schedule 9,

the date specified for that Delivery Milestone in the Delivery Program as at the date of this deed, or Schedule 9 (as relevant) occurs;

then:

(c) for each Progress Payment, a separate payment claim setting out the Supplier's calculation of the Progress Payment payable on account of satisfaction of the Delivery Milestone; and

(d) where required under clause 16.1, an Advance Payment Bond as a condition precedent to payment of the Progress Payment.

19.2 Content of payment claims

(a) For a payment claim under clauses 19.1 to be valid:

(i) the payment claim must set out any calculations necessary to arrive at the amount claimed; and

(ii) the payment claim must set out amounts previously paid by or procured to be paid by TfNSW to the Supplier in connection with this deed.

(b) The Supplier's payment claim must be accompanied by:

(i) evidence of the amount due;

(ii) the documents required under clause 18.1 in relation to payment by the Supplier of all monies due and payable to Subcontractors engaged in the performance of the Delivery Phase Activities that are the subject of the claim;

(iii) the documents required under clause 18.1 in relation to payment by the Supplier of all workers carrying out the Delivery Phase Activities;

(iv) evidence of payment by the Supplier of any Importation GST (whether by application of the GST deferral scheme or otherwise) and customs duty (if any) on imported goods including copies of finalised import declarations;

(v) subject to clause 45.1(h), a valid tax invoice (addressed to RailCorp or such other entity as notified by TfNSW); and

(vi) such other information and documents as TfNSW's Representative may reasonably require.

(c) The Supplier's payment claim must set out the amount asserted by the Supplier to be due from TfNSW to the Supplier and the Supplier to TfNSW.

19.3 Supplier's warranties in relation to payment claim

In submitting a payment claim under clause 19.1, the Supplier warrants to TfNSW that:
(a) it has achieved the relevant Delivery Milestone and (to the extent applicable to that Delivery Milestone), it has completed all work which is the subject of the payment claim;

(b) the work complies with all relevant requirements under this deed;

(c) figures and calculations appearing in the payment claim are accurate;

(d) it has paid its suppliers and Subcontractors all monies due and payable in respect of work and services carried out and goods or materials supplied in relation to the work which was the subject of the immediately preceding payment claim;

(e) it has paid its workers and employees all monies in respect of the work that is the subject of the payment claim;

(f) it has paid all Importation GST and customs duty (if any) applicable on imported goods and the documentation provided by it to TfNSW under clause 19.2(b)(iv) is complete and accurate in all material respects;

(g) all Insurances required to be affected and maintained by the Supplier are current and in force; and

(h) the Supplier has no claims in respect of the Delivery Phase Activities which are not identified in the payment claim or in any earlier payment claim and which has not previously been given to TfNSW in accordance with this deed.

19.4 Payment certificate

(a) Within 10 Business Days of the later of:

(i) receipt of a valid payment claim under clause 19.1; or

(ii) five Business Days after the end of the month in which the Supplier has achieved the Delivery Milestone(s),

TfNSW’s Representative must assess the claim and issue to the Supplier’s Representative a payment certificate setting out:

(iii) the amount which, in TfNSW’s Representative’s opinion, is payable by TfNSW to the Supplier under this deed;

(iv) if the amount referred to in clause 19.4(a)(iii) is less than the amount claimed by the Supplier in its payment claim:

A. the calculations employed by TfNSW’s Representative to arrive at the amount referred to in clause 19.4(a)(iii); and

B. the reasons for the difference.

(b) TfNSW’s Representative must also set out in each payment certificate, the allowances made for:

(i) amounts otherwise due from TfNSW to the Supplier or the Supplier to TfNSW under this deed (including on account of any Delay LDs); and

(ii) amounts set-off or deducted by TfNSW from the Supplier under this deed.

(c) In determining the amount payable by TfNSW to the Supplier under this deed, TfNSW’s Representative will not have regard to work which has been performed which is not in compliance with this deed.
(d) If the Supplier fails to make a payment claim, TfNSW's Representative may nevertheless, in its absolute discretion, issue a payment certificate.

19.5 Payment

Subject to the provisions of this deed, within 20 Business Days of TfNSW's Representative issuing a payment certificate under clause 19.4, TfNSW will procure payment to the Supplier, or the Supplier will pay to TfNSW (as the case may be), the amount determined by TfNSW's Representative as due to the Supplier or TfNSW (as the case may be).

19.6 Payment on account

(a) Any payment of moneys to the Supplier (including any Progress Payment) is not:
   (i) evidence of the value of work or services, or that any work or services have been satisfactorily carried out in accordance with this deed;
   (ii) an admission of liability; or
   (iii) approval by TfNSW or TfNSW's Representative of the Supplier's performance or compliance with this deed,

   but is only taken to be payment on account.

(b) TfNSW's Representative may, in any payment certificate or payment schedule, correct any previous payment certificate or payment schedule or apply any deductions in accordance with this deed.

19.7 Disputed payments

If an amount in a payment certificate or payment schedule is the subject of a Dispute (Disputed Amount) and the Supplier and TfNSW subsequently agree, in writing, or it is determined in accordance with the Dispute Resolution Procedures that the Disputed Amount or another amount was or was not due:

(a) TfNSW's Representative must amend the payment certificate or payment schedule (as applicable) and reissue the payment certificate or payment schedule (as applicable) within five Business Days of the agreement or determination; and

(b) TfNSW must procure payment of, or the Supplier must pay (as appropriate), the amount agreed (in writing) or determined to the other party within 10 Business Days of the date of the amended payment certificate or payment schedule.

19.8 Interest

If a party fails to pay or procure payment of an amount that is properly due and payable to the other party on the due date for payment under any Project Agreement (including a previously disputed amount or an amount which is not paid due to the application of set-off by TfNSW under clause 19.9 where the amount set-off is determined to be incorrect), that party is liable to the other party to pay or procure payment of interest on the amount incorrectly withheld at the Default Rate from the day after the date on which the payment was due until (and including) the date of payment.

19.9 Moneys Owing and set-off

(a) All Moneys Owing are payable by the Supplier to TfNSW on demand.

(b) TfNSW may demand payment of Moneys Owing at any time, and any such demand is payable within 10 Business Days of the date of demand.
(c) TfNSW may at any time set-off or deduct from monies due to the Supplier under this deed:

(i) Moneys Owing; and

(ii) any other Claim relating to the Project which TfNSW has against the Supplier, whether under this deed, any other Project Agreement or at law,

and if those amounts are insufficient, TfNSW may have recourse to the Project Security in accordance with clause 16. TfNSW must provide the Supplier with reasonable details of the basis on which it is setting off any Moneys Owing (or any other Claim) under this clause 19.9(c).

(d) The Supplier must:

(i) make all payments due to TfNSW under this deed without set-off or counterclaim; and

(ii) not at any time deduct from money otherwise due to TfNSW (including any Moneys Owing) under any Project Agreement:

A. any debt or other money due from TfNSW to the Supplier; or

B. any Claim to money which the Supplier may have against TfNSW,

whether under this deed, any other Project Agreement or at law.

(e) Nothing in this clause 19.9 affects TfNSW’s right to recover from the Supplier the whole of the debt or any balance that remains owing after any set-off.

20. Option Sets

20.1 Grant of option

The Supplier grants to RailCorp the right to purchase the Option Sets in accordance with this clause 20.

20.2 Option Set Notices

If RailCorp wishes to purchase Option Sets, RailCorp (or TfNSW on behalf of RailCorp) must give the Supplier written notice of its election to purchase the Option Set (Option Set Notice) on or before the relevant Option Set Order Date in accordance with clause 20.3 or clause 20.4. Each Option Set Notice given by RailCorp (or TfNSW on behalf of RailCorp) will identify the number of Option Sets, and the number of Spares and Special Tools in respect of those Option Sets, which RailCorp elects to purchase.

20.3 Continuous production Option Sets

(a) RailCorp (or TfNSW on behalf of RailCorp) may exercise its option to purchase any Option Set on or before the relevant Option Set Order Date for the Option Set set out in the table in paragraph 2.1 in Schedule 9.

(b) If RailCorp (or TfNSW on behalf of RailCorp) gives an Option Set Notice to the Supplier on or before the relevant Option Set Order Date set out in the table in paragraph 2.1 of Schedule 9, the Supplier must design, develop, manufacture, test, commission, supply and deliver each Option Set and each Spare and Special Tool the subject of the Option Set Notice pursuant to the terms of this deed.
20.4 Non-continuous production Option Sets

(a) Without limiting clause 20.3, RailCorp (or TfNSW on behalf of RailCorp) may exercise its option to purchase any Option Set on or before the relevant Option Set Order Date for the Option Set set out in the table in paragraph 2.2 of Schedule 9.

(b) If RailCorp (or TfNSW on behalf of RailCorp) gives an Option Set Notice to the Supplier on or before the relevant Option Set Order Date set out in the table in paragraph 2.2 of Schedule 9, the Supplier must design, develop, manufacture, test, commission, supply and deliver each Option Set and each Spare and Special Tool the subject of an Option Set Notice pursuant to the terms of this deed.

(c) RailCorp (or TfNSW on behalf of RailCorp) may give an Option Set Notice pursuant to clause 20.4 whether or not an Option Set Notice has been given pursuant to clause 20.3.

20.5 Minimum and maximum number of Option Sets

The parties acknowledge and agree that should RailCorp (or TfNSW on behalf of RailCorp) exercise options to purchase Option Sets pursuant to either or both of clause 20.3 and clause 20.4, the total number of Option Sets purchased in each instance will not be less than 15 Option Sets and in the aggregate will not exceed 45 Option Sets.

20.6 Absolute discretion

Without limiting clause 1.8, the Supplier acknowledges and agrees that:

(a) neither RailCorp, or TfNSW on behalf of RailCorp, is under any obligation to elect to purchase any or all of the Option Sets; and

(b) the Supplier will not be entitled to make any Claim against RailCorp or TfNSW in respect of an election by RailCorp or TfNSW on behalf of RailCorp to not give an Option Set Notice pursuant to this clause 20.

21. TfNSW initiated Variations

21.1 Variation Proposal

TfNSW's Representative may at any time issue to the Supplier a notice titled "Variation Proposal" setting out the details of a proposed Variation which TfNSW is considering, including TfNSW's proposed requirements for the implementation of the proposed Variation.

TfNSW will not be obliged to proceed with any Variation proposed in a "Variation Proposal".

21.2 Supplier's Variation Notice

As soon as practicable and in any event within 20 Business Days after receipt of a "Variation Proposal" (or such longer period as may be requested by the Supplier, having regard to the nature of the relevant Variation Proposal, and approved by TfNSW (acting reasonably)), the Supplier must provide TfNSW with a notice (Supplier's Variation Notice) setting out detailed particulars of:

(a) the Variation Costs which it will incur, or the Variation Savings which it will derive, as a result of the proposed Variation, such Variation Costs or Variation Savings to be separately identified in respect of:

(i) this deed;

(ii) the TLS Deed; and
(iii) the MF Works Deed;

(b) the effect (if any) which the proposed Variation will have on all affected Programs and Project Plans;

(c) the Approvals (if any) required to implement the proposed Variation;

(d) the time within which the proposed Variation will be implemented;

(e) the effects (if any) which the proposed Variation will have on:
   (i) any or all of:
      A. the Delivery Phase Activities;
      B. the TLS Phase Activities; and
      C. the MF Works Activities;
   (ii) the workmanship, durability or functional integrity of any element of the Project Activities (including the MF Works) or any Asset or the Maintenance Facility;
   (iii) the Supplier's ability to provide the Required Availability under the TLS Deed;
   (iv) the use of the Sets by the Operator and its passengers;
   (v) any Accreditation held or required by TfNSW, RailCorp, the Operator, the Supplier or the Supplier's Associates;
   (vi) the safety of the Sets;
   (vii) RailCorp's Facilities;
   (viii) any training requirements;
   (ix) the Supplier's ability to:
      A. satisfy any warranty given by the Supplier under any Project Agreement; or
      B. perform any of its other obligations under any Project Agreement;

(f) any relief required by the Supplier from its obligations under this deed to ensure that the Supplier would be left in a no better and no worse position than it would be in if the Variation were not implemented; and

(g) any other information requested by TfNSW.

21.3 Supplier's Variation Notice requirements

The Supplier's Variation Notice must be prepared:

(a) so as to avoid, as far as practicable, the need for a new Approval or a modification to an existing Approval for the implementation of the Variation;

(b) where applicable, on the basis of the prices and rates set out in Schedule 12;
(c) on an Open Book Basis (and to this end the Supplier must allow TfNSW to review and audit the Supplier's records to verify that the Supplier's Variation Notice has been prepared on an Open Book Basis);

(d) assuming the Supplier is a willing, efficient and competent provider of the Variation in an efficient and competitive market;

(e) in a manner which is consistent with the requirements of TfNSW for the implementation of the Variation;

(f) having regard to minimising disruption to the performance of the Operations Functions;

(g) having regard to minimising any delay in achieving:

(i) Provisional Acceptance in relation to a Set;

(ii) Final Acceptance in relation to a Set;

(iii) Fleet Acceptance of:

A. the Continuous Production Fleet; or

B. the Non-continuous Production Fleet; or

(iv) MF Completion in relation to the MF Works,

to the extent that Provisional Acceptance of a Set, Final Acceptance of a Set, Fleet Acceptance or MF Completion (as applicable) has not yet been achieved;

(h) having regard to minimising any adverse safety impacts of the Variation;

(i) in a manner which ensures that all appropriate insurances relevant to the Variation are taken out and maintained consistently with those that would have been required by TfNSW if the Variation had been included in the original requirements of the Project Agreements, unless TfNSW otherwise determines;

(j) in a manner so that there is no double counting; and

(k) in the form of an offer capable of immediate acceptance by TfNSW within 40 Business Days after the date on which TfNSW receives the Supplier's Variation Notice.

21.4 Instruction to proceed

Whether or not TfNSW's Representative has issued a "Variation Proposal" under clause 21.1 and whether or not the Supplier has issued a the Supplier's Variation Notice under clause 21.2 in response to a "Variation Proposal", TfNSW's Representative may at any time prior to the Date of Provisional Acceptance of the last Set to be supplied under this deed, instruct the Supplier to implement a Variation by issuing a notice titled "Variation Order". In these circumstances, the matters set out in clauses 21.2(a), 21.2(d), 21.2(e)(v) and clause 21.2(f) will, until TfNSW and the Supplier agree otherwise or a determination is made in accordance with the Dispute Resolution Procedures, be reasonably determined by TfNSW's Representative. In making his or her determination, TfNSW's Representative will:

(a) have regard to the principles set out in clause 21.3, to the extent relevant; and

(b) determine all matters required to enable the Variation to be implemented.

If the Supplier disagrees with a matter determined by TfNSW's Representative under this clause 21.4:
(c) the Supplier may refer the matter for dispute resolution in accordance with the Dispute Resolution Procedures;

(d) the Supplier must proceed to implement the Variation on the basis determined by TfNSW notwithstanding that the matters in dispute have not been agreed or determined in accordance with the Dispute Resolution Procedures; and

(e) any necessary adjustments will be made following the expert or arbitrator’s determination.

If TfNSW has not issued a "Variation Proposal" under clause 21.1, the "Variation Order" under this clause 21.4 will also be taken to be a "Variation Proposal" under clause 21.1. However, clauses 21.5, 21.6(c), 21.7(a), 21.9(a), 21.11, 21.12 and 21.13 will not apply where TfNSW issues a "Variation Proposal" under this clause 21.4.

If a Variation the subject of Variation Order affects:

(f) the TLS Phase Activities, TfNSW’s Representative will issue a separate "Variation Order" under the TLS Deed, and clause 24.4 of the TLS Deed will apply; or

(g) the MF Works Activities, TfNSW’s Representative will issue a separate "Variation Order" under the MF Works Deed, and clause 6.2 of the MF Works Deed will apply.

21.5 **Tender for works**

If TfNSW issues a "Variation Proposal" under clause 21.1, TfNSW may require that the Supplier conduct a tender process for all or part of the works which would be required to effect the Variation if the value of those works is likely to exceed [value] (CPI Indexed). If TfNSW elects to require the tender process:

(a) the tender process must be carried out promptly and in accordance with TfNSW’s reasonable requirements; and

(b) the date by which the Supplier must provide the Supplier’s Variation Notice will be extended by such period as is reasonably required to conduct the tender process.

The Supplier must have regard to the outcome of the tender process (including the tendered prices) in the Supplier’s Variation Notice (or, if the Supplier’s Variation Notice has been submitted before the completion of the tender process, promptly submit an appropriately amended Supplier’s Variation Notice).

21.6 **Election by TfNSW**

Within 40 Business Days after receipt of the Supplier’s Variation Notice or, if clause 21.5 applies, 40 Business Days after the receipt of an amended Supplier’s Variation Notice, TfNSW may either:

(a) accept the Supplier’s Variation Notice and if the Supplier’s Variation Notice contains any options, nominate which option TfNSW accepts;

(b) reject the Supplier’s Variation Notice; or

(c) withdraw the proposed Variation,

by notice to the Supplier (which in the case of paragraph (a) must be titled "Variation Order").

21.7 **TfNSW accepts the Supplier’s Variation Notice**

If TfNSW accepts the Supplier’s Variation Notice in accordance with clause 21.6(a):
(a) the Supplier must proceed to implement the Variation on the basis of the Supplier’s Variation Notice (as accepted by TfNSW); and

(b) the Supplier will be relieved of its obligations under this deed to the extent specified in the Supplier’s Variation Notice (as accepted by TfNSW).

21.8 **TfNSW rejects the Supplier’s Variation Notice**

If TfNSW rejects the Supplier’s Variation Notice in accordance with clause 21.6(b), the parties must consult in good faith, and use their reasonable endeavours to agree on a mutually acceptable resolution to the matters set out in the Supplier’s Variation Notice which are in dispute.

21.9 **If parties reach agreement**

If the parties reach agreement on the disputed matters in the Supplier’s Variation Notice and TfNSW directs the Supplier to implement the Variation (by notice titled “Variation Order”):

(a) the Supplier must proceed to implement the Variation on the basis of the Supplier’s Variation Notice (as varied by the parties’ agreement, as recorded in the “Variation Order” to both parties’ reasonable satisfaction, on the matters in the Supplier’s Variation Notice which were in dispute); and

(b) the Supplier will be relieved of its obligations under this deed to the extent specified in the Supplier’s Variation Notice (as varied by the parties’ agreement, as recorded in the “Variation Order”, on the matters in the Supplier’s Variation Notice which were in dispute).

21.10 **If parties fail to reach agreement**

If the parties are unable to reach agreement within 10 Business Days after the commencement of the consultation under clause 21.8, TfNSW may refer the matter for dispute resolution in accordance with the Dispute Resolution Procedures. In determining the dispute under the Dispute Resolution Procedures:

(a) the principles set out in clause 21.3 must be considered, to the extent relevant; and

(b) all matters required to enable the Variation to be implemented must be determined, assuming TfNSW makes the election referred to in clause 21.12(a).

21.11 **TfNSW may direct the Supplier to proceed pending outcome of dispute resolution process**

If TfNSW refers the matter for dispute resolution, TfNSW may also direct the Supplier to implement the Variation by a notice titled “Variation Order” whether or not the matters in dispute have been agreed or determined in accordance with the Dispute Resolution Procedures.

If TfNSW gives such a notice:

(a) the disputed matters will, until TfNSW and the Supplier otherwise agree or a determination is made in accordance with the Dispute Resolution Procedures, be reasonably determined by TfNSW’s Representative. In making his or her determination, TfNSW’s Representative will:

(i) have regard to the principles set out in clause 21.3, to the extent relevant; and

(ii) determine all matters required to enable the variation to be implemented;
the Supplier must proceed to implement the Variation on the basis determined by TfNSW notwithstanding that the matters in dispute have not been agreed or determined in accordance with the Dispute Resolution Procedures;

(c) the Supplier will be relieved of its obligations under this deed to the extent specified in TfNSW's notice; and

(d) any necessary adjustments will be made following the determination of the matters in dispute.

21.12 TfNSW options following determination

Following determination of the dispute referred for dispute resolution under clause 21.10 (if parties fail to reach agreement), TfNSW may, if it has not already exercised its right under clause 21.11, elect to do either of the following:

(a) require the Supplier to proceed to implement the Variation in accordance with the Supplier's Variation Notice as varied by the determination; or

(b) withdraw the proposed Variation,

by notice to the Supplier (which in the case of clause 21.12(a) must be titled "Variation Order").

21.13 Supplier to implement Variation

If TfNSW gives the Supplier notice pursuant to clause 21.12(a):

(a) the Supplier must proceed to implement the Variation in accordance with the Supplier's Variation Notice (as varied by the determination, once made); and

(b) the Supplier will be relieved of its obligations under this deed to the extent specified in the Supplier's Variation Notice (as varied by the determination, once made).

21.14 Variation Costs

(a) (Variation Costs, when agreed): If the Supplier implements a Variation in accordance with clause 21.7 or 21.9 and the Supplier's Variation Notice (as subsequently agreed, if clause 21.9 applies) states that the Variation will result in Variation Costs in an amount greater than zero, the Supplier may submit a payment claim in accordance with clause 19 in respect of the relevant portion of the Variation Costs stated in the Supplier's Variation Notice (as subsequently agreed, if clause 21.9 applies) at the times or after the achievement of the relevant milestones specified in the Supplier's Variation Notice (as subsequently agreed, if clause 21.9 applies).

(b) (Variation Costs, when not agreed): If the Supplier implements a Variation in accordance with clause 21.4, 21.11 or 21.13 which results in Variation Costs in an amount greater than zero, or if clause 23.7 applies, the Supplier may submit a payment claim in accordance with clause 19 in respect of the relevant portion of the Variation Costs:

(i) pending determination in accordance with the Dispute Resolution Procedures or agreement between the parties, as reasonably determined by TfNSW's Representative; and

(ii) following determination in accordance with the Dispute Resolution Procedures or agreement between the parties, as so determined or agreed,

after each month in which the relevant work was undertaken, or (if agreed between the parties or determined under the Dispute Resolution Procedures) at the times or
after the achievement of the relevant milestones as agreed or determined. If the Variation Costs paid under clause 21.14(b)(i) are more or less than the Variation Costs for the relevant month as subsequently determined or agreed, then the difference will be paid by the relevant party to the other.

21.15 Variation Savings

(a) If the Supplier implements a Variation in accordance with clauses 21.4, 21.7, 21.9, 21.11 or 21.13, that results in Variation Savings, the Supplier must pay TfNSW the Variation Savings.

(b) To the extent that the Variation Savings relate to the Delivery Phase Activities, TfNSW may set-off against its obligations to make any payment under this deed, the Variation Savings, in the manner and at the time as agreed between TfNSW and the Supplier or, to the extent that they fail to agree, as determined in accordance with the Dispute Resolution Procedures (or as reasonably determined by TfNSW pending determination under the Dispute Resolution Procedures).

21.16 Options

(a) TfNSW’s Representative may, in its absolute discretion and without being under any obligation to do so, instruct by way of Variation any Option by giving written notice to the Supplier.

(b) TfNSW and the Supplier agree that if a notice pursuant to clause 21.16(a) is given in respect of an Option by the relevant date specified in the table in Schedule 23, this deed, including each Set Price, will be deemed to be amended in accordance with the relevant amendments set out in the table in Schedule 23 from the date the Supplier receives such notice.

(c) Where TfNSW’s Representative directs an Option by giving written notice to the Supplier by the relevant date referred to in clause 21.16(b), the Supplier, in respect of that Option:

(i) must carry out its obligations under this deed as amended in accordance with clause 21.16(b); and

(ii) acknowledges that:

A. any adjustment to a Set Price made in accordance with clause 21.16(b) will be full compensation for all costs and any Loss or delay it suffers or incurs arising out of or in connection with the issue of such a notice and no further adjustment will be made to the amounts payable to the Supplier under the Delivery Deed; and

B. the Supplier is not entitled to make any Claim for:

1) any acceleration to the carrying out of the Project Activities which the Supplier must perform at any time in order to achieve Provisional Acceptance by a Date for Provisional Acceptance; or

2) any extension of time for any delay to the carrying out of the Project Activities, in connection with the issue of such a notice or the amendment of this deed pursuant to clause 21.16(b).

(d) Nothing in this clause prevents TfNSW’s Representative from:

(i) issuing a “Variation Proposal” as referred to in clause 21.1; or
(ii) instructing a Variation by issue of a “Variation Order” under clause 21.4, that involves the same (or similar) changes to a Set as an Option after the relevant date for giving notice of the Option specified in the table in Schedule 23.

(e) If TfNSW’s Representative:

(i) issues a “Variation Proposal” as referred to in clause 21.1; or

(ii) instructs a Variation by issue of a “Variation Order” under clause 21.4, which involves the same or similar changes to a Set as are required by an Option and which is issued or instructed (as relevant) after the relevant date in the table in Schedule 23 for that Option, TfNSW and the Supplier agree that the Variation will be valued to the extent it is reasonable to use them, in accordance with the details in Schedule 23 relevant to that Option, or otherwise in accordance with this deed.

21.17 No liability unless Variation Order

The Supplier will not be entitled to make any Claim in respect of the Delivery Phase Activities against TfNSW arising out of, or in any way in connection with, any Variation, except where the Supplier is directed to carry out a Variation pursuant to a “Variation Order” issued by TfNSW under clause 21.4, 21.6, 21.9, 21.11, 21.12 or 21.16.

21.18 AMC Option

22. Supplier initiated Variations

22.1 No Variation without consent

The Supplier must not undertake any Variation without TfNSW’s prior written consent.
22.2 Supplier may propose a Variation

The Supplier may propose a Variation by giving a written notice with details of:

(a) the proposed Variation;

(b) the reason for the proposed Variation;

(c) the Variation Costs it will incur, or the Variation Savings it will derive, by carrying out the proposed Variation, such Variation Costs or Variation Savings to be separately identified in respect of:
   (i) this deed;
   (ii) the TLS Deed; and
   (iii) the MF Works Deed;

(d) the effect (if any) which the proposed Variation will have on all affected Programs and Project Plans;

(e) the Approvals (if any) required to implement the proposed Variation;

(f) the time within, and the manner in which, the Supplier proposes to implement the proposed Variation;

(g) the effects (if any) which the proposed Variation will have on:
   (i) any or all of:
      A. the Delivery Phase Activities;
      B. the TLS Phase Activities; and
      C. the MF Works Activities;
   (ii) the workmanship, durability or functional integrity of any element of the Project Activities (including the MF Works) or any Asset or the Maintenance Facility;
   (iii) the Supplier’s ability to provide the Required Availability under the TLS Deed;
   (iv) the use of the Sets by the Operator and its passengers;
   (v) any Accreditation held or required by TfNSW, RailCorp, the Operator, Supplier or its Associates;
   (vi) the safety of the Sets;
   (vii) RailCorp’s Facilities;
   (viii) any training requirements; or
   (ix) the Supplier’s ability to:
      A. satisfy any warranty given by the Supplier under any Project Agreement; or
22.3 Supplier to provide statement

If TfNSW requires, the Supplier must provide in respect of any Variation it proposes:

(a) a written statement stating that the proposed Variation:

   (i) will not adversely affect the functional integrity of the Sets or the ability of the Supplier to provide the Required Availability or otherwise carry out the Project Activities (including the MF Works) in accordance with the Project Agreements; and

   (ii) will not adversely affect the quality standards, warranties and other obligations required under the Project Agreements; and

(b) any other information and supporting documentation TfNSW requires.

22.4 TfNSW may approve or reject

If the Supplier gives a notice under clause 22.2 together with any written statement or other information or supporting documentation which TfNSW requires under clause 22.3, TfNSW:

(a) will consider the Supplier's proposed Variation in good faith; and

(b) subject to clause 22.5:

   (i) may approve (with or without conditions) or reject the proposed Variation in its absolute discretion by notice to the Supplier (which in the case of an approval must be titled "Variation Approval"); and

   (ii) will be under no obligation to approve the proposed Variation for the convenience of or to assist the Supplier.

If TfNSW approves the Variation:

(c) the Supplier must proceed to implement the Variation on the basis approved by TfNSW; and

(d) the Supplier will be relieved of its obligations under this deed to the extent specified in TfNSW's approval.

22.5 Variation required as a result of a change in law or change to RailCorp’s Facilities

(a) To the extent that any Variation requested by the Supplier is required to ensure that the Sets comply with a change in law, TfNSW must, in its discretion, either:

   (i) approve the Variation proposed by the Supplier (by notice titled "Variation Approval");

   (ii) direct the Supplier to carry out a Variation in accordance with clause 21 to ensure that the Sets comply with the change in law; or

   (iii) take such other action as TfNSW considers necessary to ensure that the Sets comply with the change in law (including modifying RailCorp’s Facilities).
(b) To the extent, as a direct result of a modification to RailCorp's Facilities, a Variation requested by the Supplier is required to ensure that the Sets have the same functionality as prior to such modification to RailCorp's Facilities, TfNSW must, in its discretion, either:

(i) approve the Variation proposed by the Supplier (by notice titled "Variation Approval");

(ii) direct the Supplier to carry out a Variation in accordance with clause 21 to ensure that the Sets have the same functionality as prior to such modification to RailCorp's Facilities; or

(iii) take such other action as TfNSW considers necessary to ensure that the Sets have the same functionality as prior to such modification to RailCorp's Facilities (including making further modifications to RailCorp's Facilities).

(c) If TfNSW approves a Variation in accordance with clause 22.5(a)(i) or 22.5(b)(i):

(i) the Supplier must proceed to implement the Variation on the basis of the Supplier's notice under clause 22.2 (as approved by TfNSW);

(ii) if the Variation is required to ensure that the Assets, the Deliverables or the Maintenance Facility comply with a Qualifying Change in Law, clause 23 will apply; and

(iii) if the Variation is required to ensure the Assets or the Deliverables have the same functionality as prior to such modification to RailCorp's Facilities, the Supplier may submit a payment claim in accordance with clause 17.4 in respect of the relevant portion of the Variation Costs stated in the Supplier's notice under clause 22.2:

A. pending determination in accordance with the Dispute Resolution Procedures or agreement between the parties, as reasonably determined by TfNSW's Representative; and

B. following determination in accordance with the Dispute Resolution Procedures or agreement between the parties, as so determined or agreed,

after each month in which the relevant work was undertaken, or (if agreed between the parties or determined under the Dispute Resolution Procedures) at the times or after the achievement of the relevant milestones as agreed or determined. If the Variation Costs paid are more or less than the Variation Costs for the relevant month as subsequently determined or agreed, then the difference will be paid by the relevant party to the other.

22.6 Supplier to bear risks and costs

Unless otherwise agreed in writing by TfNSW and subject to clause 22.5:

(a) the Supplier will bear all risks and costs:

(i) associated with proposing a Variation and providing the details under clause 22.2 and complying with clause 22.3;

(ii) reasonably incurred by TfNSW in assessing a Variation proposed by the Supplier; and
22.7 Variation Savings

(a) If the Supplier implements a Variation in accordance with this clause 22, that results in Variation Savings, the Supplier must pay TfNSW [ ] of the Variation Savings.

(b) TfNSW may set-off the amount referred to in clause 22.7(a) against its obligations to make any payment under this deed in the manner and at the time as agreed between TfNSW and the Supplier or, to the extent that they fail to agree, as determined in accordance with the Dispute Resolution Procedures.

23. Changes in Law and other matters

23.1 Non-Qualifying Changes in Law

Subject to clause 23.2, the Supplier will be liable for the consequences of, and will have no Claim in respect of the Delivery Phase Activities against TfNSW arising out of or in any way in connection with, a change in law.

23.2 Qualifying Change in Law

If, and to the extent, a Qualifying Change in Law occurring after the date of this deed requires the Supplier to incur additional costs, the Supplier:

(a) must use all reasonable endeavours to minimise the additional costs to be incurred; and

(b) may claim compensation in respect of such additional costs (net of any savings) in accordance with this clause 23.

23.3 Notice of proposed Qualifying Change in Law

If the Supplier becomes aware of a proposed Qualifying Change in Law, the Supplier must:

(a) promptly notify TfNSW of the proposed Qualifying Change in Law; and

(b) if requested by TfNSW:

(i) provide TfNSW with details of the likely effects of the Qualifying Change in Law on the Supplier; and

(ii) otherwise consult with TfNSW in relation to the proposed Qualifying Change in Law.

23.4 Compensation for Qualifying Change in Law

To the extent that a Qualifying Change in Law increases the cost of performing the Delivery Phase Activities, a Compensation Event will occur.

23.5 Changes in Rail Industry Standards

The Supplier must, until the Date of Provisional Acceptance of the last Set to be supplied under this deed:
(a) diligently monitor all changes in Rail Industry Standards; and

(b) notify TfNSW's Representative within 20 Business Days of becoming aware of any Change in Rail Industry Standards that affect or change, or are likely to affect or change, the design of any Asset or the performance of the Project Activities.

23.6 **TfNSW to determine required action**

(a) A notice given by the Supplier under clause 23.5(b) must include a reasonable estimate of the effects the Change in Rail Industry Standards will have on the matters described in clause 21.2(e), and include reasonable supporting information.

(b) Within 20 Business Days of receiving a notice from the Supplier under clause 23.5(b), TfNSW's Representative must either:

(i) require the Supplier to submit a written notice proposing a Variation in accordance with clause 22 on the basis that TfNSW wishes to consider the impact of the requirement to comply with the Change in Rail Industry Standards on the matters described in clause 21.2(e);

(ii) direct that the requirements of this deed (and any other relevant Project Agreements) be varied to avoid the consequences of the Change in Rail Industry Standards and that direction will be deemed to be a Variation Order to the extent that it gives rise to a Variation; or

(iii) direct the Supplier to disregard the Change in Rail Industry Standards.

(c) If the Supplier submits a written notice pursuant to clause 23.6(b)(i):

(i) if TfNSW accepts the proposed Variation, the provisions of clause 22.4 will apply as if TfNSW approved the proposed Variations; or

(ii) if TfNSW ultimately rejects the proposed Variation, TfNSW must issue a direction pursuant to either clause 23.6(b)(ii) or 23.6(b)(iii).

23.7 **Change to TfNSW Policies, Rules or Procedures**

If a change to any TfNSW Policy, Rule or Procedure (except a change to the Timetable or the Interface Protocols), increases the cost of performing the Delivery Phase Activities, the change will be treated as an instruction to implement a Variation under clause 21 and clause 21.14(b) will apply.

24. **Qualifying Causes**

24.1 **Qualifying Causes**

Each of the following events is a **Qualifying Cause**:

(a) a Compensation Event;

(b) a Force Majeure Event;

(c) a Variation the subject of a direction by TfNSW under clause 21.4, 21.6, 21.9, 21.11 or 21.12;

(d) any blockade or embargo, other than a blockade or embargo which only affects the Supplier and/or one or more of the Supplier's Subcontractors;

(e) an MF Works Delay Event; or
(f) an act or omission by TfNSW, RailCorp, the Operator or another NSW Rail Entity not being an act or omission:

(i) expressly permitted or allowed by a Project Agreement;

(ii) which is within a timeframe expressly permitted or allowed by a Project Agreement;

(iii) which is caused or contributed to by a breach by the Supplier of a Project Agreement or any negligent or unlawful act or omission of the Supplier or its Associates; or

(iv) being the exercise by TfNSW, RailCorp, the Operator or another NSW Rail Entity of any of its statutory functions or powers.

24.2 Compensation Events

Each of the following events is a Compensation Event:

(a) a breach by TfNSW or RailCorp of their respective obligations under this deed or any other Project Agreement which adversely affects the ability of the Supplier to perform any of its obligations or exercise any of its rights under the Project Agreements;

(b) subject to clause 13.5(c), if TfNSW cancels or materially changes an Agreed Network Access Right;

(c) except where clause 13.14(c) applies, if TfNSW carries out, or directs the Supplier to carry out, Unplanned Verification Activities;

(d) the existence of the circumstances described in clause 23.4; and

24.3 Entitlement to claim extension of time

If the Supplier is delayed:

(a) prior to the Date for Provisional Acceptance of a Set, by a Qualifying Cause in a manner which does or will delay it in achieving Provisional Acceptance of that Set by the Date for Provisional Acceptance of that Set; or

(b) on or after the Date for Provisional Acceptance of a Set, by a Qualifying Cause (other than one described in clause 24.1(b), 24.1(c), or 24.1(e)), in a manner which does or will delay it in achieving Provisional Acceptance of that Set,

the Supplier may claim an extension of time to the relevant Date for Provisional Acceptance of the Set in accordance with this clause 24.

24.4 Entitlement to claim compensation

Where an extension of time has been granted under clause 24.8 for a delay caused by a Compensation Event, and the delay for which the extension of time has been granted causes the Supplier to incur Loss, the Supplier may claim compensation in accordance with this clause 24, calculated in accordance with clause 24.9.
24.5 Notice of Qualifying Cause and Claim

(a) As soon as practicable and in any event within five Business Days after the Supplier first becomes aware that a Qualifying Cause is likely to cause any of the consequences referred to in clause 24.3, the Supplier must give to TfNSW's Representative a notice, expressly stating:

(i) that a Qualifying Cause has occurred; and

(ii) whether the Supplier proposes to make a Claim arising from that Qualifying Cause.

(b) If the Supplier wishes to make a Claim, within 10 Business Days of giving the notice under clause 24.5(a), it must give TfNSW's Representative a written Claim which must include (to the extent practicable):

(i) detailed particulars concerning the Qualifying Cause upon which the Claim is based;

(ii) details of the obligations which have been affected by the Qualifying Cause;

(iii) if a Claim is being made under clause 24.3, details of the extension of time claimed to any Date for Provisional Acceptance of a Set and how it has been calculated;

(iv) if a Claim is being made under clause 24.4, details of the amount of any compensation claimed and calculated in accordance with clause 24.9; and

(v) details of the steps which the Supplier has taken to mitigate the effects of the relevant Qualifying Cause.

24.6 Continuing Qualifying Causes

If the Qualifying Cause (or its effects) are continuing, the Supplier must:

(a) continue to update the information required by clause 24.5(b) every 10 Business Days, and until the Qualifying Cause (or its effects) have ceased; and

(b) provide a final written Claim within five Business Days after the Qualifying Cause (or its effects) have ceased.

24.7 Condition precedent to entitlement

(a) It is a condition precedent to the Supplier's entitlement to any compensation, extension of time or other relief under this clause 24 that:

(i) the Supplier must have actually been delayed in a manner described in either clause 24.3(a) or 24.3(b);

(ii) the Qualifying Cause:

A. did not occur or arise as a result of any act or omission of the Supplier or its Associates;

B. was not within the control of the Supplier or its Associates; and
C. could not reasonably have been prevented by a prudent, competent and experienced contractor performing work of a similar nature to the Delivery Phase Activities; and

(ii) the Supplier has complied with the requirements of clause 24.5 and clause 24.6.

(b) If the Supplier fails to comply with the requirements of clause 24.5 and clause 24.6:

(i) neither TfNSW or RailCorp will be liable (in so far as it is possible to exclude such liability) upon any Claim by the Supplier; and

(ii) the Supplier will be absolutely barred from making any Claim against TfNSW or RailCorp,

arising out of or in connection with the relevant Qualifying Cause.

24.8 Extension of time, relief and/or compensation

If the conditions precedent in clause 24.7 have been satisfied, TfNSW must:

(a) in respect of Claims made under clause 24.3 for an extension of time to which the Supplier is entitled under that clause, subject to clause 24.10 and clause 24.11, extend the relevant Date for Provisional Acceptance of a Set by a reasonable period of time determined by TfNSW's Representative, having regard to the latest Confirmed Delivery Program (to the extent TfNSW's Representative considers it relevant), within 20 Business Days of the Supplier's Claim under clause 24.5(b) or clause 24.6(b) (as applicable); and/or

(b) in respect of Claims made under clause 24.4 for compensation to which the Supplier is entitled under that clause, subject to clause 24.10 and clause 24.11, pay, in accordance with clause 19, compensation to the Supplier calculated under clause 24.9.

24.9 Calculation and payment of compensation

(a) Subject to clause 24.10 and clause 24.11, for each day by which a Date for Provisional Acceptance of a Set is extended due to a Compensation Event and for which the Supplier makes a Claim for and is entitled to compensation in accordance with clause 24.4, the Supplier will be entitled to be paid, subject to clause 24.9(b), the reasonable extra costs necessarily incurred by the Supplier determined by TfNSW's Representative and verified on an Open Book Basis, which will not exceed $320583942.6 per day.

(b) The quantum payable to the Supplier by TfNSW under clause 24.9(a) will be determined by TfNSW's Representative and verified on an Open Book Basis and calculated in a manner so that there is no double counting, having regard to:

(i) where applicable or where it is reasonable to use them, the labour rates set out in paragraphs 2.2 and 2.3 of Schedule 12;

(ii) the incremental costs which the Supplier incurs or will incur as a direct result of that Compensation Event, including:

A. maintenance costs; and

B. additional administrative and onsite overhead costs;

(iii) amounts payable to the Supplier under clause 10.13 of the MF Works Deed;
(iv) any cost savings which accrue or will accrue to the Supplier as a result of the Compensation Event;

(v) any insurance proceeds, damages, compensation or other revenue which the Supplier receives or is entitled to receive (or would have been entitled to receive but for a failure by the Supplier to comply with this deed or with the terms of any Insurance) as a result of the Compensation Event; and

(vi) any liability to third parties incurred by the Supplier as a direct result of the Compensation Event,

and the Supplier will not be entitled to make, nor will TfNSW or RailCorp be liable upon, any Claim in these circumstances other than for the amount which is payable by TfNSW under this clause 24.9(b).

(c) The amounts referred to in clauses 24.9(a) and 24.9(b):

(i) are the agreed costs which will be payable by TfNSW in respect of the delay and/or disruption or a Compensation Event in these circumstances; and

(ii) are the maximum liability of TfNSW and TfNSW's Associates to the Supplier for any delay, disruption or costs which:

A. the Supplier encounters in carrying out the Delivery Phase Activities; and

B. arises out of, or in any way in connection with, a Compensation Event (including breach of this deed by TfNSW or RailCorp or Qualifying Change in Law),

and the Supplier will not be entitled to make, nor will TfNSW or RailCorp be liable upon, any Claim in these circumstances other than for the amount which is payable by TfNSW under this clause 24.9.

24.10 Mitigation

(a) The Supplier must use all reasonable endeavours to overcome or mitigate the effects of any Qualifying Cause (including by putting in place temporary measures reasonably acceptable to TfNSW's Representative) and the Supplier's entitlement to relief and/or compensation under this clause 24 will be reduced to the extent that the Supplier fails to comply with its obligations under this clause 24.10(a).

(b) Without limiting clause 24.10(a), the Supplier must use all reasonable endeavours to:

(i) avoid or minimise the consequences of any delay caused by a Qualifying Cause;

(ii) avoid or minimise any adverse impact on the performance of the Supplier's obligations under this deed;

(iii) minimise any Loss incurred or suffered as a result of a Compensation Event; and

(iv) maximise any cost savings derived as a result of a Compensation Event.

(c) The Supplier's entitlement to an extension of time to the Date for Provisional Acceptance of a Set will be reduced to the extent that:
(i) the Supplier contributed to the delay;
(ii) the Supplier failed to comply with its obligations under clause 24.10(a);
(iii) the Supplier has not actually been delayed:
A. prior to the Date for Provisional Acceptance of the Set, by a Qualifying Cause in a manner which does or will prevent the Supplier from achieving Provisional Acceptance of the Set by the Date for Provisional Acceptance of that Set; or
B. after the Date for Provisional Acceptance of the Set, by a Qualifying Cause (other than one described in clause 24.1(b), 24.1(c), or 24.1(e)), in a manner which does or will delay it in achieving Provisional Acceptance of that Set; and/or
(iv) there is a concurrent event of delay that is not a Qualifying Cause.

24.11 Non-compliance

The Supplier's entitlement to:

(a) an extension of time to any Date for Provisional Acceptance of a Set will be reduced to exclude any delay which would not have occurred; and

(b) compensation will be reduced to:

(i) exclude any incremental costs or loss of revenue which would not have been incurred or suffered; and

(ii) include any cost savings or additional revenue which would have been derived,

had the Supplier complied with its obligations under the Project Agreements.

24.12 No right to common law damages

Except as provided for by this clause 24, TfNSW and TfNSW's Associates will not be liable upon any Claim by the Supplier arising out of or in connection with a Qualifying Cause, including in respect of any breach of this deed by TfNSW.

24.13 Unilateral extension

Whether or not the Supplier has made, or is entitled to make, a claim for an extension of time to a Date for Provisional Acceptance of a Set under this clause 24, TfNSW's Representative may, in its absolute discretion at any time and from time to time by notice to the Supplier, unilaterally extend any Date for Provisional Acceptance. TfNSW's Representative is not required to exercise this discretion for the benefit of the Supplier.

25. Force Majeure Events

If a Force Majeure Event:

(a) will, in the reasonable opinion of TfNSW's Representative, prevent; or

(b) prevents,

the Supplier from performing its material non-financial obligations for a continuous period of at least 12 months then TfNSW may terminate this deed by giving 20 Business Days' notice to the Supplier.
26. Default

26.1 Supplier Events of Default

Each of the following events is a Supplier Event of Default:

(a) **(Failure to progress)**: the Supplier fails to continuously and diligently progress the Delivery Phase Activities as required under clause 15.2;

(b) **(Delay - Recovery Plan)**: the Supplier fails to implement, comply with or otherwise diligently pursue a Recovery Plan in accordance with clause 15.6(b);

(c) **(Lack of or breach of Accreditation/Approval)**: the Supplier or any of Supplier's Personnel:
   
   (i) undertakes any of the Delivery Phase Activities which require Approval (including Accreditation) without having that Approval (including Accreditation); or

   (ii) breaches (as determined by any Authority) the terms of its Approval (including any Accreditation) in carrying out the Delivery Phase Activities;

(d) **(Lack of AEO status or breach of AEO authorisation)**: the Supplier:
   
   (i) fails to achieve AEO status;

   (ii) loses AEO status; or

   (iii) breaches any AEO authorisation accreditation requirements, in breach of its obligations under clause 7.3.

(e) **(Threatened suspension or revocation of a NSW Rail Entity's Accreditation)**: an act or omission of the Supplier or Supplier's Personnel in carrying out the Delivery Phase Activities results in an Authority notifying a NSW Rail Entity that unless conditions identified by the Authority are complied with, it proposes to suspend or revoke the Accreditation of the Supplier or the NSW Rail Entity;

(f) **(Safety breach)**: there is a Notifiable Incident in respect of any Set, and the Incident is found to be primarily attributable to breach or negligence of any one or more of the Supplier or its Associates;

(g) **(Failure to report)**: the Supplier fails to comply with any of its reporting obligations under this deed or a report from the Supplier contains an inaccuracy which has a material impact on TfNSW or another NSW Rail Entity;

(h) **(Moneys Owing)**: the Supplier fails to pay any Moneys Owing when due and the failure is not remedied within 20 Business Days of a written demand from TfNSW;

(i) **(Restrictions on dealings)**: the Supplier breaches any of its obligations under clause 37;

(j) **(Change in Control)**: a Supplier Event of Default is deemed to have occurred under clause 38.3(c);

(k) **(Subcontracting)**: the Supplier breaches any of its obligations under clause 39;

(l) **(Failure to provide or replace Security)**: the Supplier fails to provide TfNSW with a Project Security as required under this deed, within the time period required under this deed;
(m) **(Failure to reinstate):** the Supplier fails to comply with any of its material obligations under clause 29;

(n) **(Failure to insure):** except as set out in clause 30, the Supplier fails to effect and maintain (or cause to be effected and maintained) any of the Insurances;

(o) **(Incorrect representation or warranty):** a representation or warranty made or given by the Supplier in this deed or any other Project Agreement proves to be untrue in a material respect;

(p) **(Breach of probity obligations):** the Supplier fails to comply with any of its obligations under clauses 36.3 or 36.4;

(q) **(Other identified breach):** any other breach that is stated in this deed to be a Supplier Event of Default; and

(r) **(Other breach):** any other material breach by the Supplier of an obligation under this deed or any other Project Agreement.

### 26.2 Default Notice

If a Supplier Event of Default occurs, TfNSW may give the Supplier a notice (Default Notice):

(a) stating that it is a notice under this clause 26.2; and

(b) specifying the nature of the Supplier Event of Default and whether that Supplier Event of Default is reasonably capable of being remedied.

### 26.3 Cure Plan

(a) If a Default Notice has been given and:

(i) the Supplier Event of Default is capable of being remedied, the Supplier must, within 10 Business Days after receipt of the Default Notice, Remedy the Supplier Event of Default; or

(ii) if the Supplier Event of Default is not reasonably capable of being Remedied within 10 Business Days after receipt of the Default Notice, the Supplier must, within that period, prepare and submit to TfNSW a draft plan describing the actions and measures which the Supplier will diligently pursue to Remedy the Supplier Event of Default (Draft Cure Plan).

(b) Within 10 Business Days after receipt of a Draft Cure Plan, TfNSW must either:

(i) approve the Draft Cure Plan by notifying the Supplier; or

(ii) reject the Draft Cure Plan by notifying the Supplier and providing reasons to the Supplier for its rejection.

(c) If TfNSW approves a Draft Cure Plan pursuant to clause 26.3(b)(i) (Approved Cure Plan):

(i) the period of time in the Approved Cure Plan to Remedy the Supplier Event of Default is the cure period (Applicable Cure Period); and

(ii) the Supplier must comply with and implement the Approved Cure Plan (or otherwise diligently pursue remediation of the Supplier Event of Default) and Remedy the Supplier Event of Default within the Applicable Cure Period.
(d) If TfNSW rejects a Draft Cure Plan pursuant to clause 26.3(b)(ii), the Supplier, in good faith consultation with TfNSW, must within five Business Days amend the Draft Cure Plan to meet TfNSW’s reasonable requirements and submit the amended Draft Cure Plan to TfNSW for its approval, in which case this clause 26.3 will apply to the amended Draft Cure Plan as if it were originally submitted under clause 26.3(a). This clause 26.3(d) does not extend the Applicable Cure Period. TfNSW is not obliged to give the Supplier more than one opportunity to amend a Draft Cure Plan.

26.4 Mitigation Plan

(a) If:

(i) a Default Notice has been given; and

(ii) the Supplier Event of Default is not capable of being Remedied,

the Supplier must, within 10 Business Days after receipt of the Default Notice, prepare and submit to TfNSW a draft plan describing the actions and measures which the Supplier will diligently pursue to Remedy or mitigate the effects of the Supplier Event of Default and prevent the Supplier Event of Default from recurring (Draft Mitigation Plan).

(b) Within 10 Business Days after receipt of the Draft Mitigation Plan, TfNSW must either:

(i) approve the Draft Mitigation Plan by notifying the Supplier; or

(ii) reject the Draft Mitigation Plan by notifying the Supplier and providing reasons to the Supplier for its rejection.

(c) If TfNSW approves a Draft Mitigation Plan pursuant to clause 26.4(b)(i) (Approved Mitigation Plan), the Supplier must comply with and implement the Approved Mitigation Plan.

(d) If TfNSW rejects a Draft Mitigation Plan pursuant to clause 26.4(b)(ii), the Supplier, in good faith consultation with TfNSW, must within five Business Days amend the Draft Mitigation Plan to meet TfNSW’s reasonable requirements and submit the amended Draft Mitigation Plan to TfNSW for its approval, in which case this clause 26.4 will apply to the amended Draft Mitigation Plan as if it were originally submitted under clause 26.4(a). TfNSW is not obliged to give the Supplier more than one opportunity to amend a Draft Mitigation Plan.

26.5 If Supplier fails to Remedy or comply

If a Default Notice has been given and the Supplier fails to:

(a) if the Supplier Event of Default is capable of being Remedied:

(i) Remedy the Supplier Event of Default, or submit a Draft Cure Plan, in accordance with clause 26.3;

(ii) if TfNSW rejects a Draft Cure Plan pursuant to clause 26.3(b)(ii), amend the Draft Cure Plan to meet TfNSW’s requirements and submit the amended Draft Cure Plan in accordance with clause 26.3(d); or

(iii) comply with and implement the Approved Cure Plan (or otherwise diligently pursue the remediation of the Supplier Event of Default so that the Supplier Event of Default is, or will be, Remedied within the Applicable Cure Period); or
(b) if the Supplier Event of Default is not capable of being Remedied:

(i) submit a Draft Mitigation Plan in accordance with clause 26.4(a);

(ii) if TfNSW rejects a Draft Mitigation Plan pursuant to clause 26.4(b)(ii), amend the Draft Mitigation Plan to meet TfNSW's requirements and submit the amended Draft Mitigation Plan in accordance with clause 26.4(d); or

(iii) comply with and implement the Approved Mitigation Plan,

a Supplier Termination Event will occur, and TfNSW may, without limiting the right of TfNSW to exercise any right or remedy under this deed, do any one or more of the following:

(iv) serve a notice on the Supplier specifying the relevant failure and requiring it to be rectified within a period specified in the notice;

(v) require the Supplier, at the Supplier's cost, to replace any Subcontractor performing the obligations of the Supplier to which the Supplier Event of Default relates with a person that:

A. satisfies the requirements of clause 39; or

B. is otherwise acceptable to TfNSW (acting reasonably);

(vi) exercise any rights pursuant to any Project Security held by TfNSW; or

(vii) exercise a right under clause 27.3.

26.6 Persistent Breach

(a) If a breach of the same obligation of the Supplier under this deed or any other Project Agreement occurs more than once in any 12 month period (Persistent Breach), TfNSW may, without limiting the right of TfNSW to exercise any right or remedy under this deed, issue a notice (Persistent Breach Notice) to the Supplier.

(b) A Persistent Breach Notice must:

(i) state that it is a Persistent Breach Notice;

(ii) identify the Persistent Breach;

(iii) not relate to a Supplier Event of Default which is the subject of a current Approved Cure Plan or Approved Mitigation Plan that the Supplier is implementing diligently; and

(iv) state that, if the breach continues beyond a period of 30 Business Days from the date of service of the Persistent Breach Notice or recurs within 12 months of the end of that period, it will result in TfNSW becoming entitled to issue a Final Persistent Breach Notice.

(c) If, following the issue of a Persistent Breach Notice, the breach specified in the Persistent Breach Notice has continued beyond 30 Business Days or recurred within 12 months of the end of that period, then TfNSW may issue a further notice to the Supplier (Final Persistent Breach Notice).

(d) A Final Persistent Breach Notice must:

(i) state that it is a Final Persistent Breach Notice;
(ii) identify the breach;

(iii) state that the breach has been the subject of the earlier Persistent Breach Notice; and

(iv) state that if the breach continues beyond a further 30 Business Days from the date of service of the Final Persistent Breach Notice or recurs three or more times in the six month period after the date of service of the Final Persistent Breach Notice, TfNSW will become entitled to terminate this deed.

26.7 Frequent Breaches

(a) If the Supplier commits frequent breaches of this deed which, in aggregate:

(i) substantially frustrate the objects of this deed;

(ii) significantly impair TfNSW’s ability to fulfil any of its objectives under the Transport Administration Act;

(iii) have a material adverse effect on the Project, TfNSW, the Operator, another NSW Rail Entity or Customers; or

(iv) in TfNSW’s reasonable opinion indicate that the Supplier does not intend to be or does not regard itself as being bound by this deed,

whether or not such breaches are of the same type or class (Frequent Breaches), TfNSW may, without limiting the right of TfNSW to exercise any right or remedy under this deed, issue a notice (Frequent Breaches Notice) to the Supplier.

(b) A Frequent Breaches Notice must:

(i) state that it is a Frequent Breaches Notice;

(ii) identify the Frequent Breaches;

(iii) not relate to a Supplier Event of Default which is the subject of a current Approved Cure Plan or Approved Mitigation Plan that the Supplier is implementing diligently; and

(iv) state that, if Frequent Breaches continue to occur at any time during the 12 month period commencing 30 Business Days after the date of service of a Frequent Breach Notice, that will result in TfNSW becoming entitled to issue a Final Frequent Breaches Notice.

(c) If, following the issue of a Frequent Breaches Notice, Frequent Breaches continue to occur at any time during the 12 month period commencing 30 Business Days after the date of service of a Frequent Breaches Notice, TfNSW may issue a further notice to the Supplier (Final Frequent Breaches Notice).

(d) A Final Frequent Breaches Notice must:

(i) state that it is a Final Frequent Breaches Notice;

(ii) identify the Frequent Breaches;

(iii) state that Frequent Breaches have been the subject of the earlier Frequent Breaches Notice; and
(iv) state that if Frequent Breaches continue to occur at any time in the six month period after the date of service of the Final Frequent Breaches Notice, TfNSW will become entitled to terminate this deed.

27. Termination

27.1 Supplier Termination Events

Each of the following events is a Supplier Termination Event:

(a) (Failure to submit, amend or implement cure/mitigation plan): an event described in clause 26.5(a) or clause 26.5(b) occurs;

(b) (Persistent Breach): TfNSW has issued a Final Persistent Breach Notice and the relevant breach has continued beyond 30 Business Days or has recurred three or more times in the six month period after the date of service of the Final Persistent Breach Notice;

(c) (Frequent Breaches): TfNSW has issued a Final Frequent Breaches Notice and Frequent Breaches continue to occur at any time in the six month period after the date of service of the Final Frequent Breaches Notice;

(d) (Delay – Longstop Milestone): the Supplier fails to achieve a Longstop Milestone;

(e) (Delay – Look Forward): if it is determined by the Independent Expert in accordance with clause 15.5(g)(i) that the Supplier will not be able to achieve a Longstop Milestone with respect to a Set in the Initial Fleet;

(f) (Delay LDs): if the total amount of Delay LDs accrued under clause 15.8 reaches the amount of the Delay LDs Cap;

(g) (Abandonment): the Supplier wholly or substantially abandons performance of the Delivery Phase Activities;

(h) (Insolvency of the Supplier): an Insolvency Event occurs in relation to the Supplier, whether or not the Supplier is or has been in breach of any Project Agreement;

(i) (Suspension or revocation of the Supplier’s Accreditation): an Authority suspends or revokes any Accreditation or Approval required by the Supplier to perform all or part of the Delivery Phase Activities;

(j) (Suspension or cancellation of NSW Rail Entity Accreditation): an act or omission of the Supplier or its Associates results in an Authority suspending or revoking a NSW Rail Entity’s Accreditation;

(k) (Default under Parent Guarantee): the Guarantor defaults in the performance of an obligation under the Parent Guarantee;

(l) (Insolvency of the Guarantor): an Insolvency Event occurs in relation to the Guarantor, whether or not the Guarantor is or has been in breach of the Parent Guarantee;

(m) (Fraud or misleading conduct): there is any corrupt, fraudulent, false, misleading or deceptive conduct or collusive pricing on the part of the Supplier in the performance of any of the Delivery Phase Activities (including any fraud or intentionally false, misleading or deceptive reporting discovered during any audit or inspection carried out by TfNSW or an Authority);

(n) (Illegality Event): the occurrence of any of the following events:
(i) any Project Agreement:

A. is revoked, repudiated or terminated or ceases to be legal, valid and binding and enforceable against the Supplier or any other person (other than TfNSW or RailCorp), other than as contemplated by the Project Agreements; or

B. becomes invalid, void or voidable in any material respect.

and, where the event is capable of being Remedied, the event is not Remedied within 20 Business Days of the relevant event occurring; or

(ii) it is or becomes unlawful for the Supplier to perform any of its obligations under the Project Agreements, and such event is not Remedied within 20 Business Days of the relevant event occurring; and

(o) (Other identified breach): any other breach that is stated in this deed to be a Supplier Termination Event.

27.2 Notice of Supplier Termination Event

Without limiting the right of TfNSW to exercise any right or remedy or the Supplier’s other obligations under this deed, the Supplier must notify TfNSW’s Representative immediately upon becoming aware of a Supplier Termination Event or an event or occurrence that, with the giving of notice, or lapse of time, would or is likely to become a Supplier Termination Event.

27.3 TfNSW action following Supplier Termination Event

Without limiting the right of TfNSW to exercise any right or remedy under this deed, if a Supplier Termination Event has occurred, TfNSW may take any action it considers appropriate or necessary to:

(a) overcome the effects of the Supplier Termination Event; or

(b) preserve the Project.

The amount of any Loss incurred by TfNSW in taking such action will be Moneys Owing.

27.4 Termination for Supplier Termination Event

If a Supplier Termination Event occurs, TfNSW may, without limiting the right of TfNSW to exercise any right or remedy under this deed, give a notice to the Supplier immediately terminating this deed. The notice must set out details of the Supplier Termination Event for which TfNSW is giving the notice.

27.5 TfNSW Termination Events

Each of following events is a TfNSW Termination Event:

(a) (Failure to pay): TfNSW fails to comply with its payment obligations under clause 19 and the failure is not remedied within 20 Business Days of a written demand from the Supplier (provided that an amount in genuine dispute is not to be taken into account for the purposes of this clause 27.5(a)); or

(b) (Breach): a breach by TfNSW of this deed which:

(i) substantially frustrates the performance by the Supplier of, or renders it impossible for the Supplier to perform, all or a substantial part of its obligations under this deed; or
(ii) renders it impossible for the Supplier to exercise all or a substantial part of its rights under this deed,

for a continuous period of two months after the Supplier has given TfNSW notice of such breach.

27.6 Termination for TfNSW Termination Event

(a) If a TfNSW Termination Event occurs, the Supplier may give TfNSW 30 Business Days' notice of its intention to terminate this deed.

(b) If the Supplier gives a notice under clause 27.6(a), TfNSW may suspend the Supplier's right to terminate by giving a suspension notice within 30 Business Days of receipt of the Supplier's notice.

(c) TfNSW's suspension of the Supplier's right to terminate expires on the earliest of:

(i) TfNSW notifying the Supplier that it is ending the suspension period;

(ii) in the case of the TfNSW Termination Event referred to in clause 27.5(a), 30 Business Days after the date of receipt of the Supplier's notice under clause 27.6(a);

(iii) in the case of any other TfNSW Termination Event, 24 months after the date of receipt of the Supplier's notice under clause 27.6(a); and

(iv) when the relevant TfNSW Termination Event has been remedied (or its effects overcome).

(d) If TfNSW's suspension of the Supplier's right to terminate expires:

(i) under clause 27.6(c)(i), 27.6(c)(ii) or 27.6(c)(iii) and the TfNSW Termination Event has not been remedied (or its effects overcome), the Supplier may immediately terminate this deed by notice to TfNSW; and

(ii) under clause 27.6(c)(iv), this deed will continue in force.

(e) The Supplier must continue to perform its obligations under this deed while its right to terminate is suspended, to the extent that it is lawful and practicable to do so.

(f) If TfNSW does not give a suspension notice under clause 27.6(b) and the relevant TfNSW Termination Event has not been remedied (or its effects overcome) within 30 Business Days of receipt of the Supplier's notice under clause 27.6(a), the Supplier may, if the TfNSW Termination Event is still subsisting, immediately terminate this deed by notice to TfNSW.

(g) If TfNSW issues a notice to the Supplier under clause 27.6(b) TfNSW must procure monthly payment to the Supplier equal to an amount sufficient to place the Supplier in the net after tax position it would have been in had the relevant TfNSW Termination Event not occurred, from the date TfNSW issues a notice under clause 27.6(b) until the end of the period of suspension.

(h) TfNSW will not be entitled to give any notice under clause 26.2 or 27.4 to the extent the occurrence or circumstance which would otherwise entitle TfNSW to give such a notice results from a TfNSW Termination Event.

27.7 Termination for convenience by TfNSW

Without limiting the right of TfNSW to exercise any right or remedy under the Project Agreements, TfNSW may:
(a) at any time, for its sole convenience and without giving reasons, terminate this deed by notice to the Supplier with effect from the date stated in the notice (which date must not precede the date the notice is received by the Supplier); and

(b) thereafter, either itself or by third parties carry out some or all of the Delivery Phase Activities (if TfNSW elects to do so).

TfNSW’s right of termination for convenience under this clause 27.7 applies as a sole and unfettered discretion to voluntarily terminate this deed as a whole.

27.8 Termination for Force Majeure Event

TfNSW may terminate this deed pursuant to clause 25.

27.9 Termination of TLS Deed or MF Works Deed

The parties acknowledge and agree that if either:

(a) the TLS Deed; or

(b) the MF Works Deed,

is terminated for any reason, then, unless notified otherwise by TfNSW in writing within 10 Business Days of the date of termination of the TLS Deed or MF Works Deed (as relevant), this deed is terminated with effect from the date that is 11 Business Days after the date of termination of the TLS Deed or MF Works Deed (as relevant), without necessity of notice.

27.10 Consequences of termination

Upon termination of this deed:

(a) except as provided in Schedule 15, the Supplier is not entitled to any compensation and will have no Claim against RailCorp, TfNSW, the Operator or the State by virtue of or arising from the termination;

(b) RailCorp and TfNSW are entitled to the compensation (if any) and other rights and remedies set out in Schedule 15;

(c) TfNSW may have recourse to and apply any Project Security and any Project Bonds or other security provided by the Supplier under or in connection with this deed in respect of any Loss it may suffer or Claim which TfNSW may have against the Supplier, whether for amounts due under a Project Agreement, damages (including liquidated damages) or otherwise; and

(d) the rights and obligations of the parties will otherwise cease except for:

(i) any accrued rights and obligations under this deed, including those arising out of the termination of this deed; and

(ii) any rights and obligations which expressly or impliedly continue after termination of this deed, including those referred to in clause 46.6.

27.11 Waiver and no Claim

If this deed is terminated:

(a) the Supplier waives any right it might otherwise have to pursue a claim of restitution of any kind, including a claim of unjust enrichment or quantum meruit; and
the Supplier will not be entitled to make a Claim against TfNSW or TfNSW's Associates for any amount other than for payment of the relevant Termination Payment.

27.12 **Preservation of rights**

Nothing in this clause 27 or that TfNSW does or fails to do pursuant to this clause 27 will prejudice the right of TfNSW to exercise any right or remedy (including recovering damages or exercising a right of set-off under this deed) which it may have where the Supplier breaches (including repudiates) a Project Agreement.

### 28. Ownership of Assets

#### 28.1 Title

Subject to the rights and title in the Contract Information expressly reserved to the Supplier pursuant to Schedule 3, title to and property in all Assets, Deliverables and any other chattels forming part of the Delivery Phase Activities will pass to RailCorp immediately, in each case, on the earliest to occur of the following:

(a) in relation to Sets, Provisional Acceptance of the Set;

(b) other than the Sets, the date when the Supplier acquires title to the Asset, Deliverable or other chattel; or

(c) termination of this deed for any reason,

free from any Security Interest and that Asset, Deliverable or other chattel shall thereafter remain the property of RailCorp.

#### 28.2 Supplier's warranty

The Supplier represents and warrants for the benefit of TfNSW, RailCorp and the other NSW Rail Entities that:

(a) the Supplier supplies all Assets, Deliverables and any other chattels forming part of the Delivery Phase Activities to TfNSW with full title guarantee and free from any Security Interests; and

(b) there are no outstanding Disputes, Claims or proceedings relating to, or arising from the design, construction, engineering, manufacture, testing, supply, delivery, condition, possession or operation of that Asset, Deliverable or other chattel with any person.

#### 28.3 Repetition of warranty

The representations and warranties of the Supplier under clause 28.2 are:

(a) made and given on the date of this deed: and

(b) taken to be repeated in relation to each Asset, Deliverable and other chattel forming part of the Delivery Phase Activities supplied under this deed on the date when title in that Asset or Deliverable is expressed to pass from the Supplier to RailCorp under clause 28.1.
29. Damage and reinstatement

29.1 Supplier bears risk of loss or damage

The Supplier bears all risk of destruction, loss or damage to all works, materials, Deliverables and Assets to be designed, developed, procured, manufactured, tested, commissioned, supplied, delivered, stored, maintained, repaired, modified or refurbished under this deed:

(a) in respect of Sets, until Provisional Acceptance; and

(b) in relation to all Spares, Special Tools and other chattels, Assets and Deliverables, until they are physically delivered to the Maintenance Facility or other agreed (in writing) place for delivery.

29.2 Supplier must reinstate

Subject to clause 29.3, if any destruction, loss or damage occurs to any thing which, by virtue of clause 29.1 is at the risk of the Supplier, (without limiting the Supplier’s other obligations under any Project Agreement), the Supplier must:

(a) promptly repair, replace, reinstate or remedy the destruction, loss or damage so that the Supplier continues at all times to comply with its obligations under this deed;

(b) apply all proceeds of the Insurances towards the cost of repair, replacement reinstatement or remediation;

(c) if either the cost to repair, replace, reinstate or remedy the destruction, loss or damage exceeds [redacted] or the destruction, loss or damage would reasonably be expected to materially impact on either:

(i) the performance of the Operations Functions by a NSW Rail Entity; or

(ii) the Supplier’s ability to perform its obligations under this deed,

promptly provide TfNSW’s Representative with notice of the destruction, loss or damage and any required repair, replace, reinstatement or remediation and as soon as practicable thereafter, provide TfNSW’s Representative fortnightly with a detailed report of all action being taken or to be taken to repair, replace, reinstate or remedy the destruction, loss or damage, including the estimated time that action will require;

(d) consult with TfNSW’s Representative about the programming of the works needed to effect the relevant repair, replacement, reinstatement or remediation;

(e) in carrying out the relevant repair, replacement, reinstatement or remediation, minimise the impact on the Project Activities, the Assets and the performance of the Operations Functions; and

(f) keep TfNSW’s Representative fully informed of the progress of the repair, replacement, reinstatement or remediation activities.

29.3 TfNSW may direct alternative action to be taken

If the Supplier has an obligation to repair destruction or damage to, or reinstate any thing under clause 29.2, TfNSW’s Representative may, in his or her absolute discretion, give a notice directing the Supplier not to carry out its repair and replacement obligations under clause 29.2, in which case:
(a) the Supplier waives in favour of and for the benefit of RailCorp and TfNSW, the Supplier's right to make a claim under the Insurances, other than claims in respect of the Supplier's Loss or any insured legal liability to third parties;

(b) the Supplier must pay to TfNSW all proceeds it receives from the Insurances, other than proceeds in respect of the Supplier's own Loss or any insured legal liability to third parties; and

(c) the rights and obligations of the parties under this deed will be varied so as to leave RailCorp, TfNSW and the Supplier in a 'no net gain, no net loss' position.

29.4 Asset security and protection

Without limiting any of the Supplier's other obligations under this deed, the Supplier must take all reasonable precautions to prevent loss of or damage to the Assets resulting from theft, misuse or vandalism (including Vandalism) by any person when the Supplier has care, custody and/or control of them for the purposes of a Delivery Phase Activity.

30. Insurance

30.1 Supplier's whole of project insurance obligations

The Supplier must, at its own cost and expense, effect and maintain (or cause to be effected and maintained) the insurances specified in paragraph 1 of Schedule 13 on the terms and for the periods set out in this clause 30 and Schedule 13.

30.2 Supplier's Delivery Phase Activities insurance obligations

The Supplier must, at its own cost and expense, effect and maintain (or cause to be effected and maintained) the insurances specified in paragraph 2 of Schedule 13 on the terms and for the periods set out in this clause 30 and Schedule 13.

30.3 Subcontractors

The Supplier must ensure that all Subcontractors effect and maintain appropriate insurances (for the relevant Delivery Phase Activities subcontracted) including workers compensation insurance in accordance with Legal Requirements.

30.4 Additional, increased or varied Insurances

(a) If TfNSW at any time reasonably requires the Supplier to:

(i) insure against a risk not specifically provided for or contemplated under clauses 30.1 or 30.2; or

(ii) increase the extent of, or change the terms of, an existing Insurance from that set out in clauses 30.1 or 30.2,

it may notify the Supplier and request that the Supplier give effect to TfNSW's requirements.

(b) The Supplier must promptly inform TfNSW of the amount of any additional premium payable in giving effect to a requirement of TfNSW under clause 30.4(a) before it implements the requirement (using reasonable endeavours to minimise any increase in or maximise any reduction in the cost of any additional, increased or varied Insurances), and TfNSW will advise the Supplier whether it still requires the Supplier to give effect to that requirement.

(c) Any additional premiums paid on any additional, increased or varied Insurances required by TfNSW under clause 30.4(b), as well as any brokerage and Taxes
payable in respect of those premiums, will be reimbursed by TfNSW to the Supplier within 20 Business Days after the Supplier provides evidence satisfactory to TfNSW (acting reasonably) that the insurance cover has been so effected and the premium paid.

30.5 Joint names

The Supplier must ensure that all Insurances effected by the Supplier in compliance with this clause 30 other than the Insurances in Schedule 13 referred to as:

(a) Professional Indemnity Insurance;

(b) Employer's Liability and Workers' Compensation Insurance; and

(c) Compulsory Third Party Motor Vehicle Insurance,

are in the joint names of the Supplier, TfNSW, RailCorp and the Operator, and extend cover to the Supplier's Subcontractors and others described in the relevant policy, by specifying them within the definition of "Insured", for their respective rights and interests.

30.6 Insurance requirements generally

(a) All Insurances effected by the Supplier in compliance with this clause 30, other than the Insurances in Schedule 13 referred to as Employer's Liability and Workers' Compensation Insurance and Compulsory Third Party Motor Vehicle Insurance:

(i) must be taken out with Reputable Insurers or with insurers approved by TfNSW's Representative (such approval not to be unreasonably withheld);

(ii) must be on the terms required by this clause 30 or otherwise as approved by TfNSW's Representative (such approval not to be unreasonably withheld);

(iii) must not contain any exclusion, endorsement or alteration unless it is first approved in writing by TfNSW's Representative (such approval not to be unreasonably withheld);

(iv) which name more than one insured, must include a waiver and cross liability clause in which the insurer agrees:

A. to waive all rights of subrogation or action that it may have or acquire against all or any of the persons comprising the insured;

B. that the term "insured" applies to each of the persons comprising the insured as if a separate policy of insurance had been issued to each of them (subject always to the overall sum insured not being increased as a result); and

C. that any non-disclosure, breach of any duty or act or omission by one insured does not prejudice the right of any other insured to claim under any Insurance;

(v) must contain a term which requires the lead insurer or the Supplier's broker to give TfNSW 30 Business Days' notice prior to:

A. the lead insurer giving the Supplier a notice of cancellation;

B. the lead insurer cancelling the policy on the request of the Supplier; or
C. the lead insurer giving the Supplier any other notice in respect of the policy;

(vi) must contain a term providing that notice of a claim by any insured will be accepted by the insurer as notice by all insureds;

(vii) must not exclude coverage for innocent non-disclosure;

(viii) for policies written on an occurrence basis, must provide that a single deductible is payable for each occurrence regardless of whether a claim or claims are brought against one or more insureds;

(ix) must not contain any 'other insurance' provisions that attempt or purport to limit or restrict coverage where another insurance policy may also potentially respond;

(x) must be governed by and be construed according to the laws of New South Wales and, in the case of all policies other than legal liability policies, include a provision under which each party to that policy agrees to:

A. submit to the non-exclusive jurisdiction of the courts of New South Wales, and the courts competent to determine appeals from those courts, with respect to any proceedings which may be brought at any time relating to that policy; and

B. waive any objection it may now or in the future have to the venue of any proceedings, and any claim it may now or in the future have that any proceedings have been brought in an inconvenient forum, if the venue falls within clause 30.6(a)(x)A; and

(xi) must not be materially altered, cancelled or permitted to lapse by or on behalf of the Supplier without the prior approval of TfNSW.

(b) All Insurances in Schedule 13 referred to as Professional Indemnity Insurance, must:

(i) cover any legal liability contractually assumed to the extent that the Supplier and any other insureds under those Insurances have contracted out of the operation of Part 4 of the Civil Liability Act 2002 (NSW) or assumed liability for others under this deed;

(ii) without limiting clause 30.6(b)(i), cover the Supplier for potential liability to TfNSW assumed by reason of the exclusion of Part 4 the Civil Liability Act 2002 (NSW); and

(iii) not exclude any potential liability the Supplier may have to TfNSW under or by reason of this deed.

(c) All Insurances in Schedule 13 referred to as Plant and Equipment Insurance and Industrial Special Risks Insurance must be endorsed to note and allow the Supplier's obligations under clause 29, to the effect that compliance with the provisions of those clauses will not prejudice the Supplier's or any other insured's rights to indemnity under the Insurances.

(d) Insurances in Schedule 13 referred to as Public and Products Liability Insurance, must not expressly exclude liability arising under clause 31 solely on the basis that it is a contractually assumed liability.
30.7 Premiums, coverage and deductibles

(a) The Supplier must punctually pay all premiums and other amounts payable in respect of the Insurances effected by it, and give TfNSW evidence of payments for premiums if and when requested by TfNSW.

(b) All Insurances required under this deed shall provide coverage for at least the 'Minimum Sum Insured' specified in Schedule 13, and deductibles no greater than the 'Maximum Deductible' specified in Schedule 13.

(c) If an insurer requires payment under a relevant insurance policy by TfNSW, TfNSW may recover the payment of such amount from the Supplier as Moneys Owing.

30.8 Evidence of insurance

In respect of the Insurances required to be effected and maintained by the Supplier under this clause 30, the Supplier must give TfNSW's Representative:

(a) certified copies of all:

(i) policies (including policy schedules, wordings and endorsements), other than any policy for Professional Indemnity Insurance;

(ii) renewal certificates; and

(iii) slips and cover notes,

within 10 Business Days after it receives them from the insurer or broker; and

(b) whenever requested by TfNSW's Representative, a certificate of currency satisfactory to TfNSW's Representative (acting reasonably) to confirm that the Insurances which the Supplier must effect and maintain pursuant to this clause 30 have been effected and maintained in accordance with the requirements of this clause 30.

30.9 Failure to produce proof of insurance

If the Supplier fails to provide evidence satisfactory to TfNSW's Representative in accordance with clause 30.8(a) or within 10 Business Days of a request under clause 30.8(b), TfNSW may effect and maintain the relevant Insurances and pay the premium. The costs incurred by TfNSW in connection with taking such action will be recoverable from the Supplier as Moneys Owing.

30.10 The Supplier's obligations not limited

The taking out of Insurances does not limit the liabilities or obligations of the Supplier under this deed. The Supplier bears the risk of the Insurances being inadequate to enable the Supplier to fulfil its obligations under this deed.

30.11 General insurance obligations

The Supplier must:

(a) not knowingly do or permit, or omit to do, anything which prejudices any Insurance;

(b) rectify anything which might prejudice any Insurance;

(c) reinstate an Insurance required to be maintained under clauses 30.1 to 30.2 if it lapses;
not cancel, vary or allow any Insurance required to be maintained under clauses 30.1 to 30.2 to lapse without the prior written consent of TfNSW’s Representative and must impose an obligation on its broker to give TfNSW 30 Business Days’ notice prior to any policy lapsing;

(e) immediately notify TfNSW of any fact or circumstance or change in circumstances which may prejudice an Insurance;

(f) without limiting clause 30.12(a), immediately notify TfNSW’s Representative if it receives any claim or notice in connection with an Insurance;

(g) give full and true particulars 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; and

(h) comply at all times with the terms of each Insurance.

30.12 Claims under Insurances

In addition to the obligations to notify the insurer under any Insurance, the Supplier must:

(a) notify TfNSW’s Representative of any occurrence of which it is aware that may give rise to a claim (other than a claim by TfNSW or its Associates) under any Insurance other than statutory insurance;

(b) keep TfNSW’s Representative informed of subsequent developments of which it is aware concerning the claim;

(c) do everything reasonably required by TfNSW (or any other person in whose name the relevant policy is effected) to enable TfNSW or such other person to claim, collect or recover money due under an Insurance;

(d) subject to clause 30.12(e), diligently pursue any material claim which it has under any Insurance in relation to that occurrence; and

(e) not compromise, settle, prosecute or enforce a claim under any Insurance without the prior written consent of TfNSW’s Representative (which must not be unreasonably withheld or delayed).

30.13 Insurance Proceeds Account

(a) This clause 30.13 applies to all amounts received under:

(i) the Insurances in Schedule 13 referred to as Plant and Equipment Insurance;

(ii) the Insurances in Schedule 13 referred to as Transit Insurance; and

(iii) the Insurance in Schedule 13 referred to as Contract Works Insurance,

(Insurance Proceeds).

(b) The Supplier must:

(i) establish an account to be known as the Insurance Proceeds Account;

(ii) maintain that account in the name of the Supplier with a financial institution nominated by the Supplier and approved by TfNSW (each approval not to be unreasonably withheld);
(iii) give details of that account to TfNSW;

(iv) if requested by TfNSW's Representative, grant TfNSW a first ranking Security Interest over the Insurance Proceeds Account; and

(v) procure the agreement of the financial institution referred to in clause 30.13(b)(ii) not to exercise any right of set-off or combination of accounts in relation to the Insurance Proceeds Account.

(c) All Insurance Proceeds must be deposited into the Insurance Proceeds Account.

(d) Subject to clause 30.13(f), moneys in the Insurance Proceeds Account may only be applied towards the cost of repair or reinstatement.

(e) The Supplier must give TfNSW records of expenditure from the Insurance Proceeds Account within 30 Business Days of such expenditure.

(f) If this deed is terminated under clauses 25 or 27, TfNSW will be entitled to any moneys remaining in the Insurance Proceeds Account on the date of termination.

31. Indemnities

31.1 Indemnity from the Supplier

The Supplier must indemnify each Indemnified Party from and against:

(a) any Loss incurred by an Indemnified Party in respect of:

   (i) damage to, loss or destruction of, or loss of use of or access to (whether total or partial), any real or personal property belonging to an Indemnified Party; or

   (ii) any claim against an Indemnified Party (including by another Indemnified Party) in respect of:

       A. any illness, personal injury to, or death of, any person; or

       B. damage to, loss or destruction of, or loss of use of or access to (whether total or partial), any real or personal property, caused by, arising out of, or in any way in connection with any breach or other act or omission of the Supplier, the Supplier's Associates or the Supplier's Personnel; or

(b) any Loss incurred by an Indemnified Party arising out of or in any way connection with:

   (i) any breach or failure to comply with the terms of any Project Agreement by the Supplier; or

   (ii) any fraudulent, negligent or unlawful act or omission by the Supplier, the Supplier's Associates or the Supplier's Personnel.

31.2 Exclusions from indemnity

The Supplier's liability under clause 31.1 will be reduced to the extent that the Loss arises from:

(a) a fraudulent, negligent or unlawful act or omission of the Indemnified Party; or
31.3 Exclusion of Indirect or Consequential Loss

(a) Subject to clause 32.4, but otherwise despite any other provision of this deed, the Supplier has no liability to any Indemnified Party (whether in contract, tort or otherwise), nor will any Indemnified Party be entitled to make any Claim against the Supplier, in respect of Indirect or Consequential Loss incurred or sustained by the Indemnified Party as a result of any act or omission of the Supplier (whether negligent or otherwise).

(b) Subject to clause 32.4(d), and despite any other provision of this deed, none of the Indemnified Parties has any liability to the Supplier (whether in contract, tort or otherwise), nor will the Supplier be entitled to make any Claim against any Indemnified Party, in respect of Indirect or Consequential Loss incurred or sustained by the Supplier as a result of any breach or other act or omission of any Indemnified Party (whether negligent or otherwise).

31.4 Procedure for Third Party Claims

(a) If an Indemnified Party wishes to claim indemnity under clause 31.1(a)(ii) in respect of a claim against the Indemnified Party (Third Party Claim), a notice of the Third Party Claim must be given to the Supplier as soon as reasonably practicable.

(b) The Indemnified Party must:

(i) subject to clause 31.4(c), take such actions as the Supplier may reasonably direct in defending or mitigating the Third Party Claim;

(ii) not settle or compromise the Third Party Claim without the Supplier's consent (not to be unreasonably withheld or delayed); and

(iii) periodically inform the Supplier of the status of the Third Party Claim and the actions taken to defend or mitigate it.

(c) If the Supplier wishes to direct an Indemnified Party to take actions in defending or mitigating the Third Party Claim, the Supplier must first give reasonable security to the Indemnified Party for any cost or liability arising out of such direction.

(d) The Supplier's liability under clause 31.1 will be reduced to the extent that a failure by an Indemnified Party to comply with clause 31.4(b) prejudices the Supplier, but not otherwise.

31.5 Obligations not affected

(a) Clause 31.1 does not limit or otherwise affect the Supplier's other obligations under this deed or otherwise according to law.

(b) The Supplier is not relieved of any obligation to indemnify an Indemnified Party under clause 31.1 by reason of effecting Insurance.

31.6 Indemnified Parties

The Supplier acknowledges and agrees that if the indemnity in clause 31.1 or the matters stated in clause 31.3(b) are unenforceable, all references in this clause 31 to "the Indemnified Party" or "an Indemnified Party" will be read as a reference to "TfNSW and RailCorp" only.
32. Liability

32.1 General Liability Cap

Subject to clause 32.4, but notwithstanding any other provision of the Project Agreements, the Supplier's aggregate liability to the Indemnified Parties or any person claiming through them under any Project Agreement arising out of, or in any way in connection with the Delivery Phase Activities (including any Claim in respect of any Defect in the Assets) and whether arising pursuant to an indemnity, in contract, in tort, in equity, by operation of law or otherwise, is limited in aggregate to an amount equal to [ ] of the sum of:

(a) the Initial Fleet Contract Value; and

(b) if RailCorp (or TfNSW on behalf of RailCorp) orders elects to purchase any Option Sets in accordance with clause 20, the Option Fleet Contract Value,

(General Liability Cap).

32.2 Increase to General Liability Cap for CPI

The General Liability Cap will be CPI Indexed on the first day of each Financial Year.

32.3 Delay LDs Cap

(a) Subject to clause 32.4, the parties acknowledge and agree that the Supplier's liability for Delay LDs under clause 15.8 or general damages under clause 32.5(c) is limited to the sum of:

(i) [ ] of the Initial Fleet Contract Value; and

(ii) if RailCorp (or TfNSW on behalf of RailCorp) orders elects to purchase any Option Sets in accordance with clause 20, [ ] of the Option Fleet Contract Value,

(Delay LDs Cap).

(b) The Delay LDs Cap will be CPI Indexed on the first day of each Financial Year.

(c) The Delay LDs Cap is a subset of the General Liability Cap.

32.4 Exceptions to liability caps and exclusions

Nothing:

(a) in clause 31.3(a) will limit or exclude the Supplier's liability to an Indemnified Party or any person claiming through an Indemnified Party under any of the Project Agreements or at law:

(i) pursuant to clause 13.9(c)(ii);

(ii) in respect of Delay LDs pursuant to clause 15.8;

(iii) in respect of any reduction in the Supplier's entitlement to be paid the full amount of the Initial Fleet Contract Value or Option Fleet Contract Value pursuant to paragraphs 1.3, 2.4 or 3 of Schedule 11;

(iv) for Loss in respect of and liabilities of an Indemnified Party to a third party [ ].
(b) in clause 31.3(a) or this clause 32 will limit or exclude the Supplier’s liability to an Indemnified Party or any person claiming through an Indemnified Party under any of the Project Agreements or at law:

(i) for Moneys Owing (except, in respect of clause 15.8 or 32, to the extent that ‘Moneys Owing’ under clause 15.8(b) or 32.5(d) are limited in accordance with clause 32.3(a) or 32.5(d) (as applicable));

(ii) to the extent that the Supplier has:
   A. recovered from a third party (including any Subcontractor and whether by way of indemnity or otherwise); or
   B. would have recovered from a third party, but for clause 31.3(a) or this clause 32 (as applicable) and if it had diligently pursued a claim against the third party, an amount in respect of that liability;

(iii) to the extent that the Supplier:
   A. is indemnified in respect of that liability by a policy of insurance; or
   B. would have been indemnified in respect of that liability by a policy of insurance but for clause 31.3(a) or this clause 32 (as applicable) and if the Supplier had:
      1) diligently pursued a claim under the policy of insurance;
      2) complied with the terms and conditions of that policy of insurance; and
      3) complied with its insurance obligations under this deed;

(iv) for Loss arising from any criminal acts or fraud on the part of the Supplier or any of the Supplier’s Associates;

(v) for Loss arising from wilful misconduct on the part of the Supplier or any of the Supplier’s Associates;

(vi) to the extent that, by law, the parties cannot limit, or exclude by contract, that liability;

(vii) in respect of any fine, penalty or impost imposed by an Authority or under any Legal Requirement;

(viii) for Loss arising where the Supplier wholly or substantially abandons the Delivery Phase Activities;

(ix) in respect of any liability to pay or allow any amount under clause 13.9(c)(ii);

(x) for any interest under clause 19.8; or

(xi) in respect of any liability under clause 31.1(a);

(c) in clause 31.3(a) or this clause 32 will limit or exclude the Supplier’s liability arising out of, or in connection with, the indemnities given by the Supplier pursuant to
paragraph 2.2 of Schedule 3 to any or all of the persons or entities identified pursuant to paragraph 2.2(b) of Schedule 3; or

(d) in clause 31.3(b) will limit or exclude the Indemnified Parties' liability to the Supplier under any of the Project Agreements:

(i) for Loss arising from any criminal acts or fraud on the part of TfNSW or any of TfNSW's Associates;

(ii) for Loss arising from wilful misconduct on the part of TfNSW or any of TfNSW's Associates;

(iii) for Loss arising from the illness, personal injury, or death of, any person to the extent caused or contributed to by TfNSW or any of TfNSW's Associates;

(iv) for Loss arising from any loss or damage to third party property to the extent caused or contributed to by TfNSW or any of TfNSW's Associates;

(v) in respect of any liability expressly imposed on TfNSW or RailCorp under any of the Project Agreements to pay or procure payment to the Supplier any of the following amounts:

A. any Progress Payments;

B. any interest under clause 19.8; or

C. any amounts payable under and calculated in accordance with the clause 24.9; or

(vi) to the extent that, by law, the parties cannot limit, or exclude by contract, that liability.

32.5 Genuine pre-estimate for Delay LDs

(a) The parties acknowledge and agree that the Delay LDs payable by the Supplier under clause 15.8 represent (and do not exceed) a reasonable and genuine pre-estimate of the Loss and damage that may be suffered or incurred by TfNSW, RailCorp, the Operator or any other NSW Rail Entity arising from late Provisional Acceptance of the Sets.

(b) The Supplier must not commence or bring any proceedings, or seek to rely on any argument that Delay LDs calculated in accordance with clause 15.8 are a penalty or are otherwise invalid or unenforceable or that clause 15.8, or any part of it, is otherwise invalid or unenforceable.

(c) If any part of clause 15.8 is found for any reason to be void, invalid or otherwise unenforceable, so as to disentitle TfNSW, RailCorp, the Operator or any other NSW Rail Entity from recovering Delay LDs, TfNSW, RailCorp, the Operator or the relevant NSW Rail Entity will be entitled to recover from the Supplier, and the Supplier must pay on a full indemnity basis, general law damages arising out of or in connection with the Supplier's failure to achieve Provisional Acceptance of a Set by its Date for Provisional Acceptance.

(d) The Supplier's liability for any general law damages payable under clause 32.5(c) is:

(i) Moneys Owing; and

(ii) limited to the Delay LDs Cap.
32.6 Genuine pre-estimate for mass adjustment

(a) The parties acknowledge and agree:

(i) that the mass adjustments which may be made by TfNSW as calculated under paragraphs 1.3 and 2.4 of Schedule 11 represent (and do not exceed) reasonable and genuine pre-estimates of the loss and damage that may be suffered or incurred by TfNSW, RailCorp, the Operator or any other NSW Rail Entity if the Actual Mass of a Set exceeds the Predicted Mass of the Set;

(ii) each of the parties require formulae for calculation of that cost and diminished value that are able to be readily applied without unnecessary administrative costs, delay or difficulty; and

(iii) there are many and varied matters which form part of the cost to TfNSW and the diminished value which TfNSW, RailCorp, the Operator and the NSW Rail Entities may suffer, many of which are difficult or impossible to calculate with precision.

(b) If any part of the Progress Payment adjustment referred to in clause 32.6(a)(i) is found for any reason to be void, invalid or otherwise unenforceable, so as to disentitle TfNSW from making that Progress Payment adjustment, TfNSW will be entitled to recover from the Supplier, and the Supplier must pay on a full indemnity basis general law damages arising out of or in connection with any Loss suffered by TfNSW, RailCorp, the Operator or any NSW Rail Entity as a result of an event, action or omission which would have entitled TfNSW to make any of the Progress Payment adjustments, up to the full amount of the applicable adjustment, if the relevant provision of this deed had not been found void, invalid or otherwise unenforceable.

(c) The Supplier's liability for any general law damages payable under clause 32.6(b) is:

(i) Moneys Owing; and

(ii) in respect of damages that are in place of a Progress Payment adjustment, limited to the amount of the Progress Payment adjustment that would otherwise have applied under this deed.

32.7 Genuine pre-estimate for delayed Fleet Acceptance

(a) The parties acknowledge and agree that the non-payment by TfNSW pursuant to paragraph 3.1 of Schedule 11 of the Progress Payment for Fleet Acceptance in relation to the Continuous Production Fleet in circumstances where the Continuous Production Fleet does not achieve Fleet Acceptance on or before the Fleet Acceptance Sunset Date (Continuous Production) represents (and does not exceed) a reasonable and genuine pre-estimate of the Loss and damage that may be suffered or incurred by TfNSW, RailCorp, the Operator or any other NSW Rail Entity arising from the failure of the Supplier to achieve Fleet Acceptance of the Continuous Production Fleet on or before the Fleet Acceptance Sunset Date (Continuous Production).

(b) The parties acknowledge and agree that the non-payment by TfNSW pursuant to paragraph 3.2 of Schedule 11 of the Progress Payment for Fleet Acceptance in relation to the Non-continuous Production Fleet in circumstances where the Non-continuous Production Fleet does not achieve Fleet Acceptance on or before the Fleet Acceptance Sunset Date (Non-continuous Production) represents (and does not exceed) a reasonable and genuine pre-estimate of the Loss and damage that may be suffered or incurred by TfNSW, RailCorp, the Operator or any other NSW Rail Entity arising from the failure of the Supplier to achieve Fleet Acceptance of the
Non-continuous Production Fleet on or before the Fleet Acceptance Sunset Date (Non-continuous Production)

(c) The Supplier must not commence or bring any proceedings, or seek to rely on any argument that the non-payment of a Progress Payment by TfNSW:

(i) pursuant to paragraph 3.1 of Schedule 11; or

(ii) pursuant to paragraph 3.2 of Schedule 11,

is a penalty or is otherwise invalid or unenforceable, or that paragraph 3.1 or 3.2 of Schedule 11 (as the case may be), or any part of either paragraph, is otherwise invalid or unenforceable.

(d) If any part of paragraph 3.1 of Schedule 11 is found for any reason to be void, invalid or otherwise unenforceable, so as to disentitle TfNSW, RailCorp, the Operator or any other NSW Rail Entity from not paying the Progress Payment referred to in paragraph 3.1 of Schedule 11, TfNSW, RailCorp, the Operator or the relevant NSW Rail Entity will be entitled to recover from the Supplier, and the Supplier must pay on a full indemnity basis, general law damages arising out of or in connection with the Supplier's failure to achieve Fleet Acceptance of the Continuous Production Fleet on or before the Fleet Acceptance Sunset Date (Continuous Production).

(e) If any part of paragraph 3.2 of Schedule 11 is found for any reason to be void, invalid or otherwise unenforceable, so as to disentitle TfNSW, RailCorp, the Operator or any other NSW Rail Entity from not paying the Progress Payment referred to in paragraph 3.2 of Schedule 11, TfNSW, RailCorp, the Operator or the relevant NSW Rail Entity will be entitled to recover from the Supplier, and the Supplier must pay on a full indemnity basis, general law damages arising out of or in connection with the Supplier's failure to achieve Fleet Acceptance of the Non-continuous Production Fleet on or before the Fleet Acceptance Sunset Date (Non-continuous Production).

(f) The Supplier's liability for any general law damages payable under:

(i) clause 32.7(d) is:

A. Moneys Owing; and

B. limited to the amount of the Progress Payment that would otherwise be not paid pursuant to paragraph 3.1 of Schedule 11.

(ii) clause 32.7(e) is:

A. Moneys Owing; and

B. limited to the amount of the Progress Payment that would otherwise be not paid pursuant to paragraph 3.2 of Schedule 11.

32.8 Sole remedies

(a) Subject to clause 32.8(b):

(i) the Delay LDs payable under clause 15.8 (or general damages payable under clause 32.5(c)) are TfNSW's and RailCorp's sole and exclusive monetary remedy for any Loss in connection with a failure by the Supplier to achieve Provisional Acceptance of a Set by the Date for Provisional Acceptance;
(ii) the Progress Payment adjustment under:

A. paragraph 3.1(b) of Schedule 11 (or general damages payable under clause 32.7(d)) are TfNSW's and RailCorp's sole and exclusive monetary remedy for any Loss due to, or in connection with, the Supplier failing to achieve Fleet Acceptance in respect of the Continuous Production Fleet on or before the Fleet Acceptance Sunset Date (Continuous Production); and

B. paragraph 3.2(b) of Schedule 11 (or general damages payable under clause 32.7(e)) are TfNSW's and RailCorp's sole and exclusive monetary remedy for any Loss due to, or in connection with, the Supplier failing to achieve Fleet Acceptance in respect of the Non-continuous Production Fleet on or before the Fleet Acceptance Sunset Date (Non-continuous Production);

(iii) the mass adjustment referred to in paragraph 1.3 of Schedule 11 (or general law damages payable under clause 32.6(b)) is TfNSW's and RailCorp's sole and exclusive monetary remedy for any Loss due to, or in connection with, the Actual Mass of a Set in the Initial Fleet exceeding the Predicted Mass; and

(iv) the mass adjustment referred to in paragraph 2.4 of Schedule 11 (or general law damages payable under clause 32.6(b)) is TfNSW's and RailCorp's sole and exclusive monetary remedy for any Loss due to, or in connection with, the Actual Mass of a Set in the Option Fleet exceeding the Predicted Mass.

(b) The Supplier acknowledges and agrees that clause 32.8(a) does not limit:

(i) if this deed is terminated as a result of a Supplier Termination Event, the Supplier's liability for Termination Payments; or

(ii) TfNSW's and RailCorp's rights and the Supplier's liability in respect of an event giving rise to delay in achieving Provisional Acceptance of any Set by the Date for Provisional Acceptance of that Set or the consequences of such event, other than in respect of Delay LDs.

33. Representations and warranties

33.1 TfNSW and RailCorp representations and warranties

TfNSW and RailCorp each separately represent and warrant for the benefit of the Supplier that:

(a) it is a statutory body validly constituted and existing under the Transport Administration Act;

(b) it has or will have in full force and effect all authorisations necessary under its constituent legislation to enter into and perform its obligations under each Project Agreement (or will have them in full force and effect at the time the obligation is to be performed);

(c) each Project Agreement to which it is a party constitutes a valid and legally binding obligation of it in accordance with its terms; and
the execution, delivery and performance of each Project Agreement does not violate any law, or any document or agreement to which it is a party or which is binding on it or its assets.

33.2 Supplier's representations and warranties

The Supplier represents and warrants for the benefit of TfNSW and RailCorp that:

(a) it is duly registered and remains in existence;

(b) the execution, delivery and performance of each Project Agreement to which it is a party does not violate any law, or any document or agreement to which it is a party or which is binding on it or any of its assets;

(c) it has taken all corporate and other action required to enter into each Project Agreement to which it is a party and to authorise the execution and delivery of that Project Agreement and the satisfaction of its obligations under it;

(d) each Project Agreement to which it is a party constitutes a valid and legally binding obligation of it in accordance with its terms;

(e) it subsists and is properly constituted;

(f) it is not the trustee or responsible entity of any trust, nor does it hold any property subject to or impressed by any trust;

(g) no Supplier Event of Default or Supplier Termination Event has occurred or is subsisting;

(h) it is not in default of its material obligations under any Project Agreement;

(i) subject to laws from time to time its obligations under each Project Agreement will rank at least equally with, all its present and future unsecured obligations;

(j) it does not have immunity from the jurisdiction of a court or from legal process (whether through service of notice, attachment prior to judgment, attachment in aid of execution, execution or otherwise);

(k) there has been no material change in the financial condition of the Supplier (since the date of its last audited accounts) which would prejudice the ability of the Supplier to perform its obligations under the Project Agreements;

(l) there has been no material change in the financial condition of the Guarantor (since the date of its last audited accounts) which would prejudice the ability of the Guarantor to perform its obligations under the Project Agreements;

(m) the most recently published financial statements of the Supplier and the Guarantor have been prepared on a basis consistently applied and using accounting principles which are generally accepted and give a true and fair view of the financial condition of the Supplier and the Guarantor and are unqualified for the period in question;

(n) the Supplier is not aware of any material facts or circumstances that have not been disclosed to TfNSW and which might, if disclosed, materially adversely affect the decision of a prudent person considering whether or not to enter into this deed with the Supplier; and

(o) no litigation, arbitration, mediation, conciliation, criminal or administrative procedures are current, pending or to its knowledge, threatened, which, if adversely determined, would or could have a material adverse effect upon it or its ability to perform its financial or other obligations under any Project Agreement to which it is expressed to be a party.
33.3 Repetition of representations and warranties

The representations and warranties contained in clauses 33.2(e), 33.2(g), 33.2(h), 33.2(k), 33.2(l), 33.2(m), 33.2(n) and 33.2(o) are made on the date of this deed. Each other representation and warranty contained in this clause 33:

(a) is made on the date of this deed; and

(b) will be deemed to be repeated on the Commencement Date and on each anniversary of the date of this deed,

with reference to the facts and circumstances then subsisting.

34. Dispute resolution

The parties must comply with the Dispute Resolution Procedures in respect of any Dispute.

35. Records, reporting obligation and privacy

35.1 Records

(a) The Supplier must keep appropriate books of account, records, documentation and systems which evidence its performance of the Project Activities and its compliance with the Project Agreements.

(b) The Supplier must ensure its books of account, records, documentation and systems are available to TfNSW in accordance with clause 4.4.

35.2 Financial reporting

(a) Not later than four months after the end of each Financial Year, the Supplier must give TfNSW audited financial statements for the previous Financial Year for the Supplier or any consolidated entity of which the Supplier forms part.

(b) Each of the documents to be provided to TfNSW in accordance with this clause 35.2 must be accompanied by a certificate signed by two authorised officers of the relevant entity certifying that the information provided is accurate, complete and correct in all respects.

(c) The Supplier must prepare (or procure the preparation of) the accounts and financial statements required under this clause 35.2 in compliance with all Legal Requirements and, without limitation, in accordance with the accounting principles generally accepted in Australia and consistently applied.

35.3 Notices under Project Agreements

The Supplier must give TfNSW as soon as practicable certified copies of all notices of default, breach or Dispute given or received by it under the Project Agreements from any of its co-contracting parties.

35.4 Advice on rights of third parties under Project Agreements

The Supplier undertakes to advise TfNSW as soon as practicable after an event has occurred which, to the Supplier's actual knowledge, could in any way materially prejudice TfNSW's or RailCorp's rights under the Project Agreements by reason of the exercise of rights available to third parties arising from the Project Agreements.
35.5 ASIC and ASX notices

The Supplier must give TfNSW, as soon as practicable, copies of all notices and other documents given or received by a member of the Supplier Group to or from the Australian Securities and Investments Commission or the Australian Stock Exchange Limited.

35.6 Other information

The Supplier must promptly give TfNSW such other information relating to the Project Agreements or the Project Activities as TfNSW may reasonably require from time to time.

35.7 Retention of records

The Supplier must retain all records in relation to the Project Agreements:

(a) until they are delivered to TfNSW pursuant to clause 45.11 of the TLS Deed; or
(b) if not so delivered to TfNSW, for at least seven years after the Provisional Acceptance of the last Set to be supplied by the Supplier under this deed.

35.8 Privacy

(a) (Definitions): In this clause Privacy Obligations means:

(i) while the PPIPA is in force, obligations imposed on public sector agencies under the PPIPA; and

(ii) if the PPIPA is repealed, obligations imposed on Authorities and private sector organisations by any Commonwealth or New South Wales legislation that replaces the PPIPA in whole or in part.

(b) (PPIPA): The Supplier agrees to comply with all relevant provisions of the PPIPA as if it was a 'public sector agency' as that term is defined in the PPIPA and will give notice to TfNSW of any matter or thing which may or would, were the Supplier a 'public sector agency', amount to a breach of any applicable provision of the PPIPA.

(c) (Compliance with Privacy Obligations and privacy plans): The Supplier must:

(i) comply with the Privacy Obligations and the Supplier's Privacy Management Plan; and

(ii) provide all reasonable assistance to enable TfNSW to comply with the Privacy Obligations.

(d) (Personal Information): Without limiting clause 35.8(c), the Supplier must ensure that Personal Information is collected, used, disclosed and handled by it in accordance with the Supplier's Privacy Management Plan and this deed.

(e) (Supplier's Privacy Management Plan): At least 20 Business Days prior to the first occasion on which the Supplier will handle any Personal Information in undertaking the Project Activities, the Supplier must submit to TfNSW's Representative a Supplier's Privacy Management Plan which sets out the Supplier's procedures in relation to privacy protection and includes, as a minimum, procedures which:

(i) ensure that the Supplier will comply with the Privacy Obligations;

(ii) are consistent with the Privacy Obligations as they apply to TfNSW; and

(iii) are consistent with Good Industry Practice.
(f) **(TfNSW's review):** TfNSW's Representative will have the right to Review the Supplier's Privacy Management Plan and the Supplier must promptly amend the Supplier's Privacy Management Plan to meet any concerns reasonably raised by TfNSW's Representative.

(g) **(Updating of the Supplier's Privacy Management Plan):** The Supplier must review and, if necessary, update the Supplier's Privacy Management Plan:

(i) to take account of:

A. events or circumstances which will, or may, affect the manner in which the Supplier carries out the Project Activities; and

B. any evolution in technology and in security threats; and

(ii) upon written request by TfNSW's Representative.

(h) **(Submission of updated plan):** The Supplier must submit any plan updated in accordance with clause 35.8(g) to TfNSW's Representative, in which case clause 35.8(f) will reapply.

(i) **(Subcontracts):** The Supplier must ensure that all Subcontracts with all Subcontractors who collect, use, store, dispose of or disclose Personal Information contain provisions to the same or similar effect as clauses 35.7 and 35.8.

(j) **(Audit):** TfNSW may require the Supplier and the Supplier's Subcontractors to have their privacy procedures audited by a qualified nationally recognised firm provided that TfNSW is not entitled to require such an audit more frequently than annually. The Supplier and the Supplier's Subcontractors must take such action as is reasonable to comply with any exceptions or discrepancies discovered by any such audit.

(k) **(Disclosure to TfNSW):** If the Supplier discloses any Personal Information to TfNSW, the Supplier must take reasonable steps to ensure that the individual about whom the Personal Information relates is aware of the following information:

(i) the fact that their Personal Information is being disclosed to TfNSW and why;

(ii) the fact that they may seek to access or correct their Personal Information held by TfNSW;

(iii) TfNSW's address, being the address stated in clause 43; and

(iv) any other information as reasonably directed by TfNSW.

### 36. Disclosure, confidentiality, probity and publicity

#### 36.1 Disclosure by TfNSW

(a) TfNSW, RailCorp or any other NSW Rail Entity may publish or disclose (on the internet or otherwise):

(i) the terms and conditions of this deed or any other Project Agreement; and

(ii) any document or information arising under, out of or in connection with this deed or any other Project Agreement or relating to the performance of this deed or any other Project Agreement.
To the extent that the information proposed to be published or disclosed by TfNSW or any other NSW Rail Entity under clause 36.6(a) (and without limiting any NSW Rail Entity's rights to publish or disclose information under clause 36.6(a)) contains Commercially Sensitive Information:

(i) TfNSW or any other NSW Rail Entity may publish or disclose the information under clause 36.6(a) without consultation with the Supplier if the Commercially Sensitive Information is redacted or otherwise not disclosed or TfNSW or any other NSW Rail Entity is required by law to do so;

(ii) TfNSW will use its reasonable endeavours to maintain the confidentiality of the Commercially Sensitive Information; and

(iii) if TfNSW proposes to disclose any Commercially Sensitive Information, TfNSW must use reasonable endeavours to give the Supplier prior notice of that intention and must consult with the Supplier prior to disclosing any Commercially Sensitive Information.

36.2 Confidentiality

(a) Subject to clause 36.2(b), the Supplier must:

(i) keep confidential the Project Agreements and information relating to the Project Agreements, the Project Activities and any discussions concerning the Project Agreements; and

(ii) ensure that each of its Associates comply with the terms of clause 36.2(a)(i).

(b) The Supplier is not obliged to keep confidential any information:

(i) which is in the public domain through no fault of the Supplier or the Supplier's Associates; or

(ii) the disclosure of which is:

A. required by law;

B. given with the written consent of TfNSW; or

C. given to a court in the course of proceedings to which the Supplier is a party.

(c) If TfNSW requires the Supplier to provide TfNSW with a confidentiality deed in favour of a third party in respect of any of that third party's confidential information that is provided to the Supplier, then the Supplier must execute such a confidentiality deed in the form reasonably specified by TfNSW.

36.3 Probity Event

(a) The Supplier must give notice to TfNSW immediately upon becoming aware that a Probity Event has occurred or is likely to occur.

(b) The notice under clause 36.3(a), must, at a minimum, describe the Probity Event, when the Probity Event occurred, or is likely to occur, and the circumstances which have given rise (or are likely to give rise) to the Probity Event.

(c) Subject to any obligation that TfNSW may have, or in its absolute discretion considers that it may have, in respect of any Legal Requirement, TfNSW (or any...
person nominated by TfNSW) and the Supplier must promptly, and in any case no later than 10 Business Days after TfNSW:

(i) receives a notice under clause 36.3(a); or

(ii) becomes aware of a Probity Event,

meet to agree a course of action to remedy or otherwise address the Probity Event and the timeframe in which that will occur.

(d) The Supplier must comply with any agreement made in accordance with clause 36.3(c) in the agreed timeframe.

(e) If TfNSW (or any person nominated by TfNSW) and the Supplier fail to agree to a course of action in accordance with clause 36.3(c), the Supplier must take any action required by TfNSW (or its nominee) to remedy the Probity Event in accordance with any timeframe determined by TfNSW (or its nominee).

36.4 Probity Investigation

Without limiting or otherwise restricting clause 36.3:

(a) TfNSW (or any person nominated by TfNSW) may, at any time, conduct a Probity Investigation in respect of a Probity Entity or any person who is proposed to become a Probity Entity;

(b) the Supplier agrees that TfNSW may require the Supplier at any time to conduct a Probity Investigation in respect of a Probity Entity;

(c) where TfNSW requires the Supplier to conduct a Probity Investigation in accordance with clause 36.4(b), the Supplier must promptly:

(i) conduct that Probity Investigation; and

(ii) communicate the findings of that Probity Investigation to TfNSW in the form required by TfNSW; and

(d) the Supplier must procure all consents necessary to enable the Supplier or TfNSW (or any person nominated by TfNSW) to conduct any Probity Investigation.

36.5 TfNSW costs of Probity Events and Probity Investigations

(a) Subject to clause 36.5(b), the Supplier must bear all costs incurred by TfNSW in connection with a Probity Event or Probity Investigation.

(b) The Supplier will not be liable for TfNSW's costs of any further Probity Investigation required by TfNSW in respect of a Probity Event in relation to which an initial Probity Investigation has been undertaken.

36.6 Public Disclosure Obligations

(a) The Supplier acknowledges and agrees that disclosures regarding the Project Agreements by TfNSW, any other NSW Rail Entity or any Authority may be required:

(i) under law, including the Government Information (Public Access) Act 2009 (NSW) or any similar or replacement legislation;

(ii) to satisfy the disclosure requirements of the Auditor General and to satisfy the requirements of Parliamentary accountability,
(Public Disclosure Obligations).

(b) The Supplier must use all reasonable endeavours to assist TfNSW, any NSW Rail Entity or an Authority in meeting their Public Disclosure Obligations in connection with the Project Agreements and the Project Activities.

36.7 Publicity

Except for notices which the Supplier is required to disclose to any recognised stock exchange, the Supplier must:

(a) not make any public announcements or statements in relation to the Project Agreements or the Project Activities (including by posting any information relating to the Project Agreements or Project Activities on any website) without TfNSW’s prior written consent;

(b) use reasonable endeavours to agree with TfNSW the wording and timing of all public announcements and statements by it or its Associates relating to the Project Agreements or the Project Activities before the relevant announcement or statement is made;

(c) give TfNSW a draft of any proposed media release relating to the Project Agreements or the Project Activities and obtain TfNSW’s prior written approval of the media release before distributing it;

(d) give TfNSW a copy of any announcement or media release as soon as practicable after it is made or distributed; and

(e) ensure that its Associates comply with the requirements referred to in this clause 36.7.

37. Restrictions on dealings

37.1 Restrictions on amendment to Project Agreements

The Supplier must not:

(a) make or permit any amendment to, replacement of or waiver of a provision of or any supplement or agreement collateral to;

(b) terminate, surrender, rescind or accept the repudiation of;

(c) permit the novation, assignment or substitution of any counterparty’s right, obligation or interest in; or

(d) enter into any agreement or arrangement which affects the operation or interpretation of,

any Project Agreement to which TfNSW is not a party, without TfNSW’s prior written consent (which consent will not be unreasonably withheld or delayed).

37.2 Restrictions on assignment

(a) (TfNSW and RailCorp):

(i) Without limiting clause 1.6(b), TfNSW and RailCorp may assign, novate, transfer or otherwise deal with their rights or obligations under any Project Agreement without the Supplier’s prior approval.
(ii) The Supplier hereby irrevocably agrees that if TfNSW or RailCorp elects to undertake any assignment, novation, transfer or other disposal in accordance with clause 37.2(a)(i) in respect of any Project Agreement to which the Supplier is a party, the Supplier:

A. will enter into a new agreement upon the same terms and conditions as each such Project Agreement excepting that the assignee, transferee or person to whom that other disposal is made pursuant to clause 37.2(a)(i) agrees to perform and observe TfNSW's or RailCorp's obligations under those documents as if it were named in the relevant Project Agreement instead of TfNSW or RailCorp (as the case may be); and

B. must execute and deliver such documents and do such things as and when reasonably requested by TfNSW or RailCorp to do so in order to enable or facilitate any assignment, novation, transfer or other disposal in accordance with this clause 37.2.

(b) (Supplier): Except as expressly permitted by this deed, the Supplier must not assign, novate, transfer, mortgage, charge or otherwise deal with its rights or obligations under any Project Agreement, without TfNSW's prior written approval.

37.3 Restrictions on dealings with Assets and Deliverables

The Supplier must not:

(a) create, permit or suffer any Security Interest over;

(b) lease, licence, transfer, sell, part with possession of, or otherwise deal with; or

(c) operate or use, or permit any other person to operate or use, any Asset or Deliverable, except as expressly permitted under the Project Agreements.

37.4 Restrictions on related party contracts

The Supplier must not (and must ensure that the Supplier's Subcontractors do not) enter into any contract relating to the Project Activities with a Related Body Corporate (other than on arm's length commercial terms) without TfNSW's prior written consent.

38. Change in ownership / Control

38.1 Initial status of ownership

The Supplier represents and warrants that, at the Commencement Date, the legal and beneficial ownership of each member of the Supplier Group and the Supplier Group structure is as set out in Schedule 4.

38.2 Change in ownership of Supplier Group Member

(a) The Supplier must inform TfNSW's Representative as soon as reasonably practicable and, in any event, within 20 Business Days of any Change in Control of the Supplier.

(b) If the Supplier provides TfNSW with a notice under clause 38.2(a), TfNSW may acting reasonably:


(i) request further information from the Supplier in respect of the Change in Control and the Supplier must provide TfNSW with the information requested within five Business Days; and

(ii) within the later of:

A. 20 Business Days of receipt of a notice from the Supplier in accordance with clause 38.2(a); and

B. 15 Business Days of receipt of further information in respect of the Change in Control in accordance with clause 38.2(b)(i),

provide the Supplier with a notice (Notice of Objection) relating to the Change in Control.

(c) The Supplier must pay TfNSW, as Moneys Owing, costs (including legal and financial advisers' fees) reasonably incurred by TfNSW or any Associate in relation to considering or consenting to a proposed Change of Control under any Project Agreement.

38.3 Notice of Objection

(a) TfNSW may give a Notice of Objection under clause 38.2(b)(ii) if TfNSW is of the reasonable opinion that:

(i) the Supplier has not provided TfNSW with full details of the proposed Change in Control or any further information requested by TfNSW;

(ii) the new Controlling Entity:

A. is not solvent or reputable;

B. has an interest or duty which conflicts in a material way with the interests of the Project, TfNSW, RailCorp, the Operator, any other NSW Rail Entity or the State;

C. has failed or is likely to fail to comply with the Probity Investigation procedure as if it were a Probity Entity; or

D. is involved in a business or activity which is incompatible, or inappropriate, in relation to the Project, TfNSW, RailCorp, the Operator or any other NSW Rail Entity or the State;

(iii) the Change in Control:

A. is against the public interest;

B. would adversely affect the ability or capability of the Supplier to perform its obligations under any Project Agreement; or

C. would increase the liability of, or risks accepted by, TfNSW or RailCorp under the Project Agreements; or

(iv) a Probity Event has occurred, or is likely to occur, in relation to the new Controlling Entity (if it were a Probity Entity) or the proposed Change in Control.

(b) If TfNSW issues the Supplier with a Notice of Objection under clause 38.2(b)(ii), TfNSW must specify the steps that it reasonably requires the Supplier to take to address the grounds for objection by TfNSW to the Change in Control.
(c) If the Supplier fails to take the steps and implement the measures identified in a Notice of Objection as referred to in clause 38.3(b) within a reasonable time specified by TfNSW, a Supplier Event of Default will be deemed to have occurred.

### 39. Subcontracting

#### 39.1 Subcontracting

(a) The Supplier may subcontract any part of its performance of the Delivery Phase Activities, but only in the manner permitted by this clause 39.

(b) The Supplier must not subcontract or delegate the management or administration responsibilities for delivering the Supplier’s obligations in relation to performance of the Delivery Phase Activities.

(c) The Supplier must ensure that each of its Subcontractors is reputable and has or has access to sufficient experience, expertise and ability to perform the relevant Delivery Phase Activities to the standards required by this deed.

#### 39.2 Supplier remains liable

The Supplier:

(a) is not relieved of any of its liabilities or obligations under a Project Agreement as a result of any subcontracting or approval of any Subcontractor;

(b) is at all times responsible for the performance of all Subcontractors; and

(c) acknowledges and agrees that breach of any Project Agreement caused or contributed to by a Subcontractor, or failure by a Subcontractor to comply with the obligations of the Supplier under the Project Agreements, is a breach or failure of the Supplier and the Supplier is entirely responsible for any failure to take reasonable care on the part of its Subcontractors to the extent permitted by law, notwithstanding that TfNSW’s Representative may have provided consent to the Supplier’s engagement of a Significant Contractor in accordance with clause 39.3.

#### 39.3 TfNSW to consent to appointment of Significant Contractor

(a) Before the Supplier may enter into any Significant Contract (including where to replace an existing Subcontractor) the Supplier must:

(i) notify TfNSW’s Representative that it proposes to enter into the Significant Contract; and

(ii) provide TfNSW’s Representative with the following information for Review:

A. details of the identity of the proposed Significant Contractor;

B. copies of the proposed Significant Contract Documents;

C. the scope of the Project Activities which the Supplier intends the proposed Significant Contractor will undertake; and

D. evidence to the satisfaction of TfNSW that the proposed Significant Contractor is (or remains) a Qualified Subcontractor.
(b) On completion of TfNSW’s Review, TfNSW’s Representative must notify the Supplier whether TfNSW consents or does not consent to the proposed engagement of the Significant Contractor based on the information provided by the Supplier in accordance with clause 39.3(a)(ii) and any further information provided by the Supplier in accordance with the Review Procedures.

(c) It will be reasonable for TfNSW’s Representative to withhold TfNSW’s consent under clause 39.3(b) if:

(i) the Supplier has not provided to TfNSW all of the information and documents required under clauses 39.3(a) and 39.3(e);

(ii) TfNSW has reasonable cause to consider the proposed Significant Contractor is not a Qualified Subcontractor; or

(iii) in the case of a proposed replacement Significant Contractor, the proposed Significant Contract Documents are not on substantially the same terms as the Significant Contract Documents to be replaced.

(d) If TfNSW’s Representative consents to the Supplier’s engagement of the proposed Significant Contractor in accordance with clause 39.3(b), the Supplier must:

(i) enter into the Significant Contract Documents;

(ii) ensure that the terms of the executed Significant Contract Documents are not materially amended from the proposed Significant Contract Documents provided to TfNSW in accordance with clause 39.3(a)(ii); and

(iii) provide TfNSW with a copy of the Significant Contract Documents as executed by the Significant Contractor and the Supplier within 15 Business Days of the execution of the Significant Contract.

(e) If the proposed Significant Contract Documents provided to TfNSW’s Representative in accordance with clause 39.3(a)(ii) are later subject to material amendment prior to the formation and execution of the Significant Documents, the Supplier must provide TfNSW with the details of those proposed amendments and clauses 39.3(a) to 39.3(d) will reapply.

39.4 Termination and replacement

The Supplier must:

(a) not terminate, surrender, rescind or accept repudiation of (or give the relevant Subcontractor an entitlement to terminate, surrender, rescind or accept repudiation of) any Significant Contract Document; and

(b) if there is an early termination, surrender or rescission of a Significant Contract Document for any reason:

(i) notify TfNSW’s Representative promptly upon its terminating or being surrendered or rescinded, or of the Supplier becoming aware of the termination, surrender or rescission (and in any event within 5 Business Days); and

(ii) take such steps as TfNSW’s Representative may direct to reinstate or replace the relevant Significant Contract Document (or Significant Contractor).
39.5 **Form of Significant Contracts**

Each Significant Contract other than the DTRS Significant Contract must include the following in a form satisfactory to TfNSW:

(a) an undertaking from the Significant Contractor to amend, rectify or make good at the Significant Contractor's own cost any Defect, omission or default;

(b) an undertaking from the Significant Contractor to provide guarantees, warranties and indemnities in favour of the Supplier functionally equivalent to those provided by the Supplier to TfNSW;

(c) an undertaking from the Significant Contractor to procure Collateral Warranty Deeds Poll in the form set out in Part B of Schedule 17 from each Subcontractor engaged by the Significant Contractor that is a Significant Contractor;

(d) assignments, licences, consents, waivers and other like provisions with respect to Intellectual Property Rights and Moral Rights in favour of TfNSW functionally equivalent to those provided by the Supplier to TfNSW;

(e) an undertaking from the Significant Contractor to do all things, including to undertake all investigations, permit such checks, and provide such consents and information as may be required in respect of its Personnel under this deed;

(f) provisions which recognise TfNSW's right in rights under clause 29 of the TLS Deed;

(g) provisions which provide for TfNSW's right to review, and consent or not consent, to the Significant Contractor's engagement of Subcontractors that are also Significant Contractors, with such provisions to be in the same terms as set out in clause 39.3 but with the Significant Contractor in the place of the Supplier, and the Subcontractor in the place of the Significant Contractor;

(h) provisions which provide that the Significant Contractor must not terminate, surrender, rescind or accept repudiation of a Subcontract to which another Significant Contractor is a party (or give the relevant Subcontractor an entitlement to terminate, surrender, rescind or accept repudiation of) the Subcontract;

(i) provisions which oblige the Significant Contractor to:

   (i) promptly notify TfNSW's Representative if there is an early termination, surrender or rescission of a Subcontract between the Significant Contractor and a Subcontractor that is also a Significant Contractor for any reason; and

   (ii) take such steps as TfNSW's Representative may direct to reinstate or replace the relevant Subcontract,

with such provisions to be in the same terms as set out in clause 39.4(b) but with the Significant Contractor in the place of the Supplier, and the Subcontractor in the place of the Significant Contractor; and

(j) provisions which satisfy the requirements of clauses 7.4, 35, 36, 40 and 44.

39.6 **Other Significant Contract requirements**

The Supplier must (and must ensure that its Subcontractors):

(a) comply with its obligations under and use reasonable endeavours to enforce the terms of each Significant Contract to which it is a party;
(b) notify TfNSW of any material breach under a Significant Contract or any dispute with or between any Subcontractors arising in connection with any Significant Contract immediately upon becoming aware of that breach or dispute and keep TfNSW informed of the status of the breach or dispute;

(c) not without TfNSW's prior written consent (not to be unreasonably withheld or delayed):

(i) make or permit any amendment to, or replacement of or waiver of a provision of;

(ii) permit the novation, assignment or substitution of any counterparty's right, obligation or interest in; or

(iii) enter into any agreement or arrangement which affects the operation or interpretation or relates to the subject matter of,

a Significant Contract; and

(d) not without TfNSW's prior written consent (not to be unreasonably withheld or delayed), suffer or permit any compromise or waiver of any material claim, or give any release under a Significant Contract.

39.7 Obligations and acknowledgements as to Claims

The Supplier must, in circumstances where it makes any Claim against TfNSW as a consequence of a Claim that has been made by a Subcontractor against the Supplier, take reasonable steps to ensure that any such Claim made by the Subcontractor is bona fide, prior to making any related Claim against TfNSW.

39.8 Arrangements with Related Bodies Corporate

The Supplier must ensure that any agreement or arrangement (whether legally enforceable or not) between it and any of its Associates is on arm's length terms.

40. PPSA

40.1 PPSA undertakings

(a) If the interests of RailCorp, TfNSW or any other NSW Rail Entity (a Secured Party) under this deed, any other Project Agreement or any transactions contemplated by them constitute one or more Security Interests in favour of that Secured Party:

(i) the Supplier agrees to promptly do anything (including executing any new document, obtaining consents, signing and producing documents, getting documents completed and signed and supplying information or procuring that a Subcontractor does the same) which that Secured Party may require for the purposes of:

A. ensuring that any Security Interest of that Secured Party is enforceable, perfected and otherwise effective;

B. ensuring that any Security Interest of that Secured Party is continuously perfected and/or perfected by control and/or perfected in a way that will reduce as far as reasonably possible the risk of a third party acquiring an interest in any property the subject of the Security Interest, to the extent possible under the PPSA;
C. enabling that Secured Party to apply for registration, or give any notification, in connection with a Security Interest so that the Security Interest has the priority required by that Secured Party; or

D. enabling that Secured Party to exercise any right or power in connection with the Security Interest;

(ii) the Supplier agrees that it will bear all costs and expenses:

A. that it incurs in complying with clause 40.1(a)(i); and

B. incurred by a Secured Party for the purposes set out in clause 40.1(a)(i);

(iii) to the extent permitted by law, and in respect of any Security Interest created by this deed, any other Project Agreement or any transactions contemplated by them:

A. the parties contract out of sections 95, 121(4), 125, 130, 132(3)(d), 132(4), 142 and 143 of the PPSA (to the extent, if any, mentioned in section 115(1) of the PPSA);

B. the application of Part 4.3 of the PPSA is contracted out of if that Part would apply by virtue of section 116(2) of the PPSA; and

C. the Supplier waives its right to receive any verification statement in respect of any financing statement or financing change statement relating to a Security Interest, and also its right to receive any other notice required under the PPSA unless the provision of such notice cannot be excluded;

(iv) the parties agree to the full extent permitted by law not to disclose information of the kind mentioned in section 275(1) of the PPSA;

(v) the Supplier agrees that it will only authorise the disclosure of information under section 275(7)(c), or request information under section 275(7)(d), if the relevant Secured Party approves;

(vi) a Secured Party's Security Interest attaches to any proceeds (including any proceeds within the definition of that term in the PPSA) derived, directly or indirectly, from any sale or dealing with the collateral that is the subject of the Security Interest or otherwise arising out of or relating to the collateral whether or not the sale or dealing is permitted under this deed;

(vii) except where contemplated in clause 40.2(a), the Supplier will not, without the relevant Secured Party's prior written consent, create, purport, or attempt to create or permit to exist any other Security Interest, however ranking, over the collateral; and

(viii) for the avoidance of doubt, pursuant to section 80 of the PPSA, the Supplier covenants not to assert any rights it would otherwise have under section 80(1) of the PPSA and it is intended specifically that any person to whom a Secured Party assigns some or all of its rights and obligations under a Project Agreement should have the benefit of this covenant.
40.2  PPSA procedures

(a) Without limiting clause 40.1(a)(vii), if the Supplier holds any Security Interests in the Assets for the purposes of the PPSA by reason of entering into any supply or other arrangements with a Subcontractor, the Supplier agrees to implement, maintain and comply in all material respects with, procedures for the perfection of those Security Interests. These procedures must include procedures designed to ensure that the Supplier takes all steps to identify Security Interests in its favour and under the PPSA to perfect continuously any such Security Interest including all steps necessary:

(i) for the Supplier to obtain the highest ranking priority possible in respect of the Security Interest (such as perfecting a purchase money security interest (as defined in the PPSA) or perfecting a Security Interest by control); and

(ii) to reduce as far as possible the risk of a third party acquiring an interest free of the Security Interest (such as including the serial number in a financing statement for personal property that may or must be described by a serial number).

(b) If a Secured Party asks, the Supplier agrees to arrange at its expense an audit of the above PPSA procedures. A Secured Party may ask the Supplier to do this if it reasonably suspects that the Supplier is not complying with this clause.

41. Rights to and use of the Intellectual Property

The parties’ rights and obligations in relation to Intellectual Property Rights are set out in Schedule 3.

42. Notice of Claims

42.1 Communication of Claims

(a) If the Supplier wishes to make a Claim against TfNSW or RailCorp, the Supplier must give TfNSW’s Representative a Prescribed Notice under clause 42.2 within 20 Business Days of the earlier of:

(i) the date when the Supplier was or could reasonably have been aware of the conduct, circumstance, event, act, default, omission, direction, fact, matter or thing upon which the Claim is or will be based (Claim Event); and

(ii) the date when the Supplier could reasonably have been aware of the entitlement to make the Claim.

(b) The Supplier must not delay giving notice until a Claim Event or series of Claim Events is complete or until the quantum of the Claim can be ascertained.

(c) This clause 42 does not apply to any Claim:

(i) for payment of a Progress Payment under 19.1; nor

(ii) in respect of a Qualifying Cause under clause 24.5.

(d) This clause 42.1 is in addition to, and not in substitution for, and does not qualify or diminish, any other requirement of this deed relating to the notification or making of Claims.
42.2 The Prescribed Notice

A Prescribed Notice is a notice stating that it is a notice under this clause 42.2 and containing full particulars of:

(a) the Claim Events;
(b) the legal basis or bases for the Claim including any clause of this deed relied upon; and
(c) the quantum or likely quantum of the Claim (if any).

42.3 Failure to notify

TfNSW and RailCorp shall not be liable upon any Claim by the Supplier which was not notified strictly in accordance with this clause 42, and such Claim will be absolutely barred.

43. Notices

43.1 How to give Notice

(a) Wherever referred to in this clause, Notice means each communication (including each notice, consent, approval, request, direction and demand) under or in connection with this deed.

(b) At any time and from time to time TfNSW's Representative may notify the Supplier that a PDCS will be used for giving Notices under or in connection with this deed. TfNSW's Representative's notice will set out:

(i) the name of the relevant PDCS;
(ii) the commencement date for use of the PDCS;
(iii) any password, login details or similar information required for the Supplier to use the PDCS; and
(iv) any other information reasonably necessary for the use and service of Notices via the PDCS.

(c) Each Notice must:

(i) before the date referred to in clause 43.1(b):

A. be in writing;

B. be:

1) in the case of a Notice from the Supplier, addressed to TfNSW's Representative; or
2) in the case of a Notice from TfNSW or RailCorp, addressed to the Supplier's Representative;

C. be signed by:

1) in the case of a Notice from the Supplier, the Supplier's Representative; and
2) in the case of a Notice from TfNSW, TfNSW's Representative.
or on that person’s behalf by any authorised agent of, that person;

D. be:

1) delivered or posted to the address via, in the case of posting, the ‘priority’ postal service offered by Australia Post (or any other postal service provider that assumes any or all of the functions of Australia Post) or other such similar service; or

2) sent by email in the form of a .pdf file of a letter (with or without attachments) to the email address, of the addressee, in accordance with clause 43.1(c)(i)E; and

E. addressed as follows (or as otherwise notified by the intended recipient to each other party from time to time):

TfNSW

Name: TfNSW, a New South Wales Government agency

Address: Level 2, 1 Prince Albert Road, Sydney NSW 2000

Email: [redacted]@transport.nsw.gov.au

For the attention of: Project Director, Sydney Growth Trains

RailCorp

Name: Rail Corporation New South Wales, a New South Wales Government agency

Address: Level 2, 1 Prince Albert Road, Sydney NSW 2000

Email: [redacted]@transport.nsw.gov.au

For the attention of: Project Director, Sydney Growth Trains

Supplier

Name: Downer EDI Rail Pty Limited

Address: T3, Triniti Business Campus, 39 Delhi Road, North Ryde NSW 2113

Email: [redacted]@downergroup.com

For the attention of: The Company Secretary

(ii) on and from the commencement date for use of the PDCS referred to in clause 43.1(b):

A. be sent through the PDCS in accordance with the requirements set out in clause 43.4(a) and:

1) in the case of a Notice from the Supplier, be addressed to TfNSW’s Representative; or
2) in the case of a Notice from TfNSW, be addressed to the Supplier’s Representative; or

B. in circumstances where the PDCS is temporarily disabled or not operating, be issued in accordance with clause 43.1(c)(i).

43.2 When Notice is received

A communication is taken to be received by the addressee:

(a) (in the case of a Notice sent through the PDCS) at the time recorded on the PDCS as being the time at which the Notice was sent;

(b) (in the case of prepaid post sent to an address in the same country) four Business Days after the date of posting;

(c) (in the case of international post) ten Business Days after the date of posting;

(d) (in the case of email) at the time in the place to which it is sent equivalent to the time shown on the automatic receipt notification received by the party sending the email from the recipient specified in clause 43.1(c)(i)E; and

(e) (in the case of delivery by hand) on delivery,

provided that if the communication would be deemed to be received on a day which is not a Business Day or after 5.00pm on a Business Day, it is deemed to be received at 9.00am on the next Business Day.

43.3 Communications sent by email

With respect to communications sent by email:

(a) only the letter in .pdf format attached to the email and, subject to clause 43.3(b) any attachments to such letter which are referred to in the letter, will form part of the Notice under clause 43.1. Any text in the body of the email or the subject line will not form part of the Notice;

(b) an attachment to an email referred to in clause 43.1(c)(i)D.2 will only form part of a Notice under clause 43.1 if it is in:

(i) .pdf format;

(ii) a format compatible with Microsoft Office; or

(iii) such other format as may be agreed between the parties from time to time; and

(c) the parties agree, with respect to any Notices under or in connection with this deed:

(i) to ensure that their respective firewall and/or mail server (as applicable):

A. allows messages of up to 100 MB to be received;

B. does not trap any messages in the spam filter which:

1) in the case of notices sent by TfNSW or RailCorp to the Supplier have been sent from the transport.nsw.gov.au domain (or such other domain as may be notified by TfNSW to the
Supplier from time to time by not less than 30 days notice); and

2) in the case of notices sent by the Supplier to TfNSW or RailCorp, have been sent from the downergroup.com domain (or such other domain as may be notified by the Supplier to TfNSW from time to time by not less than 30 days notice); and

C. automatically sends a receipt notification to the sender upon receipt of a message; and

(ii) to use reasonable endeavours to ensure that their respective systems automatically send a notification message to each of the sender and the recipient when a message is received by the recipient's domain but cannot or will not be delivered to the recipient.

43.4 Notices sent through the PDCS

(a) With respect to Notices sent through the PDCS:

(i) all Notices must be submitted by:

A. in the case of a Notice from the Supplier, the Supplier's Representative; and

B. in the case of a Notice from TfNSW, TfNSW's Representative, or on that person's behalf by any authorised agent of, that person;

(ii) only the text in any Notice, or subject to paragraph 43.4(a)(iii), any attachments to such Notice which are referred to in the Notice, will form part of the Notice. Any text in the subject line will not form part of the Notice; and

(iii) an attachment to a Notice will only form part of a Notice if it is uploaded to the PDCS in:

A. .pdf format;

B. a format compatible with Microsoft Office; or

C. such other format as may be agreed between the parties in writing from time to time.

(b) The Supplier must:

(i) ensure that it has internet access which is sufficient to facilitate use of the full functionality of the PDCS;

(ii) ensure that relevant Supplier's Personnel log on and use the PDCS and check whether Notices have been received on each Business Day;

(iii) ensure all relevant Supplier's Personnel attend all necessary training required by TfNSW's Representative in respect of the PDCS;

(iv) advise TfNSW's Representatives which of the Supplier's Personnel require access to the PDCS;
(v) at all times, ensure that it has access to Supplier’s Personnel trained in the use of the PDCS so as to be able to view, receive and submit communications (including Notices) using the PDCS; and

(vi) as soon as practicable, at the first available opportunity following any period of time during which the PDCS is temporarily disabled or not operating, send all communications which have been issued pursuant to clause 43.1(c)(ii)B to TfNSW’s Representative through the PDCS.

(c) TfNSW has no liability for any losses the Supplier may suffer or incur arising out of or in connection with its access to or use of the PDCS or any failure of the PDCS, and the Supplier will not be entitled to make, and TfNSW will not be liable upon, any Claim against TfNSW arising out of or in connection with the Supplier’s access to or use of the PDCS or any failure of the PDCS.

43.5 Formal and information communications

The parties wish to distinguish formal communications from informal communications and agree that:

(a) a formal communication is one which complies with the requirements of clause 43.1;

(b) an informal communication is one which does not comply with the requirements of clause 43.1. Examples of informal communications include:

(i) oral communications, whether made during meetings, discussions, over the phone or otherwise; and

(ii) communications sent by email which are not formal communications (for example, an email which does not attach a .pdf file of a signed letter);

(c) formal communications will have effect as Notices in connection with this deed;

(d) informal communications will not be treated as Notices under or in connection with this deed; and

(e) informal communications will not affect any party’s rights or obligations out of or in connection with this deed, and cannot be relied upon.

44. Proportionate liability

44.1 Exclusion of proportionate liability scheme

(a) 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 any party under this deed whether these rights, obligations or liabilities are sought to be enforced in contract, tort or otherwise.

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

44.2 Supplier not to apply proportionate liability scheme

To the extent permitted by law:
the Supplier must not seek to apply the provisions of Part 4 of the Civil Liability Act 2002 (NSW) in relation to any claim by TfNSW or RailCorp against the Supplier (whether in contract, tort or otherwise); and

if any of the provisions of Part 4 of the Civil Liability Act 2002 (NSW) are applied to any claim by TfNSW or RailCorp against the Supplier (whether in contract, tort or otherwise), the Supplier will indemnify TfNSW and RailCorp against any Loss, damage, cost or expense that forms part of a claim by TfNSW or RailCorp against the Supplier which TfNSW or RailCorp cannot recover from the Supplier because of the operation of Part 4 of the Civil Liability Act 2002 (NSW).

44.3 Subcontracts

The Supplier must:

(a) ensure that the terms on which it engages all its Subcontractors exclude (to the extent permitted by law) the application of Part 4 of the Civil Liability Act 2002 (NSW) in relation to all and any rights, obligations or liabilities of either party under each Subcontract whether these rights, obligations or liabilities are sought to be enforced by a claim in contract, tort or otherwise; and

(b) require each Subcontractor down the contractual chain from any Subcontractor to include, in any further contract that it enters into with a third party for the performance of the Project Activities, a term that (to the extent permitted by law) excludes the application of Part 4 of the Civil Liability Act 2002 (NSW) in relation to all and any rights, obligations or liabilities of either party under each further agreement whether such rights, obligations or liabilities are sought to be enforced by a claim in contract, tort or otherwise.

45. Taxes

45.1 Goods and Services Tax (GST)

(a) Except where the context suggests otherwise, terms and expressions used in this clause 45.1 have the meanings given to those expressions in the GST Act.

(b) Unless otherwise expressly stated in this deed, all prices or other sums payable or consideration to be provided under this deed are exclusive of GST. Any consideration that is specified to be inclusive of GST must not be taken into account in calculating the GST payable in relation to a supply for the purposes of this clause 45.1.

(c) Despite any other provision in this deed, if GST is payable on a supply made by a party (GST Supplier) under or in connection with this deed, the party that is required to provide consideration to the GST Supplier (Recipient) must pay or procure payment to the GST Supplier an amount equal to the GST payable on the supply (GST Amount) by the GST Supplier.

(d) The Recipient must pay or procure payment of the GST Amount in addition to and at the same time as payment for the taxable supply is required to be made under this deed except where the Supplier has failed to provide sufficient information required to enable TfNSW or RailCorp (as the case may be) to issue a RCTI in accordance with clause 45.1(i), in which case the GST Amount will be payable once that information is provided.

(e) If this deed requires a party to reimburse any other party for any expense, Loss or outgoing (reimbursable expense) incurred by another party, the amount required to be reimbursed by the first party will be the sum of:
(i) the amount of the reimbursable expense net of input tax credits (if any) to which the other party is entitled in respect of the reimbursable expense; and

(ii) if the other party's recovery from the first party is a taxable supply, any GST payable in respect of that supply and for the avoidance of doubt, if the supply is a taxable supply, clause 45.1(c) will apply.

(f) If a payment under this deed is calculated by reference to or as a percentage of another amount or revenue stream, that payment shall be calculated by reference to or as a percentage of that other amount or revenue stream net of any GST component.

(g) If the amount of GST paid or payable by the GST Supplier on any supply made under this deed differs from the amount of GST paid by the Recipient because the Commissioner of Taxation lawfully adjusts the value of the taxable supply for the purpose of calculating GST or for any other reason, then the amount of GST paid by the Recipient will be adjusted accordingly by a further payment by the Recipient to the GST Supplier or the GST Supplier to the Recipient as the case requires.

(h) The parties agree that, unless otherwise agreed in writing, the following will apply to the supply of Assets and any other taxable supplies made by the Supplier to TfNSW and RailCorp under or in connection with this deed:

(i) TfNSW and RailCorp (as the case may be) will issue to the Supplier a recipient created tax invoice (RCTI) for each taxable supply made by the Supplier to TfNSW and RailCorp (as the case may be) under this deed;

(ii) TfNSW and RailCorp (as the case may be) will issue to the Supplier an adjustment note for any adjustment event;

(iii) the Supplier will not issue a tax invoice in respect of any taxable supply it makes to TfNSW and RailCorp (as the case may be); and

(iv) TfNSW and RailCorp (as the case may be) may at any time notify the Supplier that it will no longer issue a RCTI for any taxable supply made by the Supplier under this deed, in which case, from that point in time:

A. TfNSW and RailCorp (as the case may be) will not be required to issue RCTIs in respect of such supply;

B. the Supplier will be required to issue tax invoices to TfNSW and RailCorp (as the case may be); and

C. TfNSW and RailCorp (as the case may be) need not make a payment for a taxable supply made by the Supplier under or in connection with this deed until the Supplier has given TfNSW or RailCorp (as the case may be) a tax invoice for the relevant taxable supply.

(i) Each party acknowledges and warrants that at the time of entering into this deed it is registered for GST and will notify the other parties if it ceases to be registered for GST or ceases to comply with any of the requirements of any taxation ruling issued by the Commissioner of Taxation in relation to the creation or issuing of RCTIs.

45.2 Taxes other than GST and duties

(a) Unless otherwise expressly provided in this deed, the Supplier must pay all Taxes due in connection with the Supplier's performance of its obligations under this deed.
(b) The Supplier acknowledges and agrees that it will be liable for and has made adequate allowance for:

(i) all Taxes other than GST (but including Importation GST);
(ii) all duties including stamp duty, customs duty and import duty; and
(iii) all costs relating to the imposition of any new Taxes, duties or the like, or a change in any of them.

(c) Where the Supplier is granted an import duty concession or there is a change in legislation or any other event that results in a reduction in customs or import duty rates (including, tariff amendments and free trade agreements) applicable to imported goods, the Supplier must, and must ensure that its Subcontractors:

(i) procure the benefit of any customs or import duty savings or any customs or import duty refunds in full as soon as reasonably practicable; and
(ii) account promptly to TfNSW for all of those savings or refunds.

Any savings or refunds that the Supplier is required to account to TfNSW under this clause will be Moneys Owing from the Supplier to TfNSW.

(d) The Supplier must not make applications for import customs duty concessions without prior consultation with TfNSW.

(e) The Supplier acknowledges and agrees that:

(i) the Supplier will attend to the importation of any imported goods necessary to fulfil its obligations under this deed;
(ii) unless already approved, prior to the importation of any such goods, the Supplier will apply for approval for the deferral of Importation GST as set out in Division 33 of the GST Act; and
(iii) notwithstanding any other provision of this deed or any other related document, the Supplier will not seek to include in any Payment Claim or in any other way pass on directly or indirectly, any unrecoverable Importation GST incurred in relation to such goods.

45.3 Withholding

(a) If TfNSW is required in its opinion to withhold any amount or procure the withholding of any amount in respect of Taxes from a payment to be made to the Supplier under any Project Agreement, that amount may be withheld and:

(i) such withholding and payment to the relevant taxing Authority will be a good discharge of TfNSW’s obligation to procure payment of the relevant amount to the Supplier; and
(ii) the Supplier will have no Claim against TfNSW or RailCorp arising out of or in any way in connection with such withholding.

(b) If TfNSW procures payment of an amount to the Supplier without withholding an amount in respect of Taxes, the Supplier must indemnify TfNSW for any Loss suffered by TfNSW as a result of TfNSW failing to withhold the amount in respect of Taxes.
46. General

46.1 Certification

For the purposes of this deed, a copy of a document will be regarded as duly certified by the Supplier if it is certified as a true copy by a director, secretary or general manager of the Supplier.

46.2 Cost of performing obligations

Subject to any express provision of this deed to the contrary each party must pay its own costs and expenses relating directly or indirectly to the preparation, negotiation, execution, stamping of and performance of its obligations under this deed.

46.3 Governing law

(a) This deed is governed by and must be construed according to the laws applying in New South Wales.

(b) Without prejudice to the operation of the provisions in Schedule 8, each party irrevocably:

(i) submits to the non-exclusive jurisdiction of the courts exercising jurisdiction in New South Wales, and any court that may hear appeals from any of those courts for any proceedings in connection with this deed; and

(ii) waives any right it might have to claim that those courts are an inconvenient forum if that venue falls within clause 46.3(b)(i).

46.4 Amendments

(a) Subject to clauses 46.4(b) and 46.4(c), this deed may only be varied by a deed executed by or on behalf of each party.

(b) If in respect of any Variation Order that requires a change to the SPR:

(i) TfNSW issues to the Supplier a letter in the form of Schedule 24 (or in such other form as may be agreed by the parties) that has been signed by TfNSW's Representative on TfNSW's behalf; and

(ii) the Supplier replies to TfNSW's letter within 10 Business Days in the form required by TfNSW's letter and signed by the Supplier's Representative on the Supplier's behalf,

the SPR will be deemed to be amended in accordance with TfNSW's letter, with effect from the date of the Supplier's reply.

(c) Nothing in clause 46.4(a) limits clause 20, 21 or 22.

46.5 Waiver

A right may only be waived in writing, signed by the party giving the waiver, and:

(a) no other conduct (including failure to exercise or enforce, or a delay in exercising or enforcing, or the partial exercise or enforcement of, a right, power or remedy provided by law or under or in connection with this deed by a party) precludes, or operates as a waiver of, the exercise or enforcement, or further exercise or enforcement, of that or any other right, power or remedy provided by law or under this deed;
(b) a waiver or consent given by a party under this deed is only effective and binding on that party if it is given or confirmed in writing by that party;

(c) a waiver of a right on one or more occasions does not operate as a waiver of that right if it arises again; and

(d) no waiver of a breach of a term of this deed operates as a waiver of another breach of that term or of a breach of any other term of this deed.

46.6 Survival of certain provisions; no merger

Without limiting clause 46.12:

(a) clauses 1 (Interpretation), 4.1 (TfNSW's Representative), 9.2 (Information Documents), 9.3 (Supplier warranty), 11.4 (Design warranties), 12.2 (Manufacture and supply warranty), 16 (Project Security), 17.2 (Prices fixed), 19.8 (Interest), 19.9 (Moneys Owing and set-off), 24.5 (Notice of Qualifying Cause and Claim), 27.10 (Consequences of termination), 27.11 (Waiver and no Claim), 28.2 (Supplier’s warranty), 31 (Indemnities), 32 (Liability), 33 (Representations and warranties), 34 (Dispute resolution), 35 (Records, reporting obligation and privacy), 36 (Disclosure, confidentiality, probity and publicity), 41 (Rights to and use of the Intellectual Property), 42 (Notice of Claims), 43 (Notices), 44 (Proportionate liability), 45.1 (Goods and Services Tax (GST)), 45.2 (Taxes other than GST and duties), this clause 46 (General), Schedule 3 (Intellectual Property) and Schedule 15 (Termination Payments), the representations, warranties and indemnities given by the Supplier under this deed and any other provision which is expressed or by implication from its nature is intended to survive termination or is necessary for the interpretation of the clauses set out in this clause 46.6 (together, the Surviving Clauses) will survive rescission, termination or expiration of this deed;

(b) if this deed is rescinded or terminated, no party will be liable to any other party except:

(i) under the Surviving Clauses; or

(ii) in respect of any breach of this deed occurring before such rescission or termination;

(c) no provision of this deed which is expressed to survive termination will prevent any other provision of this deed, as a matter of interpretation, also surviving termination; and

(d) no right or obligation of any party will merge on completion of any transaction under this deed. All rights and obligations under this deed survive the execution and delivery of any transfer or other document which implements any transaction under this deed.

46.7 Further acts and documents

Each party must do anything (including execute any document), and must ensure that its Associates do anything (including execute any document), required by law or that the other party may reasonably require to give full effect to this deed.

46.8 Consents

A consent required under this deed from a party may be given or withheld, or may be given subject to any conditions, as that party (in its absolute discretion) thinks fit, unless this deed expressly provides otherwise.
46.9 Severance

If at any time any provision of this deed is or becomes illegal, invalid or unenforceable in any respect under applicable law, that provision is to be severed to the extent necessary to make this deed enforceable, and it will not affect or impair the legality, validity or enforecability of any other provision of this deed.

46.10 Exercise of remedies

(a) If the Supplier breaches any of its obligations under this deed or any other Project Agreement, TfNSW may exercise any or all of the rights and powers and pursue any or all of the remedies available to TfNSW under the Project Agreements and/or enforce any other legal or equitable remedy available under applicable law.

(b) Each and every right, power and remedy of TfNSW will be cumulative and in addition to any other right, power and remedy, whether under a Project Agreement or applicable law, which may be exercised by TfNSW and the exercise of a right, power or remedy shall not be construed to be a waiver of the right to exercise any other right, power or remedy.

(c) No delay or omission by TfNSW in the exercise of any right, power or remedy shall impair such right, power or remedy or constitute a waiver of the relevant breach.

46.11 Entire agreement

(a) To the extent permitted by law, in relation to its subject matter, this deed together with the other Project Agreements:

(i) embodies the entire understanding of the parties, and constitutes the entire terms agreed by the parties; and

(ii) supersedes any prior written or other agreement of the parties, with respect to its subject matter.

(b) Any right that a person may have under this deed is in addition to, and does not replace or limit, any other right that the person may have.

46.12 Indemnities

(a) Each indemnity in this deed is a continuing obligation, separate and independent from the other obligations of the parties, and survives termination, completion or expiration of this deed.

(b) It is not necessary for a party to incur expense or to make any payment before enforcing a right of indemnity conferred by this deed.

(c) A party must pay on demand any amount it must pay under an indemnity in this deed.

46.13 Counterparts

This deed may be executed in any number of counterparts and by the parties on separate counterparts. Each counterpart constitutes the deed of each party who has executed and delivered that counterpart.
46.14 Attorneys

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.

46.15 Relationship between TfNSW, RailCorp and the Supplier

Nothing in, or contemplated by, this deed or any other Project Agreements will be construed or interpreted as:

(a) constituting a relationship between TfNSW, RailCorp and the Supplier, or any other person, of partners, joint venturers, fiduciaries, employer and employee or principal and agent; or

(b) imposing any general duty of good faith on TfNSW or RailCorp to the Supplier or its Associates in relation to or arising out of this deed, other than to comply with the obligations (if any) expressly stated to be assumed by TfNSW or RailCorp under this deed or any other Project Agreement on a good faith basis.

46.16 Form of documents

(a) All documentation in computer readable or other written forms brought (whether before or after the date of this deed) or required to be brought into existence as part of, or for the purpose of, performing the Delivery Phase Activities must be written in the English language.

(b) All other communications made under this deed must also be made in English.

(c) All soft copy documentation must be submitted without any security restrictions and be fully text searchable.

46.17 Vienna convention

The UN Convention on Contracts for the International Sale of Goods (1980) does not apply to this deed.

46.18 Time Limits

Where in this deed any obligation of a party is required to be performed within a specified time or on a specified date, that obligation will be deemed to continue after that time or date if the party fails to comply with that obligation within that time or on that date.
EXECUTED as a deed.

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

CLAIR HODGE

Full name of witness (print)

Group Corporate Counsel

Position held

Signature of authorised delegate

TIMOTHY RYARDON

Full name of authorised delegate (print)

Secretary

Position held

Signed sealed and delivered for and on behalf of Rail Corporation New South Wales (ABN 59 325 778 353) by its authorised delegate in the presence of:

Signature of witness

GARY CHARLES PEDERSEN

Full name of witness (print)

CHIEF FINANCIAL OFFICER

Position held

Signature of authorised delegate

HOWARD PAUL COLLINS

Full name of authorised delegate (print)

ACTING CHIEF EXECUTIVE

Position held

Signed, sealed and delivered for and on behalf of Downer EDI Rail Pty Ltd (ABN 92 000 002 031) by its attorneys under a power of attorney dated 29/11/16 in the presence of:

Signature of witness

ROBERT ST CLAIR

Full name of witness

Signature of attorney who declares that the attorney has not received any notice of the revocation of the power of attorney

GRANT FENN

Full name of attorney

Signature of attorney who declares that the attorney has not received any notice of the revocation of the power of attorney

MICHAEL MILLS

Full name of attorney
Schedule 1 – Conditions Precedent

1. Conditions to be satisfied by Supplier

Provision to TfNSW by the Supplier of the following:

(a) original copies of each Completion Document, duly executed by all parties to them (other than TfNSW and RailCorp);

(b) a legal opinion (or opinions) from solicitors reasonably acceptable to TfNSW in a form and substance satisfactory to TfNSW in relation to the due execution by all parties (other than TfNSW and RailCorp), and the enforceability, of the Completion Documents to which they are a party;

(c) evidence in a form and substance satisfactory to TfNSW that any authorisation required by the Supplier (and any other party entering into any Completion Document other than TfNSW and RailCorp) in connection with its entry into any of the Completion Documents to which it is a party and the performance of its obligations under those Completion Documents, has been obtained and is in full force and effect;

(d) evidence in form and substance satisfactory to TfNSW that any stamp duty payable in connection with the entry into the Completion Documents has been paid;

(e) evidence in form and substance satisfactory to TfNSW that the Insurances required by this deed to be effected and maintained by the Supplier from the Commencement Date, are in full force and effect and in the form approved by TfNSW;

(f) evidence in a form and substance satisfactory to TfNSW that the Supplier Group structure is consistent with Schedule 4, including certifications regarding shareholdings; and

(g) any other opinion, certificate or other documents that TfNSW reasonably requests.
Schedule 2 – Commercially Sensitive Information

The following information is Commercially Sensitive Information:

1. any information relating to the amounts payable to the Supplier in respect of the performance of the Delivery Phase Activities, including all prices, rates and margin percentages specified in this deed;

2. any information relating to the financing arrangements of the Supplier, including information regarding bonding arrangements;

3. the terms of the policies of Insurance required to be effected and maintained by the Supplier under this deed (but not the terms of clause 30);

4. the Design Books, and any Contract Information which the Supplier has identified as confidential;

5. Schedule B1 "Train Solution" (including sub-schedules) of the Supplier's Proposal;

6. Schedule B4 "Through Life Support Solution" (including sub-schedules) of the Supplier's Proposal;

7. Relevant Source Code submitted by the Supplier or its Subcontractors for submission to the Escrow Agent; and

8. all Technical Documents and Technical Packages submitted by the Supplier for Review.
Schedule 3 – Intellectual Property

1. Intellectual Property Rights

1.1 Licensed Intellectual Property

(a) The Supplier grants to TfNSW and RailCorp and any entity nominated by TfNSW or RailCorp (including the Operator), a non-exclusive, perpetual, irrevocable, transferable, royalty free licence, without additional cost to exercise all Intellectual Property Rights in the Licensed Intellectual Property for the Permitted Purpose.

(b) Without limiting paragraph 1.1(a), the Supplier grants to TfNSW and RailCorp and any entity nominated by TfNSW or RailCorp (including the Operator), a non-exclusive, perpetual, irrevocable, transferable, royalty free licence, without additional cost to exercise all Intellectual Property Rights in the Licensed Intellectual Property in or used in:

(i) the physical surface layout, dimensions and surface appearance of the Driver's cab, the Guard's cab and the detrainment device, and to the extent necessary for the purposes set out in paragraph 1.1(b)(iv) below, the surface appearance of the Cars and Sets (not including "behind the scenes" functionality or other elements not evident to an operator or passenger);

(ii) without limiting paragraph 1.1(b)(i), the appearance, method of use and functionality of the Train Operating System screens (including the logic trees that determine the progression between different screens), passenger information displays and interfaces, (not including "behind the scenes" functionality or other elements not evident to an operator or passenger);

(iii) any software developed by the Supplier or its Associates for use on a computer outside the Sets to emulate the operation of the Train Operating System; and

(iv) any item which TfNSW or RailCorp or any entity nominated by TfNSW or RailCorp (including the Operator) reasonably wishes to use to the extent necessary to ensure that:

A. so far as reasonably possible the information provided to, and the experience of, a passenger or a crew member is substantially the same whether the passenger or crew member is in a Set or in any other existing or future train within the Operator's fleet; or

B. a person who is able to operate a Set is able to also operate any other existing or future train within the Operator's fleet in generally the same way as he or she operates a Set; or

C. so far as reasonably possible the operation and functionality of the systems on any other existing or future train within the Operator's fleet used in connection with:

1) surveillance of passengers and crew members;

2) train safety; or

3) emergency situations,
have the same "look and feel" as in the Sets, being similar in appearance and operator use to those features on the Sets.

(c) The licences granted in paragraphs 1.1(a) and 1.1(b):

(i) may be sub-licensed; and

(ii) will survive expiry of this deed or termination of this deed on any basis.

1.2 Further documentation and assistance

Without limiting the Supplier’s other obligations under this deed with respect to the delivery of any Assets or Deliverables, the Supplier must provide, and procure that its Associates provide, all documentation, information and assistance as TfNSW may reasonably require in connection with:

(a) the Project;

(b) TfNSW’s, RailCorp’s or the Operator’s use and enjoyment of the Assets and the Deliverables; and

(c) TfNSW’s or RailCorp’s use and exercise of the Intellectual Property Rights in the Assets and the Deliverables,

in accordance with and as contemplated by this deed.

1.3 Access to Intellectual Property Rights

If requested by TfNSW, the Supplier must, at its own cost:

(a) fully disclose to TfNSW all details of the Intellectual Property Rights, trade secrets and know-how used in the Project and the Deliverables or in carrying out the Delivery Phase Activities; and

(b) allow TfNSW to discuss the Intellectual Property Rights, trade secrets and know-how with, and obtain information about the Intellectual Property Rights, trade secrets and know-how from, the Supplier or any of the Supplier’s Associates involved in the creation, development or use of the Intellectual Property Rights, trade secrets and know-how.

1.4 Intellectual Property Register

(a) The Supplier must develop and maintain a register ( Intellectual Property Register) which identifies:

(i) the Licensed Intellectual Property;

(ii) ownership of the Intellectual Property Rights in the Licensed Intellectual Property;

(iii) any arrangements relating to the Licensed Intellectual Property;

(iv) the entity which is to develop each item of New Contract Information and Relevant Source Code;

(v) any Relevant Source Code and Escrow Information held with an Escrow Agent, and details of the relevant deposit packages including date of last deposit; and
1.5 **Moral rights**

(a) The Supplier warrants that all of the Supplier's Personnel have provided consents and waivers, to the fullest extent possible under the laws of any applicable jurisdiction, in relation to their Moral Rights, sufficient to ensure unimpeded use of the Licensed Intellectual Property by RailCorp and TfNSW or persons authorised by them.

(b) The Supplier must do all things requested by TfNSW or RailCorp, including signing or procuring the signature of particular forms, to give full effect to paragraph 1.5(a).

1.6 **Licensing of Subcontractor created Intellectual Property Rights**

To the extent that any Licensed Intellectual Property may be owned by any of the Supplier's Associates, the Supplier:

(a) must procure from the relevant Supplier's Associate a licence from the Supplier's Associate to enable the Supplier to provide the licences in paragraph 1.1; and

(b) warrants that it:

(i) is entitled to grant to TfNSW and RailCorp the rights granted in paragraph 1.1; and

(ii) has procured from those Associates such authority and licences as are necessary for the Supplier to do so.

2. **Warranties and Indemnities**

2.1 **Warranties**

The Supplier warrants, both at the date of this deed and, to the extent that any Intellectual Property Rights or Moral Rights or other protected rights come into existence at some time in the future, at such future date, that:

(a) it will not breach any Intellectual Property Rights or Moral Rights or other protected rights of any person in performing its obligations under the Project Agreements;

(b) its design, development, manufacture, delivery, supply or use of the Assets and the Deliverables and the Licensed Intellectual Property in accordance with, or as contemplated by the Project Agreements will not infringe any Intellectual Property Rights or Moral Rights or other protected rights of any person;

(c) the use of the Assets and the Deliverables and the Licensed Intellectual Property in accordance with, or as contemplated by the Project Agreements by TfNSW, the Operator or another NSW Rail Entity will not infringe any Intellectual Property Rights or Moral Rights or other protected rights of any person;
the Licensed Intellectual Property is all the Intellectual Property Rights that are required for the Supplier to carry out its obligations under this deed;

it is not aware of any claims that any of the Assets, the Deliverables, the Licensed Intellectual Property or Source Code and their use in accordance with, or as contemplated by, the Project Agreements infringe or will infringe any Intellectual Property Rights or Moral Rights or other protected rights of any person;

it has the authority to grant the rights granted under paragraph 1.1; and

in respect of each computer program forming part of the Assets or the Deliverables, the Source Code will compile into the executable code.

2.2 Indemnity

(a) The Supplier indemnifies the persons referred to in paragraph 2.2(b) against:

(i) all Claims which may be brought or made against any of them by any person in respect of:

A. any alleged or actual infringement of Intellectual Property Rights by the Supplier or the Supplier’s Associates in the course of, or incidental to, performing any obligations under this deed;

B. the use by any of them of any Intellectual Property Rights that are the subject of the warranty in paragraph 2.1; and

C. an infringement of Moral Rights resulting from the use, operation, maintenance or modification of the Assets or the Deliverables or any part of them; and

(ii) any Loss that may be suffered or incurred by the parties referred to in paragraph 2.2(b) in connection with any Claim referred to in paragraph 2.2(a)(i) or any Claim arising from a breach of the warranties set out in paragraph 2.1.

(b) Those indemnified for the purpose of this paragraph 2.2 are RailCorp, TfNSW and anyone receiving a right through them (including the Operator) to exercise any Intellectual Property Right assigned, granted or licensed to RailCorp or TfNSW under this deed and any of their Associates.

(c) Subject to paragraphs 2.2(d) and (e), a party indemnified must, as soon as reasonably practicable after it becomes aware of a Claim:

(i) notify the Supplier of the alleged infringement;

(ii) give the Supplier at the time of notification the option to conduct the defence of the Claim; and

(iii) provide the Supplier (at the Supplier’s expense) with reasonable assistance in conducting the defence of such Claim.

(d) Paragraph 2.2(c) does not apply where:

(i) interlocutory proceedings are commenced against a party indemnified on an urgent basis;

(ii) the party indemnified reasonably considers that there is insufficient time to notify the Supplier and for the Supplier to commence defence of such proceedings on behalf of the party indemnified; and
(iii) the party indemnified initially defends such proceedings.

(e) Paragraph 2.2(c) does not apply to Claims which would or may prevent the continued development or operation of the Assets or the Deliverables or continued conduct of the Project Activities and the party indemnified:

(i) to the extent reasonably practicable, consults in good faith with the Supplier with respect to such Claims; and

(ii) does not in the course of defending or compromising such claims make admissions which may materially affect the validity of the Licensed Intellectual Property without the written consent of the Supplier (such consent not to be unreasonably withheld).

2.3 Infringements

(a) If the Supplier becomes aware of a Claim by a person that the use of any of the Licensed Intellectual Property infringes or amounts to a misuse of the Intellectual Property Rights or other rights of a third party, it must promptly provide TfNSW with notice of the alleged Claim.

(b) Notwithstanding paragraphs 2.1 and 2.2, if as a result of any alleged infringement or threatened infringement of Intellectual Property Rights, RailCorp, TfNSW, the Operator, the Supplier, or any other entity is prevented (whether by court order or otherwise) from exercising Intellectual Property Rights it had been exercising or was proposing to exercise pursuant to this deed, the Supplier must:

(i) secure for RailCorp and TfNSW and any other entity that has been nominated by TfNSW or RailCorp under paragraph 1.1 the right to continue to exercise the Intellectual Property Rights;

(ii) replace the Intellectual Property Rights with equivalent non infringing Intellectual Property Rights; or

(iii) modify any materials, equipment, software, devices or processes so that they become non infringing or remove any materials, equipment, software, devices or processes that are infringing without prejudice to any other rights of RailCorp or TfNSW or any other entity that has been nominated by TfNSW or RailCorp under paragraph 1.1.

(c) If the amount of time necessary to proceed with one of the options set out in paragraph 2.3(b) is deemed excessive by TfNSW, then TfNSW may direct the Supplier to select another option and the Supplier must comply with that direction.

(d) The steps required for the Supplier to comply with its obligations under paragraphs 2.3(b) and 2.3(c) are at the Supplier's sole cost and expense.

3. Source Code

3.1 Escrow Agreement

As a Condition Precedent to this deed, the Supplier must enter into an Escrow Agreement with RailCorp, TfNSW and the Escrow Agent to set out the terms on which all Relevant Source Code and Escrow Information will be held in escrow by the Escrow Agent.

3.2 Significant Contractor Escrow Agreement

Without limiting clause 39, the Supplier must ensure that each Significant Contractor that has produced or will or may produce Relevant Source Code in the performance of its obligations under its Significant Contract:
(a) enters into a Significant Contractor Escrow Agreement; and

(b) complies with the terms of the Significant Contractor Escrow Agreement.

3.3 Deposit of Relevant Source Code

(a) Within 20 Business Days of the Commencement Date, the Supplier must deposit a copy of all Relevant Source Code and Escrow Information existing at the Commencement Date with the Escrow Agent on the terms of the Escrow Agreement.

(b) The Supplier must thereafter, within 10 Business Days of the end of each quarter until the end of the TLS Phase, update the Relevant Source Code and Escrow Information deposited with the Escrow Agent by depositing with the Escrow Agent:

(i) a copy of all Relevant Source Code and Escrow Information which has been created or newly incorporated into any Deliverable during that quarter; and

(ii) an updated copy of any Relevant Source Code and Escrow Information to which modifications have been made.

(c) The Supplier must ensure that the Relevant Source Code and Escrow Information deposited with the Escrow Agent is current as at the end of each quarter.

4. Trade Mark Licence

4.1 Licence

TfNSW grants to the Supplier a non-exclusive licence to use the Trade Marks for the purposes of the Delivery Phase Activities.

4.2 Restrictions

The Supplier must not:

(a) use the Trade Marks for any purposes other than for the purposes of the Delivery Phase Activities, without TfNSW's prior written consent; or

(b) use the Trade Marks for any unlawful purpose.

4.3 Directions

The Supplier agrees to observe all directions notified to it by TfNSW regarding such matters as:

(a) the nature, standards, characteristics and quality of the Trade Mark Materials, or any goods upon which, or services in respect of which, the Trade Marks are to be used; and

(b) the manner in which the Supplier uses any of the Trade Marks, including in the Trade Mark Materials.

4.4 TfNSW's rights in respect of Trade Marks

The Supplier agrees that the Supplier must not:

(a) use the Trade Marks in any way which is likely to harm or prejudice TfNSW's or any NSW Rail Entities' rights in the Trade Marks;
(b) apply to register in any territory any trade mark, or apply to register any business name, company name or internet domain name that comprises or contains the Trade Marks (or any of them) or any words or images that are substantially identical with, or deceptively similar to, the Trade Marks (or any of them), without the prior written consent of TfNSW; or

(c) challenge or in any way impugn:

(i) TfNSW's or the relevant NSW Rail Entity's complete ownership of, or rights to use, the Trade Marks; or

(ii) the validity of, or TfNSW's or any NSW Rail Entity's title to, any applications for registration made by TfNSW or any NSW Rail Entity, or any registrations obtained by TfNSW or any NSW Rail Entity in respect of the Trade Marks.

4.5 Goodwill in Trade Marks

All use of the Trade Marks as between TfNSW and the Supplier shall enure for the benefit of TfNSW, and any goodwill arising in respect of any of the Trade Marks is exclusively the property of TfNSW.

4.6 Limitations on rights granted

TfNSW and the Supplier agree that the licence granted to the Supplier under paragraph 4.1 excludes:

(a) the right to commence an action for trade mark infringement under section 26(1)(b) of the Trade Marks Act 1995 (Cth), which TfNSW expressly reserves to itself (for itself and on behalf of the NSW Rail Entities) in all instances; and

(b) the rights of an 'authorised user' of a trade mark referred to in sections 26(1)(c), (d), (e) and (f) of the Trade Marks Act 1995 (Cth).
# Schedule 4 – Supplier Group Structure and Key Personnel

## 1. Supplier Group Structure

- Downer EDI Limited
  - (Guarantor)

- Downer EDI Rail Pty Limited
  - (Supplier)

## 2. Key Personnel

### 2.1 Supplier's Key Personnel

<table>
<thead>
<tr>
<th>Position [TfNSW proposed title]</th>
<th>Name</th>
<th>Position Description Attributes</th>
</tr>
</thead>
</table>
| Supplier's Representative [Project Director] | [Redacted] | Core Accountabilities
The Downer Project Director has overall accountability for managing the project delivery from mobilisation to completion. He is the key point of contact for TfNSW and will liaise with the TfNSW Representative to ensure issues are reported, recorded and actions are agreed as required by the Delivery Deed.
The Project Director will ensure all issues that arise during the Project are handled effectively and that the necessary advice, controls, processes and resources are provided.

Qualifications & Experience
Qualifications in Business, Engineering, Project or Construction Management with a minimum of 10 years' relevant experience in managing a multi discipline teams to deliver a complex engineering projects, or 15 years' experience in the delivery of complex Rollingstock or large scale infrastructure projects.
<table>
<thead>
<tr>
<th>Position [TfNSW proposed title]</th>
<th>Name</th>
<th>Position Description Attributes</th>
</tr>
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<tbody>
<tr>
<td>Project Manager [Delivery Director SGT]</td>
<td></td>
<td><strong>Core Accountabilities</strong> Leads a cross-disciplinary, international team tasked with all aspects of the SGT Project Fleet Delivery Activities. Delivers the SGT Fleet Delivery Activities in line with Downer's budgeted investment, program and cash-flow commitments <strong>Qualifications &amp; Experience</strong> Qualifications in Construction, Business Administration, Project Management, or related discipline, with extensive experience in the delivery of complex Rollingstock or large scale infrastructure projects</td>
</tr>
<tr>
<td>Project Commercial Manager [Commercial Manager]</td>
<td></td>
<td><strong>Core Accountabilities</strong> Manages all commercial issues, including minor and major contract disputes when delegated by senior management Negotiates contract terms and conditions with customers, subcontractors and suppliers, in liaison with the senior management team and Project management <strong>Qualifications &amp; Experience</strong> Qualifications in Law or associated commercial disciplines, with a minimum of 5 years' experience in managing contractual arrangements on complex large scale transport or infrastructure projects</td>
</tr>
<tr>
<td>Project Engineering Manager – Rolling Stock [Engineering &amp; Assurance Director]</td>
<td></td>
<td><strong>Core Accountabilities</strong> Plans, directs and controls the engineering activities of Downer to ensure safety, design assurance and engineering quality objectives are achieved Provides direction on systems engineering, design assurance, requirements management and interface management processes and issues <strong>Qualifications &amp; Experience</strong> Degree qualified in an appropriate engineering discipline, with a minimum 10 years’ experience and proven track record in the application of engineering and assurance processes in the Rollingstock sector</td>
</tr>
<tr>
<td>Lead Design</td>
<td></td>
<td><strong>Core Accountabilities</strong></td>
</tr>
<tr>
<td>Position</td>
<td>Name</td>
<td>Position Description Attributes</td>
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<tr>
<td>Engineer – Rolling Stock [Engineering Manager]</td>
<td><strong>Manages the engineering team to ensure satisfactory implementation of the design</strong>&lt;br&gt;<strong>Ensures that product designs meet all relevant standards and client requirements</strong>&lt;br&gt;<strong>Qualifications &amp; Experience</strong>&lt;br&gt;<strong>Degree qualified in an appropriate engineering discipline, with a minimum 10 years’ experience and proven track record in the design management of passenger train projects.</strong></td>
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</tr>
<tr>
<td>Lead Electrical Engineer – Rolling Stock</td>
<td><strong>Core Accountabilities</strong>&lt;br&gt;<strong>Provides management electrical engineering resources to achieve project deliverables</strong>&lt;br&gt;<strong>Responsible for electrical engineering integration, design activities and approvals in line with Downer processes and procedures</strong>&lt;br&gt;<strong>Qualifications &amp; Experience</strong>&lt;br&gt;<strong>Degree qualifications in Electrical Engineering or similar with a minimum of 5 years’ relevant experience in Rollingstock engineering.</strong></td>
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</tr>
<tr>
<td>Lead Mechanical Engineer – Rolling Stock</td>
<td><strong>Core Accountabilities</strong>&lt;br&gt;<strong>Responsible for specification compliance in relation to mechanical design and authorisation of design changes</strong>&lt;br&gt;<strong>Provides support for mechanical aspects of manufacturing and testing</strong>&lt;br&gt;<strong>Qualifications &amp; Experience</strong>&lt;br&gt;<strong>Degree qualifications in Mechanical Engineering or similar with a minimum of 5 years’ relevant experience in Rollingstock engineering.</strong></td>
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<tr>
<td>Quality System and Assurance Lead – Rolling Stock [Safety Accreditation &amp; Assurance Manager]</td>
<td><strong>Core Accountabilities</strong>&lt;br&gt;<strong>Ensures adequate systems are in place to demonstrate compliance with all Rail Safety legislation for the Project</strong>&lt;br&gt;<strong>Conducts regular internal audits of Rail Safety procedures, follows up with the relevant personnel, verifies implementation of preventative and corrective actions</strong>&lt;br&gt;<strong>Qualifications &amp; Experience</strong>&lt;br&gt;<strong>Degree Qualified in an appropriate engineering discipline or equivalent with a minimum of 7 years’ experience.</strong></td>
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<tr>
<td>Position [TfNSW proposed title]</td>
<td>Name</td>
<td>Position Description Attributes</td>
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<tr>
<td>Lead Safety &amp; Reliability Engineer</td>
<td>years’ experience and a proven track record in the application of systems and safety assurance in rail sector</td>
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<td>Demonstrable experience in the application of relevant safety standards such as EN50126, EN50128, EN50129, AS4292</td>
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<tr>
<td>Lead Testing &amp; Commissioning Engineer – Rolling Stock</td>
<td>Core Accountabilities</td>
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<td></td>
<td>Develop and execute RAM, Systems Safety Management Plan and Technical Maintenance Plan through the design, testing and commissioning and maintenance phases</td>
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<td></td>
<td>Ensure compliance with EN50126, Rail Safety National Law</td>
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<tr>
<td></td>
<td>Qualifications &amp; Experience</td>
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<td></td>
<td>Engineering degree or equivalent with strong electronics and mechanical aptitude and at least 5 years’ project experience related employment</td>
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<tr>
<td>Support Services Director</td>
<td>Core Accountabilities</td>
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<td>Participates in all aspects of quality control, including reviewing requirements, developing test structures (concepts, plans, cases) and testing the product</td>
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<td>Ensures that acceptance reporting for provisional and final acceptance is compiled and submitted as per Delivery Deed</td>
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<tr>
<td></td>
<td>Qualifications &amp; Experience</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Degree qualified in an appropriate engineering degree with extensive experience in Rollingstock fleet management including experience in investigating failures, establishing root causes and implementing solutions</td>
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<tr>
<td></td>
<td>Qualifications in either Risk Management, People Management, Safety, Environment or Quality with 10 years’ experience</td>
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<td>Finance Director</td>
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<td>managing risk and regulatory functions within construction or related industries</td>
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**Core Accountabilities**
Completes detailed and timely financial reporting and analysis, including labour and materials use versus the original plan, and updated forecast costs to provide early identification of potential deviations or issues, such that suitable mitigations and controls can be put in place.
Supports and manages statutory requirements including taxation, customs and financial audit across relevant jurisdictions.

**Qualifications & Experience**
Qualifications: Finance, Business or a related discipline with Chartered status (CA or CPA), with a minimum of 10 years' experience as a finance lead within transport or infrastructure related industries.
## Schedule 5 – Significant Contracts

### 1. Significant Contracts at Commencement Date

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<tr>
<th>System</th>
<th>Nominated Significant Contractor</th>
<th>Role in Delivery Phase Activities</th>
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</thead>
<tbody>
<tr>
<td>Bogies, gearboxes and wheelsets</td>
<td>CRRC Changchun Railway Vehicles Co. Ltd</td>
<td>Subcontractor to Downer - scope of work includes bogie fabrication and assembly</td>
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<td>Car body, including body shell, cables, wiring, ducts and glass</td>
<td>CRRC Changchun Railway Vehicles Co. Ltd</td>
<td>Subcontractor to Downer - scope of work includes car body manufacture and assembly</td>
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<td>Traction and main power system and cabling</td>
<td>Hitachi East Asia Ltd 05748889-000-09-16-0 (Registration No. of Hong Kong) 6/F, North Tower, World Finance Centre, Harbour City, Canton Rd, Tsimshatsui, Kowloon, Hong Kong</td>
<td>Subcontractor to CRRC Changchun - scope of work includes design and manufacture of traction motors, controls and electrical auxiliary power system</td>
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<td>Braking system and pneumatics</td>
<td>Knorr-Bremse Australia Pty Ltd ABN 31 092 562 671 23 - 29 Factory St, Granville NSW 2142, Australia</td>
<td>Subcontractor to CRRC Changchun - scope of work includes design and manufacture of bogie mounted brake equipment, air supply equipment and cab mounted controls</td>
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<td>Interior fit-out including ceilings, walls, handrails, seats and flooring</td>
<td>CRRC Changchun Railway Vehicles Co. Ltd</td>
<td>Subcontractor to Downer - scope of work includes car body manufacture and assembly</td>
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<td>Communication and Surveillance system (including CCTV system and passenger information systems)</td>
<td>Open Access Pty Ltd ABN 97 009 177 986 56 Epping Road, North Ryde 2113</td>
<td>Subcontractor to CRRC Changchun - scope of work includes design, manufacture and integration of communications and surveillance equipment including CCTV, DVR, PEI, IDI, EDI and crew handsets</td>
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<td>HVAC systems</td>
<td>Sigma Air Conditioning Pty Ltd ABN 31 000 900 970</td>
<td>Subcontractor to CRRC Changchun - scope of work includes design and manufacture of climate control system</td>
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## System | Nominated Significant Contractor | Role in Delivery Phase Activities
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Couplers | Voith Turbo Pty Ltd ABN 48 008 763 808 Building 2, 1-47 Percival Street, Smithfield, NSW 2164 | Subcontractor to CRRC Changchun - scope of work includes design and manufacture of intercar couplers
Gangways | Hubner Interface Systems (Shanghai) Co. Ltd Building 81, No 90 Delin Rd, Waigaoqiao Free Trade Zone Shanghai 200131, P.R. China | Subcontractor to CRRC Changchun - scope of work includes design and manufacture of intercar gangways
Train Information System (including Set-borne Gateway) | EKE Electronics Ltd Business ID 0100720-4 Piispanportti 7, 02240 Espoo, Finland | Subcontractor to CRRC Changchun - scope of work includes design, manufacture and integration of hardware and software for ethernet-based train communication network, including set-borne gateway
Access/door systems | IFE Doors (Knorr-Bremse Australia Pty Limited ABN 31 092 562 671 23 - 29 Factory St, Granville NSW 2142, Australia) | Subcontractor to CRRC Changchun - scope of work includes design and manufacture of crew, passenger and intercar doors and mechanisms, including emergency access devices and control systems

### 2. Other Significant Contracts

(a) Those contracts involved, or that may be involved, in the following elements of the Delivery Phase Activities:

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<td>Subcontractor to the Supplier who will free issue material to CRCC Changchun - scope of work includes design and manufacture digital train radio equipment and commissioning support.</td>
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### Schedule 6 – Information Documents

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**Shed Block**

**General Arrangement**

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**Schedule 6**

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| E43 | MORTDALE CAR SHEDS  
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**G** Sydney Growth Trains

| G1  | Sydney Growth Trains Project (ISD-16-5312) Information – Concept of Operations | V05.2 | 9 May 2016 | - | SGT - Concept of operations V05.2 | pdf |
| G2  | Sydney Growth Trains Project ASA Concession Process for STGTP                | -    | 20/06/2016 | - | TfNSW Concession Process 20160630 | pdf |
| G4  | TfNSW Enterprise Risk Management Standard, 30-ST-164/4.0                       | 4.0  | 14/01/2016 | 30-ST-164/4.0 | transport-enterprise-risk-management-standard-30-ST-164 | pdf |

**H** Editable Versions of the Request for Proposal documents

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Delivery Deed
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**I Technical Documents**

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Schedule 7 – Review Procedures

1. General

This Schedule applies:

(a) where any documents, plans, processes, programs or manuals in any format, or any other document or thing must be submitted to TfNSW, TfNSW's Representative or another person (as applicable) (Reviewing Party) for Review under this deed (Submitted Document); and

(b) to define the Review Procedures.

2. Submission and review

2.1 Submission

When documents and other information are submitted for Review, the submission must include:

(a) details of the Submitted Document, its nature and the relevant clause, schedule or annexure of this deed under which it is submitted for Review;

(b) the Submitted Document; and

(c) any other information required under this deed or otherwise necessary for the Reviewing Party to review the Submitted Document and respond in accordance with these Review Procedures.

2.2 Review

The Reviewing Party may review the Submitted Document and provide any comments in writing to the Supplier in accordance with these Review Procedures and this deed within the Review Period.

2.3 Review Period

The Review Period for a Submitted Document is:

(a) [Redacted] for the AMS Technical Package; and

(b) in all other cases, [Redacted].

from the date the relevant Reviewing Party receives (or is deemed, pursuant to any determination of the issue under the Dispute Resolution Procedures, to have received) the relevant information reasonably required to support the request for Review or comment or in order to make the election or determination. Provided that in each case if at any time during the Review Period a Reviewing Party reasonably requires additional information concerning the request for Review or comment or in order to make the election or determination and such information is available or able to be obtained if the Supplier uses reasonable endeavours to obtain it, then the Review Period will not include the time that the Supplier takes to provide that information after the request for that additional information is made.

3. Further Information

The Supplier must as soon as reasonably practicable upon request by the Reviewing Party submit any further or other information, data or documents, and make available appropriately
qualified Supplier’s Personnel, that the Reviewing Party reasonably requires in order to be able to review the Submitted Document and respond in accordance with these Review Procedures.

4. Comment on Submitted Document

4.1 No comment on Submitted Document

The Reviewing Party may return a Submitted Document to the Supplier with or without comment. If the Reviewing Party has no comments on a Submitted Document, the Reviewing Party may mark that document with a statement 'No comment'.

4.2 No intention to comment

If the Reviewing Party decides that it does not intend to Review, comment on or respond to any Submitted Document in accordance with paragraphs 2.1 or 3 then the Reviewing Party must use reasonable endeavours to advise the Supplier as soon as possible after making that decision, and if it does so, the Reviewing Party will be deemed to have returned the Submitted Document to the Supplier marked with the statement 'No comment'.

4.3 Failure to comment

Subject to paragraph 4.4, if the Reviewing Party fails to comment on or respond to any Submitted Document submitted in accordance with paragraphs 2.1 and 3 within the Review Period, then the Reviewing Party will be deemed to have returned the Submitted Document to the Supplier marked with the statement 'No comment'.

4.4 Late comments

If a Reviewing Party fails to comment on or respond to any Submitted Document within the relevant Review Period, or otherwise wishes to raise a comment on a Submitted Document after the expiry of the Review Period for the Submitted Document, it will nevertheless be entitled to later make comments on the relevant Submitted Document, in which case the provisions of these Review Procedures will apply to those comments as if they had been provided within the Review Period.

4.5 Response to Submitted Document

The Reviewing Party may provide comments in respect of a Submitted Document in accordance with paragraph 5.

4.6 Substantiate comments

If the Reviewing Party provides the Supplier with comments in respect of the Submitted Document under paragraph 5, the Reviewing Party must provide sufficient detail to the Supplier to substantiate those comments.

5. Grounds on which Reviewing Party may make comments

5.1 General

The Reviewing Party may provide comments in respect of a Submitted Document where:

(a) the Submitted Document:
  (i) is incomplete, of poor quality or otherwise is not in a condition to allow the Reviewing Party to adequately review it;
  (ii) is not fit for purpose;
(iii) does not comply with relevant Mandatory Requirements or Approvals (including in respect of safety); or

(iv) is otherwise not in accordance with, or is not submitted in accordance with, the requirements of this deed in respect of the Submitted Document;

(b) the Reviewing Party considers that the Supplier's ability to perform its obligations under this deed or another Project Agreement would be adversely affected by the implementation of the Submitted Document;

(c) the implementation of the Submitted Document or proceeding on the basis of the Submitted Document would adversely affect any right of TfNSW, RailCorp, the Operator or another NSW Rail Entity under this deed or another Project Agreement or its ability to enforce any such right;

(d) the ability of TfNSW, RailCorp, the Operator or another NSW Rail Entity to perform their respective obligations under this deed or another Project Agreement would be adversely affected by the implementation of the Submitted Document;

(e) the ability of TfNSW, the Operator or another NSW Rail Entity to undertake the Operations Functions would be adversely affected by the implementation of the Submitted Document; or

(f) the implementation of the Submitted Document would be likely to result in an increase to TfNSW's or RailCorp's liabilities or potential or contingent liabilities under this deed or another Project Agreement.

5.2 Programs

Where the Submitted Document is a Program required under this deed, in addition to its rights under paragraph 5.1, the Reviewing Party may provide comments in respect of the Submitted Document on the grounds that compliance with the Program would (on the balance of probabilities):

(a) not allow for Provisional Acceptance of a Set to be achieved by the Date for Provisional Acceptance of that Set; or

(b) adversely affect the safety of any person;

(c) mean that the period for carrying out programmed work exceeds or falls short of the period reasonably required for that work; or

(d) increase the likelihood of disruption to the conduct of the Operations Functions by TfNSW, the Operator or another NSW Rail Entity.

5.3 Project Plans

Where the Submitted Document is a Project Plan, or any revision to any such plan, in addition to its rights under paragraph 5.1, the Reviewing Party may provide comments in respect of the Submitted Document and the Supplier must address those comments on the Submitted Document where:

(a) carrying out the relevant Delivery Phase Activities in the periods or at the times suggested is reasonably likely to interfere with the carrying out of the Operations Functions;

(b) there is a risk that the safety of any person would be adversely affected;
the period for carrying out work under the plan would exceed or fall short of the period reasonably required for the relevant work;

(d) the plan is otherwise not in accordance with Good Industry Practice; or

(e) the Life Cycle Cost of the Assets to TfNSW, the Operator or the NSW Rail Entities will be increased.

5.4 Technical Documents

Where the Submitted Document is a Technical Document, in addition to its rights under paragraph 5.1, the Reviewing Party may provide comments in respect of the Submitted Document and the Supplier must address those comments on the Submitted Document where the Reviewing Party considers that the relevant Technical Document:

(a) fails to mitigate safety risk so far as is reasonably practicable;

(b) is not a consistent or logical extension of the Design Books or previously Confirmed Technical Documents;

(c) is not consistent with the physical configuration of the Assets;

(d) fails to consider or address feedback from stakeholders and User Groups;

(e) is not in accordance with Good Industry Practice; or

(f) if implemented, would result in:

(i) an increase in the Life Cycle Costs of the Assets; or

(ii) a reduction in the performance of the Assets, including with respect to:

A. capacity;

B. quality of the Customer experience and amenity;

C. quality of the Crew amenity;

D. safety;

E. aesthetics, cleanliness, condition and visible features;

F. Design Life;

G. maintainability;

H. durability, including resistance to Graffiti and Vandalism;

I. reliability;

J. whole of life performance;

K. environmental performance;

L. sustainability performance;

M. functional performance; or

N. security.
6. Document management

6.1 Copies of Submitted Documents

Unless otherwise specified in this deed, the Supplier must provide an electronic copy of all Submitted Documents to the Reviewing Party for Review in accordance with these Review Procedures and the SPR via the PDCS, or, if TfNSW has not or does not give the notification referred to in clause 43.1(b), in accordance with clause 43.1.

6.2 Register of Submitted Documents

The Supplier must compile and maintain a register of the date of receipt and content of each Submitted Document, and must regularly update that register to record:

(a) each Submitted Document to which it receives a response or comment from the Reviewing Party, including that response or comment; and

(b) each Submitted Document to which it receives no response or comment or is deemed not to receive any response or comment from the Reviewing Party in accordance with paragraphs 4.1 to 4.3.

7. Compliance with Confirmed Documents

7.1 Commented Submitted Document

Where the Reviewing Party comments on a Submitted Document under paragraph 5 then:

(a) subject to paragraph 7.2; and

(b) provided that the Supplier does not give notice of a Technical Dispute Matter in accordance with paragraph 1.1 of Schedule 8 in relation to the Reviewing Party’s comments on that Submitted Document,

the Supplier must, prior to proceeding with any relevant part of the Delivery Phase Activities (or anything else the subject of the Submitted Document) in accordance with the Submitted Document:

(c) amend the Submitted Document in accordance with the comments of the Reviewing Party to ensure that the Submitted Document meets the requirements of this deed; and

(d) re-submit the Submitted Document (as amended) to the Reviewing Party,

and the provisions of paragraphs 2 to 8 (inclusive) shall re-apply until such time as the Submitted Document is returned to the Supplier without any comment or with the statement ‘No comment’.

7.2 Proceed at Risk to implement Technical Package

(a) Subject to paragraph 7.2(b), the Supplier may proceed with the development, procurement, engineering, manufacture, construction, testing, commissioning or supply of a Technical Package at its own risk notwithstanding that:

(i) a Reviewing Party has not reviewed one or more Technical Documents related to that Technical Package in accordance with the Review Procedures; or

(ii) a Reviewing Party has issued comments in respect of one or more Technical Documents related to that Technical Package in accordance
with paragraph 5 and the Supplier has not completed the process required to be completed under paragraph 7.1, (Proceed at Risk).

(b) The Supplier may only Proceed at Risk if the Supplier has:

(i) complied with its obligations under the Review Procedures (other than completion of the process required to be completed under paragraph 7.1); and

(ii) submitted to TfNSW’s Representative notice of its intention to Proceed at Risk in relation to the relevant Technical Package (Proceed at Risk Notice).

(c) If the Supplier Proceeds at Risk in accordance with paragraph 7.2(a):

(i) the Supplier must prepare the Technical Documents required for the next stage (if any) of Review contemplated in the Systems Engineering Management Plan for Review and submit it to the Reviewing Party within the times and in the manner required by this deed notwithstanding that the Supplier may have Proceeded at Risk in relation to that Technical Package;

(ii) the Reviewing Party may review any Submitted Documents in respect of that Technical Package in accordance with paragraph 5 notwithstanding that the Supplier may have Proceeded at Risk in relation to that Technical Package;

(iii) TfNSW’s Representative may, in addition to the rights of a Reviewing Party under paragraph 5 of the Review Procedures, direct the Supplier to amend, rectify, change or modify any as-built (or partially completed) works which relate to that Technical Package to resolve any issues identified by the Reviewing Party as part of its review under paragraph 5 of the Review Procedures with respect to the relevant Submitted Documents; and

(iv) the Supplier must promptly comply with any direction given by TfNSW’s Representative in accordance with paragraph 7.2(c)(iii).

(d) The Supplier is not entitled to make any Claim against TfNSW and RailCorp arising out of or in connection with the exercise by the Supplier of its right to Proceed at Risk in accordance with paragraph 7.2(a).

8. Significance of Reviews

(a) The parties acknowledge and agree that these Review Procedures are solely for the purpose of enabling TfNSW to monitor the progress of, and provide feedback on, the Supplier’s compliance with the requirements of the Project Agreements in its conduct of the Project Activities.

(b) Nothing which occurs under these Review Procedures will:

(i) relieve the Supplier from, or alter or affect, the Supplier’s liabilities, obligations or responsibilities in relation to a Submitted Document whether under a Project Agreement or otherwise according to a Mandatory Requirement;

(ii) prejudice TfNSW’s rights against the Supplier whether under any Project Agreement or otherwise under a Mandatory Requirement; or
(iii) be construed as a direction by TfNSW or TfNSW's Representative to do or not do anything.

(c) Neither TfNSW nor TfNSW's Representative assumes or owes any duty of care to the Supplier to review or, if it does review, in reviewing the Submitted Documents submitted by the Supplier for errors, omissions or compliance with the Project Agreements or any Mandatory Requirement.
Schedule 8 – Dispute Resolution Procedures

1. Dispute Resolution

1.1 Notification

(a) Any Dispute must be resolved in accordance with these Dispute Resolution Procedures.

(b) A party that wishes to progress a Dispute must give the other party and TfNSW's Representative notice of the Dispute (Notice of Dispute) in accordance with the notice requirements set out in clause 43. The Notice of Dispute must:

(i) specify the Dispute;

(ii) provide particulars of the party's reasons for being dissatisfied; and

(iii) set out the position which the party believes to be correct.

1.2 Procedure to settle Disputes

(a) The procedure that is to be followed to resolve a Dispute notified under paragraph 1.1 is as follows:

(i) for a Dispute about a matter that is a Technical Dispute Matter:
   A. first, negotiation under paragraph 1.3(b);  
   B. second, referral of the Dispute for resolution by an Independent Expert under paragraph 1.4; and
   C. if, pursuant to paragraphs 1.4(1) or 1.4(m), any determination of an Independent Expert made in respect of the Dispute is not final and binding, then third, arbitration of the Dispute under paragraph 1.7.

(ii) for a Dispute about any other matter:
   A. first, negotiation under paragraph 1.3(c); and
   B. second, mediation of the Dispute under paragraph 1.6; and
   C. third, arbitration of the Dispute under paragraph 1.7.

(b) A party may not commence court proceedings in relation to a Dispute until it has followed the procedures in this paragraph 1.2, unless the party is seeking appropriate injunctive or other interlocutory relief to preserve property or rights or to avoid losses that are not capable of being adequately compensated by an award of damages.

1.3 Negotiation

(a) Within three Business Days of a party issuing a Notice of Dispute to the other party, the parties must determine whether the Dispute is about a matter that is a Technical Dispute Matter.

(b) If the Dispute is about a matter that the parties have determined under paragraph 1.3(a) is a Technical Dispute Matter then, within five Business Days of a party issuing a Notice of Dispute to the other party:
the parties must each nominate a suitably qualified person to consult on behalf of that party in relation to the relevant Technical Dispute Matter; and

(ii) the persons nominated pursuant to paragraph 1.3(b)(i) must consult in person and use reasonable endeavours to resolve the Dispute by joint discussions and negotiations.

(c) If the parties determine that the Dispute is not about a matter that is a Technical Dispute Matter, or do not agree on a determination as to whether the Dispute is or is not a Technical Dispute Matter within the timeframe specified in paragraph 1.3(a) then, within 15 Business Days of a party issuing a Notice of Dispute to the other party, suitably authorised senior representatives of the parties must consult in person and use reasonable endeavours to resolve the Dispute by joint discussions and negotiations.

1.4 Independent Expert (Technical Dispute Matters)

(a) If negotiations under paragraph 1.3(b) do not resolve a Dispute about a matter that is a Technical Dispute Matter within 10 Business Days after the Notice of Dispute was issued in respect of the Dispute then, unless otherwise agreed by the parties (in writing), the Dispute must be referred for resolution to an independent expert under this paragraph (Independent Expert).

(b) An Independent Expert must be chosen by the parties within five Business Days after the date referred to in paragraph 1.4(a) and appointed within a further five Business Days.

(c) If the parties fail to agree on the choice of an Independent Expert within the time referred to in paragraph 1.4(b), then TfNSW's Representative may:

(i) nominate an Independent Expert from the appropriate discipline on the Technical Dispute Panel; or

(ii) if TfNSW's Representative's nominee is unable or unwilling to act, request the President or Acting President of the Australian Centre for International Commercial Arbitration (ACICA) or any person to whom the President of ACICA has delegated decision making authority, to nominate an alternative expert in accordance with paragraph 1.4(e).

(d) The parties may review and update the Technical Dispute Panel at any time but not more than once in every quarter after the date of this deed.

(e) The Independent Expert may be nominated by the President or Acting President of ACICA on the application of TfNSW's Representative pursuant to paragraph 1.4(c)(ii), provided that:

(i) no person may be appointed to act as the Independent Expert under this paragraph unless qualified by education, experience and training to determine the relevant Technical Dispute Matter; and

(ii) unless the parties otherwise agree in writing, no person may be appointed as the Independent Expert who is (or has been at any time within the preceding three years) an employee of any party or any Associate of that party or who is (or has been at any time within the preceding three years) a consultant to or contractor of any party or any Associate of that party or who holds any significant financial interest in any party.
The parties shall enter into an agreement with the expert on the terms contained in Schedule 21 or such other terms as may be agreed between the parties and the Independent Expert (Independent Expert Determination Agreement).

The parties shall not withhold agreement to:

(i) any amendment the Independent Expert requests to be made to those terms contained in the Independent Expert Determination Agreement, provided the amendment is reasonable and does not conflict with this paragraph 1.4; or

(ii) any reasonable fees and disbursements the Independent Expert requests to be set out in the Independent Expert Determination Agreement.

The Independent Expert shall make the determination in accordance with:

(i) the Independent Expert Determination Agreement and this deed generally; and

(ii) the Expert Determination Rules (2010) published by the Resolution Institute (or by whichever entity subsequently replaces that entity, from time to time), or any rules published by that entity to replace such rules, from time to time, which the parties agree will be modified and amended as required to the extent that such rules conflict with the requirements of this deed or any other Project Agreement, (Independent Expert Determination Rules).

An expert determination conducted in accordance with the Independent Expert Determination Agreement is not an arbitration.

If the Independent Expert does not submit the determination by the time required under or in accordance with the Independent Expert Determination Agreement, either party may, by notice to the other party, instigate the appointment of another Independent Expert in accordance with the provisions of this paragraph 1.4. On the appointment of a new Independent Expert, the appointment of the previous Independent Expert ceases, unless before the appointment of the new Independent Expert, the previous Independent Expert has submitted a final determination in the manner required, in which case the new Independent Expert must immediately be informed that his or her services will not be required.

The Independent Expert will act as an expert and not an arbitrator and may make a decision from his or her own knowledge and expertise. The parties agree that any law or legislation relating to arbitration will not apply to that Independent Expert or the determinations or the procedure by which such determinations are reached.

The determination of the Independent Expert must be in writing and, unless clause 1.4(m) applies, following the expiry of the period of time allowed for a request for amendment under paragraph 1.4(n), will, to the extent permitted by law, save in the event of fraud, be final and binding on TfNSW, RailCorp and the Supplier unless within:

(i) 20 Business Days of receipt of the determination; or

(ii) 10 Business Days of the receipt of the determination amended under paragraph 1.4(n) or the notification by the Independent Expert that no amendment will be made to the determination,

a party gives notice to the other party of its dissatisfaction and intention to refer the matter to arbitration pursuant to paragraph 1.7. If a notice of dissatisfaction is given
under this paragraph 1.4(i), the Independent Expert's determination will be binding on the parties and must be given effect until it is overturned or varied by the determination of the arbitrator.

(m) Notwithstanding paragraph 1.4(i), the determination of the Independent Expert will not be final and binding on TfNSW, RailCorp or the Supplier where:

(i) the Dispute is about whether any relevant Technical Document, Deliverable or Asset:

A. is fit for purpose; or

B. complies with the requirements of any Project Agreement; or

(ii) the Dispute is about whether any of the following have occurred:

A. Provisional Acceptance or Final Acceptance of a Set; or

B. Fleet Acceptance.

(n) A party may request the Independent Expert to amend the determination within five Business Days of receipt of the determination and, following such a request by any party, the Independent Expert may amend the determination to correct:

(i) a clerical mistake;

(ii) an error from an accidental slip or omission;

(iii) a material miscalculation of figures or a material mistake in the description of any person, thing or matter; or

(iv) a defect in form.

If a request for amendment to a determination is made by any party under this paragraph 1.4(n), the Independent Expert must amend the determination or notify the parties that no amendment will be made (as is applicable) within 5 Business Days of the request.

(o) Any determination of an Independent Expert which is final and binding will be determinative only of the matters in dispute which were referred to the Independent Expert and will not be binding on the parties in respect of a dispute in respect of any other matter (including related matters).

(p) Each party will bear its own costs relating to its participation in the Independent Expert process established by this paragraph 1.4, including preparation of submissions, attendance at conferences and legal expenses.

(q) The fees, expenses and costs of the Independent Expert will be borne equally between the parties unless otherwise determined by the Independent Expert.

1.5 Independent Expert – Related expert determinations

Where any Dispute is to be referred to the process provided in paragraph 1.4 and that Dispute involves issues that are substantially the same as, or connected with issues raised in a related dispute or difference between TfNSW or RailCorp and any other party or parties involved in the Project, and expert determination proceedings have already commenced in respect of the Dispute or the related dispute or disputes, TfNSW may, in its absolute discretion:

(a) join the Dispute to those existing expert determination proceedings by giving notice to all parties concerned and the relevant expert, and the expert in such proceedings will have the power to make such directions as are necessary to join the parties and
the cause of action to enable the expert to make a determination in respect of the Dispute; or

(b) join the related dispute or disputes to the existing expert determination proceedings concerning the Dispute by giving notice to all parties concerned and the relevant expert, and such parties will be considered parties to the expert determination proceedings for the purposes of paragraph 1.4 and the Independent Expert Determination Rules, and such rules will, to the extent possible, be modified to accommodate this, and the expert in such proceedings will have the power to make such directions as are necessary to join the parties and the cause or causes of action to enable the expert to make a determination in respect of the Dispute and the related dispute or disputes.

1.6 Mediation (non-Technical Dispute Matters)

(a) If negotiations between authorised senior representatives under paragraph 1.3(c) do not resolve the Dispute within 20 Business Days of a party issuing a Notice of Dispute to the other party then, unless otherwise agreed by the parties (in writing), the Dispute must be referred to mediation under this paragraph.

(b) The mediator must be chosen by the parties from the Panel of Mediators within 25 Business Days of a party issuing a Notice of Dispute to the other party and appointed within a further five Business Days.

(c) In the absence of agreement by the parties as to the mediator, the mediator will be appointed on the application of either party by the President or Acting President of ACICA or by any person to whom the President of ACICA has delegated decision making authority.

(d) Each party to the mediation may appoint a person, including a legally qualified person, to represent it or assist it in the mediation.

(e) All meetings and proceedings in relation to the mediation must be held at a place determined by the mediator in the Sydney CBD, administered by ACICA and will be conducted in accordance with the ACICA Mediation Rules (2007), which the parties agree will be modified and amended as required to the extent that such rules conflict with the requirements of this deed or any other Project Agreement.

(f) Each party will bear its own costs relating to the preparation for and attendance at the mediation.

(g) The fees, expenses and costs of the mediator will be borne equally between the parties.

(h) The mediation process will cease if the Dispute has not been settled within 20 Business Days of the mediator being appointed, or such longer time as may be agreed by the parties in writing (having regard to the nature of the Dispute and the time required to assemble relevant information).

1.7 Arbitration – General principles

(a) If:

(i) paragraphs 1.4(i) or 1.4(m) apply; or

(ii) mediation under paragraph 1.6 does not resolve the Dispute within 20 Business Days of the mediator being appointed, or such longer time as may be agreed by the parties in writing (having regard to the nature of the Dispute and the time required to assemble relevant information) (Mediation Cut Off Date).
then, unless otherwise agreed by the parties, the Dispute will be referred to and finally resolved by arbitration in accordance with either:

(iii) the rules of ACICA (ACICA Arbitration Rules); or

(iv) the Australian Centre for International Commercial Arbitration Expedited Arbitration Rules (ACICA Expedited Arbitration Rules),

which the parties agree will be modified and amended as required to the extent that such rules conflict with the requirements of this deed or any other Project Agreements.

(b) Notwithstanding any provision of the ACICA Expedited Arbitration Rules to the contrary (including any monetary thresholds), if:

(i) a party considers that a Dispute about a matter may be resolved in accordance with the ACICA Expedited Arbitration Rules and that party wishes to progress the Dispute in accordance with the ACICA Expedited Arbitration Rules, that party must give the other party notice that it considers that the Dispute may be resolved in accordance with the ACICA Expedited Arbitration Rules (Arbitration Expedition Notice) within three Business Days after the Mediation Cut Off Date; and

(ii) the other party agrees (in writing) that the matter in dispute is suitable to be resolved in accordance with the ACICA Expedited Arbitration Rules, the other party must advise the party that provided the Arbitration Expedition Notice that the proposed use of the ACICA Expedited Arbitration Rules is accepted in writing within two Business Days of receipt of the Arbitration Expedition Notice,

then the Dispute will be referred to and finally resolved by arbitration in accordance with the ACICA Expedited Arbitration Rules.

(c) If:

(i) no Arbitration Expedition Notice is given; or

(ii) within two Business Days of the issue of an Arbitration Expedition Notice, the parties have not agreed in writing whether the matter in dispute will be resolved in accordance with the ACICA Expedited Arbitration Rules,

then the Dispute will be referred to and finally resolved by arbitration in accordance with the ACICA Arbitration Rules.

(d) Within two Business Days after the rules for the arbitration are determined in accordance with paragraph 1.7(b) or paragraph 1.7(c), the party who issued the Notice of Dispute in relation to the relevant Dispute must issue a notice of arbitration to ACICA in accordance with the ACICA Arbitration Rules or the ACICA Expedited Arbitration Rules as the case may be (Notice of Arbitration).

(e) The parties agree that there will be one arbitrator.

(f) The seat of the arbitration will be Sydney.

(g) The language of the arbitration will be English.

(h) The parties further agree to the following general principles relating to the procedure of the arbitration:
arbitration has been chosen for the purposes of achieving a just, quick and cost-effective resolution of any Dispute;

(ii) any arbitration conducted pursuant to this paragraph 1.7 shall not necessarily mimic court proceedings and the practices of those courts will not regulate the conduct of the proceedings before the arbitral tribunal;

(iii) in conducting the arbitration, the arbitrator must take into account the matters set out above, particularly in deciding issues such as:

A. how many written submissions will be allowed;
B. where appropriate, the length of written submissions;
C. the extent of document discovery permitted, if any;
D. the consolidation of arbitration proceedings, when requested;
E. the joinder of parties or the consolidation of proceedings, when requested;
F. the length of any hearing; and
G. the number of experts, if any, each party is allowed to appoint; and

(iv) the arbitrator has the power to grant all legal, equitable and statutory remedies, except punitive damages.

(i) The parties agree that the arbitrator will conduct the arbitration as expeditiously as possible and no party will unnecessarily delay the arbitration proceedings.

(j) All evidence in chief will be in writing, unless otherwise ordered by the arbitrator.

(k) Each party may only rely upon one expert witness in respect of any recognised area of specialisation, unless otherwise ordered by the arbitrator.

(l) After consultation with the parties, the arbitrator will determine whether to conduct the proceedings on the basis of documents and other materials only or whether an oral hearing will be held. In doing so the arbitrator shall have particular regard to the parties' request for an expedited procedure and the rules of natural justice.

(m) If the arbitrator determines that an oral hearing will be conducted, the following principles will apply in respect of the oral hearing:

(i) the duration of the oral hearings will be fixed by the arbitrator;

(ii) unless otherwise ordered by the arbitrator, the oral hearing will be conducted on a stop-clock basis with the effect that the time available to the parties will be split equally between the parties so that each party shall have the same time to conduct its case unless, in the opinion of the arbitral tribunal, such a split would breach the rules of natural justice or is unfair to one of the parties;

(iii) oral evidence in chief at the hearing will be permitted only with the permission of the arbitrator for good cause;

(iv) not less than 10 Business Days prior to the date fixed for the oral hearing, or any other period of time specified by the arbitrator, each party...
shall give notice of those witnesses (both factual and expert) of the other party that it wishes to attend the hearing for cross-examination; and

(v) in exceptional circumstances the arbitrator may extend the time for the oral hearing set pursuant to paragraph 1.7(m)(i).

(n) The parties agree that section 24 of the *International Arbitration Act 1974* (Cth) will apply in respect of consolidations.

(o) The arbitrator has the power, on the application of any party to this arbitration agreement, to allow a third party, who the arbitral tribunal considers has a sufficient interest in the outcome of the arbitration, to be joined in the arbitration as a party. Each party to this deed hereby consents to such joinder. In the event of such joinder of parties in the arbitration, the arbitrator has the power to make a single final award, or separate awards, in respect of all parties so joined in the arbitration.

(p) Any arbitration award will be final and binding upon the parties.

(q) This arbitration agreement is governed by and must be construed according to the laws applying in New South Wales.

1.8 Arbitration – Related arbitral proceedings

Where any Dispute is to be resolved by arbitration in accordance with paragraph 1.7 and that Dispute involves issues that are substantially the same as, or connected with issues raised in a related dispute or difference between TfNSW or RailCorp and any other party or parties involved in the Project, and arbitral proceedings have already commenced in respect of the Dispute or the related dispute or disputes, TfNSW may, in its absolute discretion:

(a) join the Dispute to those existing arbitral proceedings by giving notice to all parties concerned and the arbitral tribunal, and the arbitral tribunal in such proceedings will have the power to make such directions as are necessary to join the parties and the cause of action to enable the arbitral tribunal to make an award in respect of the Dispute; or

(b) join the related dispute or disputes to the existing arbitral proceedings concerning the Dispute by giving notice to all parties concerned and the arbitral tribunal, and such parties will be considered parties to the arbitral proceedings for the purposes of paragraph 1.7 and the ACICA Arbitration Rules or ACICA Expedited Arbitration Rules, and such rules will, to the extent possible, be modified to accommodate this, and the arbitral tribunal in such proceedings will have the power to make such directions as are necessary to join the parties and the cause or causes of action to enable the arbitral tribunal to make an award in respect of the Dispute and the related dispute or disputes.

1.9 Continued performance of obligations

(a) Notwithstanding the existence of a Dispute, each of the parties must continue to perform its obligations under the Project Agreements, save for the payment of any money which is the subject of the Dispute.

(b) Paragraph 1.9(a) will not apply where a Project Agreement has been terminated and does not prevent TfNSW from exercising its rights of set-off under a Project Agreement.

1.10 Final and binding

Where the Dispute Resolution Procedures state that the settlement or the final resolution of any Dispute arising under or in connection with a Project Agreement, including any Dispute as to the Supplier's liability under or in connection with the Project Agreement, in accordance
with the procedures provided for in this deed or otherwise as agreed between the parties (in writing), will be final and binding on the Supplier, the Supplier must not reopen, revisit or otherwise dispute that settlement or resolution or the subject matter of that settlement or resolution.

2. **Technical Dispute Panel**

The Technical Dispute Panel is comprised of the following persons:

(a) 

(b) 

(c) 

3. **Independent Expert for clause 15.5**

The Independent Expert for the purposes of clause 15.5 is one of the following persons:

(a) 

(b) 

(c) 

(d) or

(e) 

4. **Exclusion from determination or award**

(a) The powers conferred and restrictions imposed on a court by Part 4 of the *Civil Liability Act 2002* (NSW) are not conferred on an Independent Expert or an arbitrator appointed in accordance with these Dispute Resolution Procedures.

(b) The Independent Expert or arbitrator has no power to make a binding or non-binding determination or any award in respect of a claim by applying or considering the provisions of Part 4 of the *Civil Liability Act 2002* (NSW) (and any equivalent statutory provisions in any other state or territory) which might, in the absence of this paragraph, have applied to any Dispute referred to the Independent Expert or arbitrator.
1. Initial Fleet Delivery Schedule

The Initial Fleet comprises 24 Sets. The Dates for Provisional Acceptance for each Set in the Initial Fleet are set out in Table 1 below.

Table 1 – Initial Fleet Delivery Schedule

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### 2. Option Sets Delivery Schedule

#### 2.1 Continuous Production

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<td>Option Set No.</td>
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<td>Date for Provisional Acceptance</td>
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</tbody>
</table>
## 2.2 Non-continuous Production

<table>
<thead>
<tr>
<th>Option Set No.</th>
<th>Option Set Order Date</th>
<th>Delivery Period (Business Days)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
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<tr>
<td>Option Set No.</td>
<td>Option Set Order Date</td>
<td>Delivery Period (Business Days)</td>
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</table>

The Date for Provisional Acceptance of each Option Set purchased under clause 20.4 will be the date after the period of time specified in the column entitled "Delivery Period" in the table set out above, measured from the date of the Option Set Notice given under clause 20.4.
Schedule 10 – Acceptance Criteria

1.1 Provisional Acceptance Criteria for the Sets

The Provisional Acceptance Criteria for all Sets are as follows:

(a) the Supplier has provided TfNSW’s Representative with copies of all Approvals that are required to be obtained prior to the commencement of operational use of the Set;

(b) each Project Security required to have been provided on or before the Date of Provisional Acceptance of that Set must have been provided and must comply with all requirements for that Project Security in accordance with the terms of this deed;

(c) the Set has passed all Verification Activities required under the Verification Plan to be performed prior to Provisional Acceptance for the Set to achieve Provisional Acceptance;

(d) the Set complies with the Minimum Operating Standards for Available Sets;

(e) the Set meets the configuration baseline requirements set out in the Configuration Management Plan;

(f) the Set has successfully completed at least 500 consecutive kilometres in simulated passenger services on the Network without the occurrence of any Defect;

(g) all documents and other information and things (including Contract Information, manuals, the Operations and Maintenance Manual and Training materials) relating to the Set which are required under this deed and, as applicable, the Project Plans, to have been Confirmed, completed or updated and supplied to TfNSW before Provisional Acceptance of that Set have been Confirmed, completed or updated and supplied to TfNSW;

(h) the Set is free from all Defects except for Minor Defects;

(i) the Supplier has done everything else which the Project Agreements (including the SPR) require it to have done as a precondition to Provisional Acceptance of the Set, including:

(i) completion of all associated quality records; and

(ii) providing to TfNSW all:

A. Detailed Design Review certificates in accordance with section 3.5(b) of the SPR;

B. Test Readiness Review certificates in accordance with section 3.6(b) of the SPR; and

C. manufacturing build books and certificates required by the SPR,

in respect of the Set.

(j) the Asset Information System is populated with accurate data for the Set;

(k) prior to delivery of the Set to the Maintenance Facility, the Sets preceding the relevant Set and selected by TfNSW’s Representative have undergone a physical configuration audit by TfNSW’s Representative for each system, subsystem and configuration item and the physical configuration audit confirms full compliance of
the Sets with the Technical Documents prepared by the Supplier in accordance with the requirements of this deed. The Supplier must support the process by making equipment available to meet a program submitted by the Supplier by providing suitable inspection facilities and resources; and

(l) the Supplier has completed and achieved System Verification Review in accordance with section 3.7 of the SPR as it relates to the Set and has issued a System Verification Review certificate in accordance with section 3.7(b)(iii) of the SPR.

1.2 Provisional Acceptance Criteria for the first Set

In addition to the Provisional Acceptance Criteria set out in paragraph 1.1 of this Schedule 10, the following additional Provisional Acceptance Criteria apply to the first Set:

(a) all Accreditation Variations required under clause 6.1 have been obtained;

(b) all Relevant Source Code and Escrow Information in respect of the Sets has been deposited in escrow in accordance with this deed and:

(i) if the Relevant Source Code and Escrow Information in respect of the Sets was produced by the Supplier, the Escrow Agreement; and

(ii) if the Relevant Source Code and Escrow Information in respect of the Sets was produced by a Significant Contractor, the relevant Significant Contractor Escrow Agreement;

(c) all Training to be provided by the Supplier in respect of the Set prior to Provisional Acceptance of that Set has been completed to the reasonable satisfaction of TfNSW's Representative;

(d) the Asset Management System has been developed and provided to TfNSW;

(e) the following ICT systems and transactions required by this deed are fully operational and comply with the requirements of the SPR:

(i) all infrastructure to support the disaster recovery, business continuity and integrated support and test environments set out in sections 7.5, 7.8, 7.9 of SPR Appendix 3;

(ii) the Asset Information System;

(iii) the B2B Gateway and all relevant system integration and interactions as set out in section 4 of SPR Appendix 3;

(iv) the Performance Monitoring System;

(v) all utilities, software and tools required to allow the Operator to view Set data;

(vi) the Fleet Gateway and Set-borne Telemetry System required to allow the Supplier to communicate bi-directionally with the Sets;

(vii) the Set-borne Telemetry System required to allow the Operator to communicate with the Set from the CTIP Shore; and

(viii) all ICT operation and procedures required to support the Help Desk, system maintenance, release management and day-to-day functions;

(f) the Supplier has delivered the Spares and Special Tools described in the First Set Spares List; and
(g) MF Completion has been achieved under the MF Works Deed.

**1.3 Provisional Acceptance Criteria for the last Set in the Initial Fleet**

In addition to the Provisional Acceptance Criteria set out in paragraph 1.1 of this Schedule 10, as an additional Provisional Acceptance Criteria for the last Set in the Initial Fleet, the Supplier must have:

(a) delivered the Spares and Special Tools listed in the Initial Fleet Spares List;

(b) delivered the Spare Driver Trailer Car to the Maintenance Facility Site or other location approved in writing by TfNSW’s Representative; and

(c) completed all Verification Activities for the Spare Driver Trailer Car.

**1.4 Provisional Acceptance Criteria for last Set in the Option Fleet**

In addition to the Provisional Acceptance Criteria set out in paragraph 1.1 of this Schedule 10, as an additional Provisional Acceptance Criteria for the last Set in the Option Fleet, the Supplier must have delivered the Spares and Special Tools listed in the Option Set Notice(s).

**1.5 Final Acceptance Criteria for Sets**

The Final Acceptance Criteria relating to each Set are:

(a) the Supplier has provided TfNSW’s Representative with copies of all Approvals that are required to be obtained prior to Final Acceptance of the Set as contemplated in this deed;

(b) the Set has not been taken out of service (as defined in clause 16.4(c) of the TLS Deed) due to Supplier Related Problems for a cumulative period exceeding five Availability Periods in the preceding six months;

(c) the Set must have achieved a level of reliability in performance such that the MDBI exceeds 25,000 km for that Set measured over the preceding 6 month period;

(d) the Supplier must have provided TfNSW with the Defect Liability Bond in accordance with Schedule 14;

(e) all updated documents and other information and things (including Contract Information, the Operations and Maintenance Manual, manuals and Training materials) relating to the Set which are required under this deed and, as applicable, the Project Plans, to have been Confirmed, completed or updated and supplied to TfNSW before Final Acceptance of that Set have been Confirmed, completed or updated and supplied to TfNSW;

(f) all Relevant Source Code and Escrow Information in respect of the last Set has been deposited in escrow in accordance with this deed and the Escrow Agreement or Significant Contractor Escrow Agreements (as applicable);

(g) all Spares and Special Tools required to be maintained by the Supplier pursuant to the Project Agreements are held at the Maintenance Facility Site or other location notified by TfNSW;

(h) all Training to be provided by the Supplier in respect of the Set before Final Acceptance of that Set has been completed to the reasonable satisfaction of TfNSW’s Representative;
the Supplier has rectified all Minor Defects in the Set in accordance with clause 14.2 or is diligently following a Minor Defect Rectification Plan in accordance with clause 14.2(e);

Provisional Acceptance has been achieved in respect of that Set;

the Set must comply with all Mandatory Requirements;

subject to clause 14.2(a)(ii)B, the Set is free from all Defects;

the Supplier has rectified all Recurrent Defects in accordance with clause 14.3 or is diligently following a Confirmed Recurrent Defect Rectification Plan in accordance with clause 14.3(d); and

the Supplier has done everything else which this deed requires it to have done as a precondition to achieving Final Acceptance of the Set.

1.6 Fleet Acceptance Criteria

The Fleet Acceptance Criteria for each of the Continuous Production Fleet and the Non-continuous Production Fleet are:

(a) the Required Availability has been achieved in every Availability Period over a rolling three month period;

(b) each Set in the:
   (i) Continuous Production Fleet; or
   (ii) Non-continuous Production Fleet,

must have achieved a level of reliability in performance such that the MDBI exceeds 35,000 km for the Continuous Production Fleet or the Non-continuous Production Fleet (as the case may be), measured over a rolling three month period;

(c) the Supplier must have achieved Final Acceptance of each Set within the Continuous Production Fleet or the Non-continuous Production Fleet (as the case may be);

(d) all updated documents and other information and things (including Contract Information, the Operations and Maintenance Manual, manuals and Training materials) relating to the Continuous Production Fleet or the Non-continuous Production Fleet (as the case may be) which are required under this deed and, as applicable, the Project Plans, to have been Confirmed, completed or updated and supplied to TfNSW before Fleet Acceptance have been Confirmed, completed or updated and supplied to TfNSW;

(e) all Relevant Source Code and Escrow Information in relation to the Continuous Production Fleet or the Non-continuous Production Fleet (as the case may be) and the Maintenance Facility has been deposited in escrow in accordance with this deed and the Escrow Agreement or Significant Contractor Escrow Agreements (as applicable);

(f) the Supplier has rectified all Minor Defects in the Continuous Production Fleet or the Non-continuous Production Fleet (as the case may be) in accordance with clause 14.2(b);

(g) the Supplier has rectified all Recurrent Defects in accordance with clause 14.3 or is diligently following a Confirmed Recurrent Defect Rectification Plan in accordance with clause 14.3(d); and
(h) the Supplier has done everything else in respect of the Continuous Production Fleet or the Non-continuous Production Fleet (as the case may be) which this deed requires it to have done as a precondition to achieving Fleet Acceptance.
Schedule 11 - Payment Mechanism

1. Initial Fleet

1.1 Initial Fleet Contract Value and Initial Fleet Set Price

Subject to paragraph 3.1, TfNSW must procure payment of Progress Payments to the Supplier in respect of the Initial Fleet in accordance with clause 17.3 and Table 1.2.

Table 1.1: Initial Fleet Contract Value and Initial Fleet Set Price

<table>
<thead>
<tr>
<th>Set No.</th>
<th>Initial Fleet Contract Value ($ Nominal)</th>
<th>Initial Fleet Set Price ($ Nominal per Set)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 to 24</td>
<td></td>
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</tbody>
</table>

1.2 Progress Payments

Table 1.2: Progress Payments – Initial Fleet

<table>
<thead>
<tr>
<th>Delivery Milestone</th>
<th>When Delivery Milestone achieved</th>
<th>% of Initial Fleet Contract Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Mobilisation payment</td>
<td>The Supplier will be entitled to payment of this Progress Payment when the following conditions have been satisfied:</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(a) the Supplier has submitted each document nominated in the column entitled &quot;Mobilisation&quot; in SPR Appendix 7 to TfNSW’s Representative for Review; and</td>
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<td></td>
<td>(b) the Delivery Program submitted as a Submitted Document as referred to in paragraph (a) above has been Confirmed.</td>
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<tr>
<td>(b) System Definition Review complete</td>
<td>The Supplier will be entitled to payment of this Progress Payment when the following conditions have been satisfied:</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(a) the Supplier has submitted all Technical Documents to TfNSW’s Representative for the System Definition Review Design Stage outlined in section 3.3 of the SPR;</td>
<td></td>
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<tr>
<td></td>
<td>(b) each Submitted Document referred to in paragraph (a) above, and each document nominated in the column entitled &quot;Mobilisation&quot; in SPR Appendix 7, has been Confirmed; and</td>
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<td></td>
<td>(c) the Supplier has provided to TfNSW original copies of the following documents, duly executed by all parties to them (other than TfNSW and RailCorp):</td>
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<tr>
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<td>(i) a certified copy of each Significant Contract other than</td>
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L'320583942.6 49066665_30 Schedule 11 Delivery Deed
<table>
<thead>
<tr>
<th>Delivery Milestone</th>
<th>When Delivery Milestone achieved</th>
<th>% of Initial Fleet Contract Value</th>
</tr>
</thead>
</table>
| (c) Detailed Design Review complete | The Supplier will be entitled to payment of this Progress Payment when the following conditions have been satisfied: and  
(a) the Supplier has submitted all Technical Documents to TfNSW’s Representative for the Detailed Design Review Design Stage outlined in section 3.5 of the SPR;  
(b) each Submitted Document referred to in paragraph (a) above has been Confirmed; and  
(c) the Supplier has provided to TfNSW an original copy of the DTRS Significant Contract, duly executed by all parties to the DTRS Significant Contract. |  |
| (d) Body-shell fabrication complete | The Supplier will be entitled to payment of this Progress Payment when:  
(a) the following conditions have been satisfied:  
(i) body-shell fabrication is complete; and  
(ii) the body-shell has been physically moved out of the body-shell fabrication shop; and  
(b) TfNSW’s Representative has confirmed in writing that the above conditions have been satisfied. | (pro-rated equally on a per Set basis) |
| (e) Set complete and loaded for transport | The Supplier will be entitled to payment of this Progress Payment when:  
(a) the following conditions have been satisfied:  
(i) the manufacture of the Set is | (pro-rated equally on a per Set basis) |
<table>
<thead>
<tr>
<th>Delivery Milestone</th>
<th>When Delivery Milestone achieved</th>
<th>% of Initial Fleet Contract Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>(g) Provisional Acceptance of each Set</td>
<td>Provisional Acceptance of each Set</td>
<td>(pro-rated equally on a per Set basis)</td>
</tr>
<tr>
<td>(h) Final Acceptance of each Set</td>
<td>Final Acceptance of each Set (as specified in each Final Acceptance Certificate)</td>
<td>(pro-rated equally on a per Set basis)</td>
</tr>
<tr>
<td>(i) Fleet Acceptance of the Continuous Production Fleet</td>
<td>Fleet Acceptance Certificate in respect of the Continuous Production Fleet is issued</td>
<td></td>
</tr>
<tr>
<td>(j) Completion of AMS reliability improvement solution</td>
<td>The Supplier will be entitled to payment of this Progress Payment when the Supplier has implemented an AMS reliability improvement solution in respect of the Continuous Production Fleet which satisfies the requirements of Section 3.19 of SPR Appendix 2.</td>
<td></td>
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</tbody>
</table>

Initial Fleet Contract Value

### 1.3 Adjustment of Final Acceptance Delivery Milestone Progress Payment if excess mass

If the Actual Mass of a Set in the Initial Fleet exceeds the Predicted Mass then the Final Acceptance Delivery Milestone Progress Payment for that Set referred to in paragraph 1.2, Table 1.2 row (h) will be calculated in accordance with the following formula:

\[
MA(Adj)_{F} = \frac{MA(Adj)}{F_{F}}
\]

Where:

- \( MA(Adj)_{F} \) = Adjusted Final Acceptance Delivery Milestone Progress Payment for the Set in the Initial Fleet.
PPFA_{ir} = \text{Progress Payment for Final Acceptance of Each Set in the Initial Fleet, which for an individual Set will be determined in accordance with Table 1.2, row (h):}

AM = \text{Actual Mass of the Set.}

PM = \text{the Predicted Mass.}

If the Adjusted Final Acceptance Delivery Milestone Progress Payment for a Set in the Initial Fleet as calculated in accordance with the above formula is less than zero, then the Adjusted Final Acceptance Delivery Milestone Progress Payment for that Set will be deemed to be zero.

2. **Option Sets**

2.1 **Option Fleet Set Prices for Option Sets purchased under clause 20.3**

If RailCorp (or TfNSW on behalf of RailCorp) exercises its right to purchase any or all of the Option Sets under clause 20.3, TfNSW must, subject to paragraph 3.1 procure payment of Progress Payments to the Supplier in respect of the Option Sets in accordance with clause 17.3 and Table 2.3.

**Table 2.1: Option Fleet Set Price**

<table>
<thead>
<tr>
<th>Option Set No.</th>
<th>Option Fleet Set Price ($ Nominal per Set)</th>
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<tbody>
<tr>
<td>1 - 45</td>
<td></td>
</tr>
</tbody>
</table>

2.2 **Option Fleet Set Prices for Option Sets purchased under clause 20.4**

If RailCorp (or TfNSW on behalf of RailCorp) exercises its right to purchase any or all of the Option Sets under clause 20.4, TfNSW must, subject to paragraph 3.2 procure payment of Progress Payments to the Supplier in respect of the Option Sets purchased under clause 20.4 in accordance with clause 17.3 and Table 2.4, where the Option Fleet Set Price will be calculated as follows:

Option Fleet Set Price = Nominal Option Fleet Set Price x IF

Where:

Nominal Option = Fleet Set Price

the Nominal Option Fleet Set Price for the relevant Option Set identified in Table 2.2 below

IF = \%Index1 \times (Index_{1}\text{factor}) + \%Index2 \times (Index_{2}\text{factor})

Where:

\%Index1 = 

\%Index2 = 

Index_{1}\text{factor} = CPI

Index_{2}\text{factor} = AWE
Table 2.2: Nominal Option Fleet Set Prices

<table>
<thead>
<tr>
<th>Option Set No.</th>
<th>Option Fleet Set Prices ($ Nominal per Set)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
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<td>2 - 45</td>
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</tbody>
</table>

2.3 Progress Payments

Table 2.3: Progress Payments – Option Sets purchased under clause 20.3

<table>
<thead>
<tr>
<th>Delivery Milestone</th>
<th>When Delivery Milestone achieved</th>
<th>Amount of Progress Payment (% of Option Fleet (Continuous Production) Contract Value)</th>
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</thead>
<tbody>
<tr>
<td>1.</td>
<td>Body-shell fabrication complete</td>
<td>The Supplier will be entitled to payment of this Progress Payment when:</td>
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<td>(a) the following conditions have been satisfied:</td>
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<td>(i) body-shell fabrication is complete; and</td>
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<td></td>
<td>(ii) the body-shell has been physically moved out of the body-shell fabrication shop; and</td>
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<td>(b) TfNSW’s Representative has confirmed in writing that the above conditions have been satisfied.</td>
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<td>2.</td>
<td>Set complete and loaded for transport</td>
<td>The Supplier will be entitled to payment of this Progress Payment when:</td>
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<tr>
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<td></td>
<td>(a) the following conditions have been satisfied:</td>
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<td></td>
<td>(i) the manufacture of the Set is complete;</td>
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<td></td>
<td>(ii) the Set is loaded for transport at Dalian Port;</td>
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<td>(iii) the Set is free of all Security Interests which would prevent the Set from being transported; and</td>
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<td>(iv) the Set is listed in a</td>
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</tbody>
</table>
### Table 2.4: Progress Payments – Option Sets purchased under clause 20.4

<table>
<thead>
<tr>
<th>Delivery Milestone</th>
<th>When Delivery Milestone achieved</th>
<th>Amount of Progress Payment</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Body-shell fabrication complete</td>
<td>The Supplier will be entitled to payment of this Progress Payment when: (a) the following conditions have been satisfied: (i) body-shell fabrication is complete; and (ii) the body-shell has been physically moved out of the body-shell fabrication shop; and (b) TfNSW's Representative has confirmed in writing that the above conditions have been satisfied.</td>
<td>of Option Fleet (Non-continuous Production) Contract Value (pro-rated equally on a per Set basis)</td>
</tr>
<tr>
<td>2. Set complete and loaded for transport</td>
<td>The Supplier will be entitled to payment of this Progress Payment when: (a) the following conditions have been satisfied: (i) the manufacture of the Set is complete; and (ii) the Set is loaded for transport at Dalian Port;</td>
<td>of Option Fleet (Non-continuous Production) Contract Value (pro-rated equally on a per Set basis)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Provisional Acceptance of each Set</th>
<th>Provisional Acceptance of each Set</th>
<th>(pro-rated equally on a per Set basis)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Final Acceptance of each Set</td>
<td>Final Acceptance of each Set</td>
<td>(pro-rated equally on a per Set basis)</td>
</tr>
<tr>
<td>Fleet Acceptance of the Continuous Production Fleet</td>
<td>Fleet Acceptance Certificate in respect of the Continuous Production Fleet is issued</td>
<td></td>
</tr>
</tbody>
</table>

Option Fleet (Continuous Production) Contract Value
(iii) the Set is free of all Security Interests which would prevent the Set from being transported; and

(iv) the Set is listed in a bill of lading for transport from Dalian Port; and

(b) TfNSW's Representative has confirmed in writing that the above conditions have been satisfied.

3. Provisional Acceptance of each Set
   Provisional Acceptance of the Set
   of Option Fleet (Non-continuous Production) Contract Value (pro-rated equally on a per Set basis)

4. Final Acceptance of each Set
   Final Acceptance of the Set
   of Option Fleet (Non-continuous Production) Contract Value (pro-rated equally on a per Set basis)

5. Fleet Acceptance of the Non-continuous Production Fleet
   Fleet Acceptance Certificate in respect of the Non-continuous Production Fleet is issued
   of Option Fleet (Non-continuous Production) Contract Value

Option Fleet (Non-Continuous Production) Contract Value

2.4 Adjustment of Final Acceptance Delivery Milestone Progress Payment if excess mass

If the Actual Mass of an Option Set exceeds the Predicted Mass then the Final Acceptance Delivery Milestone Progress Payment for that Set referred to in:

(a) paragraph 2.3, Table 2.3, row 4; and/or

(b) paragraph 2.3, Table 2.4, row 4,

will be calculated in accordance with the following formula:

\[
MA(\text{Adj})_{OS} = \text{Adjusted Final Acceptance Delivery Milestone Progress Payment for the Option Set.}
\]
PPF\textsubscript{OS} = \text{Progress Payment for Final Acceptance of each Option Set, which for an individual Option Set will be determined in accordance with Table 2.3, row 4, or Table 2.4, row 4.}

If the Adjusted Final Acceptance Delivery Milestone Progress Payment for an Option Set as calculated in accordance with the above formula is less than zero, then the Adjusted Final Acceptance Delivery Milestone Progress Payment for that Set will be deemed to be zero.

3. Fleet Acceptance

3.1 Continuous Production Fleet

(a) The Progress Payments for Fleet Acceptance in Tables 1.2 and 2.3 are payable when the Fleet Acceptance Certificate is issued for the Continuous Production Fleet.

(b) The Supplier acknowledges and agrees that:

(i) the Supplier can only claim a Progress Payment for Fleet Acceptance in relation to the Continuous Production Fleet, and the Progress Payment for Fleet Acceptance in relation to the Continuous Production Fleet will only be payable, if Fleet Acceptance of the Continuous Production Fleet is achieved on or before the Fleet Acceptance Sunset Date (Continuous Production); and

(ii) the Supplier will not be entitled to any Claim in respect of, and waives all entitlement to payment of, the Progress Payments for Fleet Acceptance in relation to the Continuous Production Fleet if Fleet Acceptance of the Continuous Production Fleet is not achieved on or before the Fleet Acceptance Sunset Date (Continuous Production), irrespective of whether Fleet Acceptance of the Continuous Production Fleet is subsequently achieved by the Supplier at a later time.

3.2 Non-continuous Production Fleet

(a) The Progress Payment for Fleet Acceptance in Table 2.4 is payable when the Fleet Acceptance Certificate is issued for the Non-continuous Production Fleet.

(b) The Supplier acknowledges and agrees that:

(i) the Supplier can only claim a Progress Payment for Fleet Acceptance in relation to the Non-continuous Production Fleet, and the Progress Payment for Fleet Acceptance in relation to the Non-continuous Production Fleet will only be payable, if Fleet Acceptance of the Non-continuous Production Fleet is achieved on or before the Fleet Acceptance Sunset Date (Non-continuous Production); and

(ii) the Supplier will not be entitled to any Claim in respect of, and waives all entitlement to payment of, the Progress Payment for Fleet Acceptance in relation to the Non-continuous Production Fleet if Fleet Acceptance of the Non-continuous Production Fleet is not achieved on or before the relevant Fleet Acceptance Sunset Date (Non-continuous Production), irrespective of whether Fleet Acceptance in relation to the Non-continuous Production Fleet is subsequently achieved by the Supplier at a later time.
Schedule 12 – Schedule of Rates

1. Pricing

All amounts in this Schedule 12 are amounts at the Price Base Date, excluding the Other Costs.

For the avoidance of doubt, all rates included within this Schedule 12 are fully inclusive and no Supplier margin will be applied to any of them, except as expressly provided in paragraph 2.3 in relation to the Other Costs.

2. Rates and Other Costs

2.1 Agreed Rates

The rates (Agreed Rates) which the Supplier may charge to TfNSW for items of work will be as set out in paragraph 2.2 and paragraph 2.3.

2.2 Labour Rates for additional services

The labour rates are outlined in Table 2.2 below:

<table>
<thead>
<tr>
<th>Category</th>
<th>Description</th>
<th>Unit</th>
<th>Labour Cost</th>
<th>Labour overhead</th>
<th>Other costs (eg subcontract labour)</th>
<th>Profit Margin</th>
<th>Total Labour Cost per unit</th>
</tr>
</thead>
<tbody>
<tr>
<td>LR1.1</td>
<td>Project Manager</td>
<td>per hr</td>
<td>A</td>
<td>B</td>
<td>C</td>
<td>D</td>
<td>A+B+C+D</td>
</tr>
<tr>
<td>LR1.2</td>
<td>Senior Executive</td>
<td>per hr</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>LR1.3</td>
<td>Engineering</td>
<td>per hr</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>LR1.4</td>
<td>Software developer</td>
<td>per hr</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>LR1.5</td>
<td>Supervisor</td>
<td>per hr</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Category</td>
<td>Description</td>
<td>Unit</td>
<td>Labour Cost</td>
<td>Labour overhead</td>
<td>Other costs (eg subcontract labour)</td>
<td>Profit Margin</td>
<td>Total Labour Cost per unit</td>
</tr>
<tr>
<td>----------</td>
<td>--------------</td>
<td>------</td>
<td>-------------</td>
<td>----------------</td>
<td>------------------------------------</td>
<td>---------------</td>
<td>--------------------------</td>
</tr>
<tr>
<td>LR1.6</td>
<td>Technician</td>
<td>per hr</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>LR1.7</td>
<td>Tradesman</td>
<td>per hr</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>LR1.8</td>
<td>Labourer</td>
<td>per hr</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>LR1.9</td>
<td>Car cleaner</td>
<td>per hr</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### 2.3 Other Costs

Any other parts, materials and third party costs used for such additional services (Other Costs) will be charged at a rate based on invoice cost (on arm's length commercial terms) plus mark up which includes all overheads and a profit margin.
## Schedule 13 – Insurances

### 1. Whole of project insurances

<table>
<thead>
<tr>
<th>Insurance</th>
<th>Minimum Coverage Requirements</th>
<th>Maximum Deductible</th>
<th>Period Insurance to be effected and maintained</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employers Liability and Workers' Compensation Insurance</td>
<td>Workers' compensation insurance in accordance with Legal Requirements (and on the basis that, where permitted under the relevant statutory workers compensation or accident compensation scheme, the insurance shall extend to cover the vicarious liability of TfNSW, the Operator and RailCorp for the acts or omissions of the Supplier) and, where common law claims can be brought outside of the relevant statutory workers compensation or accident compensation scheme, employer's liability insurance covering any injury, damage, expense, loss or liability suffered or incurred by any persons employed by the Supplier or engaged in performing the Project Activities or their dependants (and on the basis that such insurance shall extend to cover the vicarious liability of TfNSW, the Operator and RailCorp for the acts or omissions of the Supplier).</td>
<td>In accordance with Legal Requirements</td>
<td>From the Commencement Date until the later of the Date of Fleet Acceptance of the Continuous Production Fleet and (where relevant), the Date of Fleet Acceptance of the Non-continuous Production Fleet.</td>
</tr>
<tr>
<td>Own Damage Motor Vehicle Insurance</td>
<td>Coverage: Policy to cover all physical loss or damage to motor vehicles (whether owned, hired, leased or acquired by the Supplier or any of the Supplier's Subcontractors) which are used in connection with the Project Activities. Insured amount: Not less than market value.</td>
<td></td>
<td>From the Commencement Date until the later of the Date of Fleet Acceptance of the Continuous Production Fleet and (where relevant), the Date of Fleet Acceptance of the Non-continuous Production Fleet.</td>
</tr>
<tr>
<td>Third Party Property Damage Motor Vehicle Insurance</td>
<td>Coverage: Policy to cover third party property damage related to any motor vehicles which are used in connection with the Project Activities. Insured amount: <strong>xxx</strong> for any one occurrence and unlimited in</td>
<td></td>
<td>From the Commencement Date until the later of the Date of Fleet Acceptance of the Continuous Production Fleet and (where relevant), the Date of Fleet Acceptance of the Non-continuous Production Fleet.</td>
</tr>
<tr>
<td>Insurance</td>
<td>Minimum Coverage Requirements</td>
<td>Maximum Deductible</td>
<td>Period Insurance to be effected and maintained</td>
</tr>
<tr>
<td>-----------------------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>-----------------------------------------------------------------------------------</td>
<td>--------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Compulsory Third Party Motor Vehicle Insurance</td>
<td>Coverage: Compulsory third party motor vehicle insurance, in respect of all registrable motor vehicles which are used in connection with the Project Activities. Insured amount: In accordance with Legal Requirements</td>
<td>In accordance with Legal Requirements</td>
<td>the Date of Fleet Acceptance of the Non-continuous Production Fleet</td>
</tr>
<tr>
<td>Plant and Equipment Insurance</td>
<td>Coverage: Covers physical loss or damage to any plant or equipment (whether owned, hired, leased or acquired by the Supplier or the Supplier's Subcontractors) which is used in connection with the carrying out of the Project Activities. Insured amount: Not less than market value.</td>
<td></td>
<td>From the Commencement Date until the later of the Date of Fleet Acceptance of the Continuous Production Fleet and (where relevant), the Date of Fleet Acceptance of the Non-continuous Production Fleet</td>
</tr>
</tbody>
</table>
# 2. Sets Insurance Requirements

<table>
<thead>
<tr>
<th>Insurance</th>
<th>Minimum Sum Insured</th>
<th>Maximum Deductible</th>
<th>Period Insurance to be effected and maintained</th>
</tr>
</thead>
<tbody>
<tr>
<td>Professional Indemnity Insurance</td>
<td>Coverage: A project specific professional indemnity insurance policy, on a claims made basis, covering the liability of the Supplier in respect of any act or omission in the rendering of professional services, and any breach of a duty owed in a professional capacity by the Supplier, the Supplier's Subcontractors and anyone engaged by the Supplier or any of the Supplier's Subcontractors in a professional capacity. The Policy must extend to training and provision of manuals and coverage for loss of electronic documents. Insured amount: [ ] for any one claim and [ ] in the aggregate.</td>
<td></td>
<td>From the date of this deed until seven years after the last Date of Provisional Acceptance</td>
</tr>
</tbody>
</table>
| Contract Works            | Coverage: A policy that covers loss, damage to or destruction, and such other risks as are reasonably required by TfNSW of:  
- the Delivery Phase Activities (excluding Verification Activities);  
- Verification Activities. The policy must be a primary policy of cover in relation to testing and commissioning of the Sets (so as not to provide any coordinate indemnity with any cover held by the state or otherwise give rise to dual insurance); and  
- all manufacturing plant, materials, parts, spares, consumables, temporary and permanent works and equipment used by the Supplier and its Subcontractors in the Delivery Phase Activities. | | From the date of this deed until the end of the Delivery Phase. |
<table>
<thead>
<tr>
<th>Insurance</th>
<th>Minimum Sum Insured</th>
<th>Maximum Deductible</th>
<th>Period Insurance to be effected and maintained</th>
</tr>
</thead>
<tbody>
<tr>
<td>Coverage for equipment to cover equipment at any location prior to risk passing to TfNSW. Insured amount: The full reinstatement and replacement value of all accumulated property associated with the Delivery Phase Activities including an appropriate allowance for extra costs or reinstatement, removal of debris, loss mitigation expenses, acceleration costs and professional fees/claim expenses but not less than with sub-limits:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• removal of debris:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• expediting expenses:</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>• search and locate costs:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• professional fees:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• mitigation expenses:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• claims preparation costs:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• extra cost of reinstatement:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• increased cost of working:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Coverage: A project specific broad form public and products liability insurance policy, written on an occurrence basis, which covers the liability of the Supplier, the Supplier's Subcontractors, TfNSW, RailCorp and the Operator in respect of:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• damage to, loss or destruction of, or loss of use of, real or</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Public Liability: From the date of this deed until 24 months after last Date of Provisional Acceptance</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Product Liability: From the</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Insurance</td>
<td>Minimum Sum Insured</td>
<td>Maximum Deductible</td>
<td>Period Insurance to be effected and maintained</td>
</tr>
<tr>
<td>-----------</td>
<td>---------------------</td>
<td>--------------------</td>
<td>-----------------------------------------------</td>
</tr>
<tr>
<td>personal property;</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>injury to, or death, illness or disease of, any persons (other than employees or where covered by other compulsory insurance); and</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>advertising injury or advertising liability risks including:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>libel, slander or defamation;</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>infringement of copyright or of title or slogan;</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>piracy or unfair competition or idea misappropriation under an implied contract; and</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>invasion of privacy,</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>committed or alleged to have been committed in any advertisement, publicity article, broadcast or telecast, arising out of, or in connection with, the Delivery Phase Activities or ownership, maintenance, repair and occupation of property.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>The policy must cover:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TfNSW, RailCorp and the Operator for their own acts and omissions, including for liability to each other and any other insured;</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>the liability of the Supplier, its Associates and Subcontractors, and the vicarious liability of the Indemnified Parties (other than TfNSW, RailCorp and the Operator) for the acts and</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Commencement Date until seven years after last Date of Provisional Acceptance
<table>
<thead>
<tr>
<th>Insurance</th>
<th>Minimum Sum Insured</th>
<th>Maximum Deductible</th>
<th>Period Insurance to be effected and maintained</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>omissions of other named insureds; and</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>• any indemnity given by the Supplier under the Project Agreements.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>The definition of product must be wide enough to include any software or computer related products.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Insured amount: not less than the maximum value of property in transit at any one time including insurance and freight.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Transit Insurance (including marine transit insurance)</td>
<td>Coverage: A policy of insurance covering Sets, Spares and Special Tools and any materials, equipment or components incorporated into the Sets, Spares and Special Tools.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Schedule 14 – Project Security

1. Provision of Project Security by Supplier

1.1 Guarantee

On or before the Target Contractual Close Date, the Supplier must provide TfNSW with a validly executed guarantee and indemnity in the form set out in Schedule 16 (or such other substantially similar form as TfNSW may agree, in writing) given by the Guarantor (Parent Guarantee) as a Condition Precedent under clause 2.

1.2 Project Bonds

The Supplier must provide the Project Bonds to TfNSW, in the form set out in Schedule 18 and in accordance with the provisions of paragraph 2.

2. Project Bonds

2.1 Advance Payment Bonds

(a) The Supplier must provide TfNSW with:

(i) the bonds described in Table 2.1(a)(i) below in respect of the Initial Fleet;

(ii) if RailCorp (or TfNSW on behalf of RailCorp) elects pursuant to clause 20.3 to purchase any or all of the Option Sets, the further bonds described in Table 2.1(a)(ii) in respect of those Option Sets; and

(iii) if RailCorp (or TfNSW on behalf of RailCorp) elects pursuant to clause 20.4 to purchase any or all of the Option Sets, the further bonds described in Table 2.1(a)(iii) in respect of those Option Sets,

(Advance Payment Bonds), in each case as a condition precedent to payment by TfNSW under Schedule 11 of the following Progress Payments referred to in Table 1.2, Table 2.3 and Table 2.4 in Schedule 11:

Table 2.1(a)(i) – Initial Fleet

<table>
<thead>
<tr>
<th>Progress Payment: (Table 1.2 of Schedule 11)</th>
<th>Amount of bond: (percentage of Initial Fleet Contract Value)</th>
<th>Amount: ($ Nominal)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Initial Fleet</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mobilisation payment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>System Definition Review complete</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Detailed Design Review complete</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Body-shell fabrication complete</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Set complete and</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

(Advance Payment Bonds)
<table>
<thead>
<tr>
<th>Progress Payment: (Table 1.2 of Schedule 11)</th>
<th>Amount of bond: (percentage of Initial Fleet Contract Value)</th>
<th>Amount: ($ Nominal)</th>
</tr>
</thead>
<tbody>
<tr>
<td>loaded for transport</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table 2.1(a)(ii) – Option Sets (Continuous Production)

<table>
<thead>
<tr>
<th>Progress Payment: (Table 2.3 of Schedule 11)</th>
<th>Amount of bond: (percentage of Option Fleet (Continuous Production) Contract Value)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Body-shell fabrication complete</td>
<td>% (pro-rated equally on a per Set basis)</td>
</tr>
<tr>
<td>Set complete and loaded for transport</td>
<td>% (pro-rated equally on a per Set basis)</td>
</tr>
</tbody>
</table>

Table 2.1(a)(iii) – Option Sets (Non-continuous Production)

<table>
<thead>
<tr>
<th>Progress Payment: (Table 2.4 of Schedule 11)</th>
<th>Amount of bond: (percentage of Option Fleet (Non-continuous Production) Contract Value)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Body-shell fabrication complete</td>
<td>% (pro-rated equally on a per Set basis)</td>
</tr>
<tr>
<td>Set complete and loaded for transport</td>
<td>% (pro-rated equally on a per Set basis)</td>
</tr>
</tbody>
</table>

Subject to TfNSW’s rights under this deed, the Release Date for each Advance Payment Bond is:

(i) for the bonds relating to the mobilisation payment, System Definition Review completion and Detailed Design Review completion, the Date of Provisional Acceptance of the 12th Set to achieve Provisional Acceptance; and

(ii) for the other Advance Payment Bonds, on the Date of Provisional Acceptance of the Set in respect of which the corresponding Progress Payment was made.

2.2 Defect Liability Bonds

(a) As a condition precedent to Final Acceptance of each Set, the Supplier must provide TfNSW with a bond (Defect Liability Bond) with a value equal to of the Set Price of that Set.

(b) Subject to TfNSW’s rights under this deed, the Release Date for each Defect Liability Bond is two years after the Date of Final Acceptance of the relevant Set.
2.3 Bond requirements

Each Project Bond must be:

(a) an irrevocable and unconditional instrument in the form set out in Schedule 18 or such other form as TfNSW may approve;

(b) issued in favour of TfNSW;

(c) issued in Australian Dollars;

(d) state an expiry date that is no less than three years after the date on which the Project Bond is provided to TfNSW under this deed;

(e) at all times provided by a bank acceptable to TfNSW that maintains the Required Bond Rating; and

(f) payable at an office of the issuer in Sydney (or such other place as TfNSW may approve).

2.4 Replacement of expiring Project Bond

(a) Except where TfNSW otherwise permits in writing, the Supplier must ensure that no Project Bond held by TfNSW expires.

(b) The Supplier must replace each Project Bond (Original Bond) with a new Project Bond (Renewing Bond) by no later than 20 Business Days prior to the expiry date stated in the Original Bond.

(c) The Renewing Bond must comply with all of the requirements for a Project Bond in paragraph 2.3 and will be held by TfNSW for the same purposes for which the Original Bond was held.

(d) TfNSW agrees to surrender an Original Bond in exchange for a Renewing Bond complying with this paragraph 2.4 upon receiving reasonable notice of a request to do so (which notice need not exceed five Business Days).

(e) If the Supplier fails to provide a Renewing Bond as required under this clause then, without limiting TfNSW's other rights including under clauses 16.6 and 26.1(l) of this deed, TfNSW may present the Original Bond for payment and may hold the proceeds as a cash security for the performance of the obligations for which the Original Bond was held.

2.5 Bond ratings trigger

If the issuer of a Project Bond ceases to have the Required Bond Rating, then the Supplier must:

(a) notify TfNSW of that circumstance as soon as reasonably practicable and in any event within 20 Business Days of the Project Bond ceasing to have the Required Bond Rating; and

(b) within 10 Business Days of being requested to do so, procure the issue to TfNSW of a replacement bond (Replacement Bond) which must have a face value equal to that of the Project Bond being replaced, comply with all of the requirements for a Project Bond in paragraph 2.3 and will be held by TfNSW for the same purposes for which the Original Bond was held.

and TfNSW must promptly surrender the original Project Bond to the Supplier following the issue of the Replacement Bond.
Schedule 15 – Termination Payments

1. Termination for Supplier Termination Event

1.1 Indemnity

If this deed is terminated:

(a) pursuant to clause 27.4; or
(b) pursuant to clause 27.9, as a result of:

(i) termination of the TLS Deed for a "Supplier Termination Event" under the TLS Deed; or
(ii) termination of the MF Works Deed for a "Contractor's default" referred to in clause 14.1 of the MF Works Deed,

the Supplier must indemnify the Indemnified Parties on demand from and against all Loss arising from the termination of this deed including:

(c) the costs of procuring a replacement contract including any increase in the price of the replacement contract and all project management, legal and other professional costs and fees in relation to that replacement contract;
(d) all other costs of the Indemnified Parties (including project management, legal and other professional costs and fees); and
(e) costs of redundancy and other demobilisation and retraining costs necessary as a result of the Operator operating a smaller fleet of Sets (as relevant).

1.2 Termination before Provisional Acceptance of the Fleet

If this deed is terminated pursuant to clause 27.4 before Provisional Acceptance of every Set in the Fleet, title in all the Supplier's work in progress and all other Assets and Deliverables will immediately pass to RailCorp or its nominee and, without prejudice to the rights of TfNSW and each Indemnified Party under clause 31 and paragraph 1.1, TfNSW:

(a) will be entitled (in its absolute discretion) to procure a third party to complete all or any part of the Delivery Phase Activities; and
(b) must procure payment to the Supplier of the value of all work reasonably and properly undertaken by the Supplier up to the date of termination in accordance with this deed, less:

(i) all Progress Payments procured by TfNSW and made; and
(ii) if RailCorp or TfNSW exercises its right under paragraph 1.2(a) and the amount paid to the third party to complete the Delivery Phase Activities exceeds the amount of Progress Payments that were not paid to the Supplier, that difference,

and if that amount is a negative amount, the corresponding positive amount will be Moneys Owing from the Supplier to TfNSW.

1.3 Indemnity in respect of omitted Option Sets

If TfNSW gives an instruction pursuant to clause 15.5(g)(ii), the Supplier must indemnify the Indemnified Parties on demand from and against all Loss arising from the omission, including:
(a) the costs of procuring a replacement contract including any increase in the price of the replacement contract and all project management, legal and other professional costs and fees in relation to that replacement contract;

(b) all other costs of the Indemnified Parties (including project management, legal and other professional costs and fees); and

(c) costs of redundancy and other demobilisation and retraining costs necessary as a result of the Operator operating a smaller fleet of Sets (as relevant).

2. Termination for convenience by TfNSW or for TfNSW Termination Event

2.1 Sole remedy

If this deed is terminated for convenience under clause 27.7 or for a TfNSW Termination Event under clause 27.6, as its sole remedy in relation to that termination, the Supplier is entitled to payment of compensation calculated in accordance with paragraph 2.2.

2.2 Compensation payable

The compensation payable or to be procured by TfNSW to the Supplier under this paragraph is limited to the sum of the following amounts (and if the resulting amount is a negative amount, the corresponding positive amount will be Moneys Owing from the Supplier to TfNSW):

(a) the value of all work reasonably and properly undertaken by the Supplier up to the date of termination in accordance with this deed less the amount of all Progress Payments paid or procured to be paid by TfNSW;

(b) the cost of redundancy payments for Personnel that have been incurred by the Supplier, or will be reasonably incurred by the Supplier as a direct result of the termination;

(c) the reasonable cost of closing or demobilising any location to the extent that it was used by the Supplier solely for the purpose of:

(i) manufacturing, installing or assembling any Asset, Deliverable or works; or

(ii) storing Materials, Assets, Spares or other Deliverables, for the purposes of this deed, subject to a maximum of [redacted] before Provisional Acceptance of the first 12 Sets, a maximum of [redacted] before Provisional Acceptance of the last Set in the Initial Fleet and, if RailCorp (or TfNSW on behalf of RailCorp) elects pursuant to clause 20 to purchase any or all of the Option Sets, a maximum of [redacted] thereafter until all Sets have achieved Provisional Acceptance;

(d) to the extent not taken into account in any item above, the amount reasonably and properly payable by the Supplier to its Subcontractors as a direct result of the termination of this deed,

but only to the extent those amounts:

(e) are incurred under arrangements and/or agreements entered into on arm's length commercial terms prior to the date of termination;

(f) the Supplier and its Associates have used their best endeavours to mitigate those amounts; and
they are adjusted to avoid any double counting,

less:

amounts in respect of which the Supplier:

(i) is indemnified by a policy of Insurance; or

(ii) would have been indemnified if the Supplier had:

A. diligently pursued a claim under the policy of Insurance;

B. complied with the terms and conditions of that policy of Insurance; and

C. complied with its Insurance obligations under this deed; and

any gains which have or will accrue to the Supplier as a result of the termination of this deed and any other Project Agreements.

3. Termination for Force Majeure Event

3.1 Sole remedy

If this deed is terminated pursuant to clause 25, as its sole remedy in relation to that termination, the Supplier is entitled to payment of compensation calculated in accordance with paragraph 3.2.

3.2 Compensation payable

The compensation payable or to be procured by TfNSW to the Supplier under this paragraph is limited to the sum of the following amounts (and if the resulting amount is a negative amount, the corresponding positive amount will be Moneys Owing from the Supplier to TfNSW):

(a) the value of all work reasonably and properly undertaken by the Supplier up to the date of termination in accordance with this deed less the amount of all Progress Payments paid or procured to be paid by TfNSW;

(b) to the extent not taken into account in the item above, the amount reasonably and properly payable by the Supplier to its Subcontractors as a direct result of the termination of this deed,

but only to the extent those amounts:

(c) are incurred under arrangements and/or agreements entered into on arm's length commercial terms prior to the date of termination;

(d) the Supplier and its Associates have used their best endeavours to mitigate those amounts; and

(e) they are adjusted to avoid any double counting,

less:

amounts in respect of which the Supplier:

(i) is indemnified by a policy of Insurance; or

(ii) would have been indemnified if the Supplier had:
A. diligently pursued a claim under the policy of Insurance;
B. complied with the terms and conditions of that policy of Insurance; and
C. complied with its Insurance obligations under this deed; and

(g) any gains which have or will accrue to the Supplier as a result of the termination of this deed and any other Project Agreements.

4. General

4.1 Time for Payment

An amount payable or to be procured under this Schedule 15 by TfNSW to the Supplier is due and payable as a lump sum on or before the later of:

(a) 60 Business Days from the date of termination; and
(b) 30 Business Days from the date on which that amount is determined and agreed (in writing) between the parties.
Guarantee and Indemnity - Sydney Growth Trains Project

Downer EDI Limited
Guarantor

Transport for NSW
TfNSW

Clayton Utz
Lawyers
Level 15 1 Bligh Street
Sydney NSW 2000
GPO Box 9806
Sydney NSW 2001
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www.claytonutz.com

Our reference 17948/80172419
Guarantee and indemnity

Date

Parties
Downer EDI Limited ABN 97 003 872 848 of T3, Triniti Business Campus, 39 Delhi Road, North Ryde NSW 2113 (Guarantor)

Transport for NSW ABN 18 804 239 602 of 18 Lee Street, Chippendale, NSW 2008 (TfNSW)

Background

A. TfNSW, RailCorp and the Supplier are parties to a delivery deed dated [insert date] (Delivery Deed) under which TfNSW has agreed to procure, and the Supplier has agreed to design, develop, manufacture, test, commission, supply and deliver new passenger rolling stock and other related assets, and a design and construct deed dated [insert date] (MF Works Deed) under which TfNSW has agreed to procure, and the Supplier has agreed to undertake design and construction of maintenance facility works.

B. This Deed sets out the terms on which the Guarantor gives a guarantee and indemnity in respect of the Guaranteed Money and the Supplier’s obligations to the Beneficiaries under the Project Agreements and TfNSW accepts the benefit of each guarantee, indemnity and other obligation of the Guarantor in this Deed in its own right and on behalf of each of the Beneficiaries as trustee and agent for each of the Beneficiaries.

Operative provisions

1. Definitions

1.1 Definitions and Interpretation

In this Deed:

Authorised Representative means a director or company secretary, or a person one party notifies to the other party as being authorised to act as its authorised representative for the purposes of the Project Agreements.

Beneficiary means TfNSW, RailCorp, the State and each of their Associates and Beneficiaries means all of them.

Delivery Deed has the meaning given in Paragraph A of the Background.

Event of Default means any event which constitutes a breach of, or is duly and properly declared to be an event of default (howsoever described) in a Project Agreement.

External Administrator means an administrator, controller or managing controller (each as defined in the Corporations Act), trustee, provisional liquidator, liquidator or any other person (however described) holding or appointed to an analogous office or acting or purporting to act in an analogous capacity.
**Guarantee** means a guarantee, indemnity, letter of credit, legally binding letter of comfort or other obligation of any kind:

(a) to provide funds (whether by the advance or payment of money, the purchase of or subscription for shares or other securities, the purchase of assets or services, or otherwise) for the payment or discharge of;

(b) to indemnify any person against the consequences of default in the payment of; or

(c) to be responsible for,

an obligation or monetary liability of another person or the assumption of any responsibility or obligation in respect of the solvency or financial condition of another person.

**Guarantee and Indemnity** means the guarantee and indemnity contained in this Deed.

**Guaranteed Money** means all money and amounts (in any currency) that the Supplier is, or may become liable at any time (presently, prospectively or contingently), to pay to or for the account of any Beneficiary (whether alone or not and in any capacity) under or in connection with a Project Agreement (including by way of interest, fees, costs, charges, expenses, duties, indemnities, Obligations, debts or damages and money which a person would be liable to pay but for an Insolvency Event in respect of that person).

**Insolvency Provision** means any Legal Requirement or principle of law or equity relating to insolvency, sequestration, liquidation or bankruptcy (including any Legal Requirement relating to the avoidance of conveyances in fraud of creditors or of preferences, and any Legal Requirement under which a liquidator or trustee in bankruptcy may set aside or avoid transactions), and any provision of any agreement, arrangement or scheme, formal or informal, relating to the administration of any of the assets of any person.

**Liquidation** means:

(a) a winding up, dissolution, liquidation, provisional liquidation, administration, bankruptcy or other proceeding for which an External Administrator is appointed, or an analogous or equivalent event or proceeding in any jurisdiction; or

(b) an arrangement, moratorium, assignment or composition with or for the benefit of creditors or any class or group of them.

**MF Works Deed** has the meaning given in Paragraph A of the Background.

**Obligations** means all the liabilities and obligations of the Supplier to the Beneficiaries under or arising out of or in any way in connection with a Project Agreement or the work to be carried out or performed by the Supplier under a Project Agreement, and includes any liabilities or obligations which:

(a) are liquidated or unliquidated;

(b) are present, prospective or contingent;

(c) are in existence before or come into existence on or after the date of this Deed;

(d) relate to the payment of money or the performance or omission of any act;

(e) sound in damages only; or

(f) accrue as a result of any Event of Default,
and irrespective of:

(g) whether the Supplier is liable or obligated solely, or jointly, or jointly and severally with another person;

(h) the circumstances in which the Beneficiaries come to be owed each liability or obligation and in which each liability or obligation comes to be secured by this Deed, including any assignment of any liability or obligation or of this Deed; or

(i) the capacity in which the Supplier and the Beneficiaries come to owe or be owed such liability or obligation,

and Obligation means any liability or obligation forming part of the Obligations.

Obligor means the Supplier and the Guarantor.

Power means any right, power, authority, discretion, remedy or privilege conferred on TfNSW or RailCorp under any Project Agreement by statute, by law or by equity.

Project Agreement means:

(a) this Deed;

(b) each document described as such in Part 2 of Schedule 1 of this Deed;

(c) any other document that the Guarantor and TfNSW agree is a 'Project Agreement'; and

(d) a document entered into or given under or in connection with, or for the purpose of amending or novating, any document referred to in paragraphs (a), (b) or (c) above.

RailCorp means the body corporate known as Rail Corporation New South Wales (ABN 59 325 778 353).

Security means a mortgage, charge, pledge, lien, hypothecation, guarantee (including this Deed), indemnity, letter of credit, letter of comfort, performance bond, contractual right of set-off or combination or other assurance against loss which secures the Guaranteed Money or the performance of any other Obligation, and whether existing at the date of this Deed or at any time in the future.

Specified Rate means the rate which is above the rate expressed as a percentage per annum:

(a) which is the average of the bid rates shown at approximately 10.15 am on reference rate page “BBSY” on the Reuters Monitor System on the day the relevant amount was due and payable for bank accepted bills having a tenor of 30 days; or

(b) if for any reason the rate referred to in paragraph (a) is no longer available or if there is no rate displayed for that period at that time, then the average of the buying rates quoted by 3 banks selected by TfNSW at or about 10.15 am on the relevant date referred to in paragraph (a) for bills accepted by such banks having a tenor of 30 days.

Supplier is the entity identified as such in Part 1 of Schedule 1 of this Deed.

1.2 Defined terms

Terms used in this Deed which are not otherwise defined will have the meaning given to them in the Delivery Deed.
1.3 Interpretation

In this Deed:

(a) headings and subheadings are for convenience only and do not affect interpretation,

and the following rules apply in interpreting this Deed, unless the context makes it clear that a rule is not intended to apply:

(b) a reference to a person includes an individual, the estate of an individual, a corporation, an authority or agency, an association or a joint venture (whether incorporated or unincorporated), a partnership, a trust and other entity;

(c) a reference to a party is to a party to this Deed or a reference to a party to another document includes that party's executors, administrators, successors and permitted assigns, including persons taking by way of novation;

(d) a reference to a document or instrument (including this Deed) is to that document or instrument as varied, novated, ratified or replaced from time to time;

(e) a reference to any Authority, institute, association or body is:

(i) if that Authority, institute, association or body is reconstituted, renamed or replaced or if the powers or functions of that authority, institute, association or body are transferred to another organisation, deemed to refer to the reconstituted, renamed or replaced organisation or the organisation to which the powers or functions are transferred, as the case may be; and

(ii) if that Authority, institute, association or body ceases to exist, deemed to refer to the organisation which serves substantially the same purposes or objects as that authority, institute, association or body;

(f) a reference to a statute includes its delegated legislation and a reference to a statute or delegated legislation or any section or provision of either of these includes:

(i) all ordinances, by-laws, regulations of and other statutory instruments (however described) issued under the statute or delegated legislation; and

(ii) any consolidations, amendments, re-enactments and replacements;

(g) a word importing the singular includes the plural (and vice versa), and a word indicating a gender includes every other gender;

(h) a reference to a party, clause, paragraph or schedule is to a party to, clause or paragraph of or schedule to, this Deed, and a reference to this Deed includes any schedules;

(i) if a party is obliged to do something it must do so at its own cost unless expressly provided otherwise in this Deed;

(j) any agreement, undertaking, representation, warranty or indemnity by two or more parties (including where two or more persons are included in the same defined term) binds them jointly and severally;

(k) any agreement, representation, warranty or indemnity in favour of two or more parties (including where two or more persons are included in the same defined term) is for the benefit of them jointly and severally;
(l) if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;

(m) the meaning of general words is not limited by specific examples introduced by including, for example or similar expressions;

(n) a reference to A$ , $A, dollar or $ is to Australian currency;

(o) a word or expression defined in the Corporations Act has the meaning given to it in the Corporations Act;

(p) a reference to time is to Sydney, Australia time;

(q) a month means a calendar month;

(r) an agreement includes any legally enforceable arrangement, understanding, undertaking or representation whether or not in writing;

(s) a reference to property or an asset includes any real or personal, present or future, tangible or intangible property or asset and any right, interest, revenue or benefit in, under or derived from the property or asset.

(t) no waiver of any breach of this Deed or of any of its terms will be effective unless the waiver is in writing and signed by the party against whom the waiver is claimed, and no waiver of any breach will operate as a waiver of any other breach or subsequent breach;

(u) unless stated otherwise, all interest, amounts in the nature of interest (including discount amounts) and fees are to be calculated on a daily basis and a year of 365 days; and

(v) an Event of Default subsists until either:

(i) remedied to TfNSW’s satisfaction before a Power relating to that Event of Default is exercised; or

(ii) waived by TfNSW in writing; and

(iii) no provision or expression is to be construed against a party on the basis that the party (or its advisers) was responsible for its drafting.

1.4 Business Day

If the day on or by which any sum is payable or anything is to be done under this Deed is not a Business Day, that sum will be paid or that thing must be done no later than the next Business Day.

1.5 Transfer of functions

The Guarantor:

(a) acknowledges that TfNSW or RailCorp may be reconstituted, renamed, dissolved, replaced or restructured and that some or all of the powers, functions, assets, liabilities or responsibilities of either of them may be transferred to or vested in another entity;

(b) agrees to do anything (including execute any document), and must procure that its Associates do anything (including execute any document), required to give full effect to any of the matters contemplated in clause 1.5(a); and
(c) shall have no claim or entitlement to payment of any costs arising from any of the above.

1.6 Nothing to affect rights

Nothing in this Deed or any other Project Agreement in any way limits, derogates from or affects any right, power, privilege or immunity in whatever form that TfNSW, RailCorp or any Authority or any other person has or may have under or by virtue of any law and no action for breach of this Deed or any Project Agreement will lie against TfNSW or any Beneficiary for the exercise of any such right, power, privilege or immunity.

2. Guarantee

2.1 Consideration

The Guarantor acknowledges:

(a) that TfNSW and RailCorp entered into the Project Agreements on the condition that the Guarantor guarantee the Supplier's performance of the provisions of the Project Agreements;

(b) that TfNSW holds on trust for the Beneficiaries the benefit of:

(i) each guarantee, indemnity and release given by the Guarantor under this Deed in favour of the Beneficiaries; and

(ii) each right in each Project Agreement to the extent that such right is expressly stated to be for the benefit of a Beneficiary;

(c) that the Beneficiaries rely on the Guarantee and Indemnity; and

(d) the existence of the trusts mentioned in 2.1(b),

and the Guarantor consents to:

(e) TfNSW exercising rights in relation to, or otherwise enforcing such guarantees, indemnities, releases and rights on behalf of the Beneficiaries as trustee and agent for each of the Beneficiaries; and

(f) the Beneficiaries exercising rights in relation, or otherwise enforcing the indemnities, releases and those rights as if they were a party to this Deed.

2.2 Guarantee

The Guarantor irrevocably and unconditionally guarantees to the Beneficiaries the due and punctual performance by the Supplier of all the Obligations.

2.3 Payment by Guarantor

If the Supplier does not pay the Guaranteed Money when due, the Guarantor must on demand pay to TfNSW (or to a nominee of TfNSW) the Guaranteed Money which is then due and unpaid or which later becomes due, owing or payable.

2.4 Perform Obligations

If the Supplier defaults in the performance or observance of any of the Obligations, the Guarantor must, in addition to its obligations under clause 2.3 of this Guarantee, on demand from time to time by TfNSW, immediately perform any of the Obligations then required to be
performed by the Supplier in the same manner as the Supplier is required to perform the Obligations.

2.5 **TfNSW holds benefit**

TfNSW accepts the benefit of the undertakings provided in this clause 2 in its own right and on behalf of each of the Beneficiaries as trustee and agent for each of the Beneficiaries.

3. **Indemnity**

(a) As a covenant separate and distinct from that contained in clause 2.2, the Guarantor irrevocably and unconditionally agrees to indemnify the Beneficiaries and at all times to keep the Beneficiaries indemnified against any loss or damage suffered by any Beneficiary arising out of or in connection with:

(i) any failure by the Supplier to perform the Obligations duly and punctually;

(ii) an Insolvency Event in respect of the Supplier; or

(iii) any obligation or liability that would otherwise form part of the Obligations being void, voidable or unenforceable against or irrecoverable from the Supplier for any reason, and whether or not any Beneficiary knew or ought to have known of that reason.

(b) TfNSW accepts the benefit of the undertakings provided in this clause 3 in its own right and on behalf of each of the Beneficiaries as trustee and agent for each of the Beneficiaries.

4. **Deferral of certain rights**

Until TfNSW has given a final discharge to the Guarantor, the Guarantor may not (either directly or indirectly) without TfNSW's prior written consent:

(a) claim, exercise or attempt to exercise a right of set-off, counterclaim or any other right or raise any defence:

(i) against the Supplier; or

(ii) which either Obligor may have against any Beneficiary,

which might reduce or discharge the Guarantor's liability under the Guarantee and Indemnity;

(b) claim or exercise a right of subrogation or contribution or otherwise claim the benefit of a Guarantee, irrespective of whether or not that Guarantee:

(i) relates to the Guaranteed Money;

(ii) is given by the Guarantor; or

(iii) is in favour or for the benefit of any Beneficiary,

and any money the Guarantor receives in breach of this clause 4(b) will be held on trust for the Beneficiaries and must be paid promptly to TfNSW to hold in its own right and on behalf of each of the Beneficiaries as trustee and agent for each of the Beneficiaries; or
(c) unless TfNSW has given a direction to do so (in which case the Guarantor must do so in accordance with the direction as trustee for TfNSW):

(i) prove, claim or exercise voting rights in the Supplier's Liquidation, or otherwise claim or receive the benefit of any distribution, dividend or payment arising out of the Supplier's Liquidation on any account; or

(ii) demand, or accept payment of, any money owed to the Guarantor by the Supplier,

and any such money it receives in excess of what may be or become Guaranteed Money will be held on trust for the Beneficiaries and must be paid promptly to TfNSW to hold in its own right and on behalf of each of the Beneficiaries as trustee and agent for each of the Beneficiaries.

5. Prove in Liquidation

The Guarantor irrevocably authorises TfNSW (in its own right and on behalf of each of the Beneficiaries as trustee and agent for each of the Beneficiaries) and each of TfNSW's Authorised Representatives to prove in the Liquidation of the Supplier for all money that the Guarantor can claim against the Supplier on any account. TfNSW need only account to the Guarantor for dividends it receives in excess of the Guaranteed Money, without interest.

6. Nature and preservation of liability

6.1 Liability as guarantor and indemnifier

A reference in this Deed to the obligations or liabilities of the Guarantor is a reference to the Guarantor's obligations or liabilities as either guarantor or indemnifier (or both) under this Deed. The use of the expression "Guarantor" in this Deed in relation to a party must not be construed as diminishing that party's obligations as an indemnifier under this Deed.

6.2 Absolute liability

(a) The liability of the Guarantor under this Deed is absolute and is not subject to the performance of any condition precedent or subsequent by the Supplier or the Guarantor.

(b) This Deed binds each person who has executed it, notwithstanding:

(i) any person, whether named as a party or not, and whether or not that person was intended to become a "Guarantor", not executing this Deed or not becoming a "Guarantor" or not otherwise being bound by this Deed;

(ii) the execution of this Deed by any person being defective, invalid, forged or irregular in any way; or

(iii) this Deed being or becoming not binding, unenforceable, void or voidable against any other person.
6.3 **Unconditional liability**

The liability of the Guarantor under this Deed will not be affected by any act, omission, matter or thing which, but for this clause 6.3, might operate in law or in equity to release the Guarantor from that liability or to reduce the Guarantor’s liability under this Deed, including any of the following:

(a) the occurrence before, on or at any time after the date of this Deed, of any Insolvency Event in relation to the Supplier or the Guarantor;

(b) the receipt by a Beneficiary of any payment, dividend or distribution under any Insolvency Provision in relation to the Supplier or the Guarantor;

(c) the occurrence of any Event of Default;

(d) a Project Agreement or any payment or other act, the making or doing of which would otherwise form part of the Obligations being or becoming or being conceded to be frustrated, illegal, invalid, void, voidable, unenforceable or irrecoverable in whole or in part for any reason whether past, present or future;

(e) TfNSW accepting or declining to accept any Security from any person at any time;

(f) any person granting time, waiver or other indulgence or concession to, or making any composition or compromise with, the Supplier or the Guarantor;

(g) any person not exercising or delaying (whether deliberately, negligently, unreasonably or otherwise) in the exercise of any remedy or right it has for the enforcement of a Project Agreement or any Obligation;

(h) any laches, acquiescence or other act, neglect, default, omission or mistake by TfNSW or RailCorp;

(i) the determination, rescission, repudiation or termination, or the acceptance of any of the foregoing, by TfNSW, RailCorp, the Supplier or the Guarantor of a Project Agreement or any Obligation;

(j) any variation or alteration to, or any substitution of, a Project Agreement or any Obligation, whether or not that variation, alteration or substitution is substantial or material, or imposes any additional liability on or disadvantages the Supplier or the Guarantor;

(k) the full, partial or conditional release or discharge by TfNSW or RailCorp or by operation of law, of the Supplier or the Guarantor from a Project Agreement or any Obligation;

(l) any change in membership (whether by death or retirement of an existing member, admission of a new member, or otherwise) or in the name of any partnership, firm or association in which the Supplier or the Guarantor is a member;

(m) the Guaranteed Money not being recoverable or the liability of an Obligor or any other person to any Beneficiary ceasing or reducing (including due to a release or discharge by any Beneficiary under the terms of any composition or arrangement with the creditors of the Beneficiary or by law);

(n) any Project Agreement not being executed by, or binding against, the Supplier;

(o) the transfer, assignment or novation by TfNSW, RailCorp, the Supplier or the Guarantor of all or any of its rights or obligations under a Project Agreement or under any other Obligation;

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any failure by TfNSW, RailCorp or another Beneficiary to disclose to the Guarantor any material or unusual fact, circumstance, event or thing known to, or which ought to have been known by, TfNSW, RailCorp or another Beneficiary relating to or affecting the Supplier or the Guarantor at any time before or during the currency of this Deed, whether prejudicial or not to the rights and liabilities of the Guarantor and whether or not TfNSW, RailCorp or another Beneficiary was under a duty to disclose that fact, circumstance, event or thing to the Guarantor or to the Supplier;

TfNSW, RailCorp or another Beneficiary agreeing with the Supplier or the Guarantor not to sue, issue process, sign or execute judgment, commence proceedings for bankruptcy or liquidation, participate in any administration, scheme or deed of arrangement or reconstruction, prove in any bankruptcy or liquidation, or do anything else in respect of the liability of the Supplier or the Guarantor;

the provisions of section 440J of the Corporations Act operating to prevent or delay:

(i) the enforcement of this Deed against any Guarantor; or

(ii) any claim for contribution against any Guarantor; or

a disclaimer of any contract or property (including the Contract) made by a liquidator of the Supplier pursuant to Part 5.6 Division 7A of the Corporations Act 2001 or other applicable laws.

6.4 No merger

(a) This Deed is in addition to and does not merge with, postpone, lessen or otherwise prejudicially affect a Project Agreement or any other Power of TfNSW or RailCorp.

(b) TfNSW will hold any judgment or order obtained by it against any person in respect of the Guaranteed Money or the Obligations collaterally with this Deed, and this Deed will not merge in that judgment or order.

6.5 No obligation to gain consent

No consent is required from any Guarantor nor is it necessary for the Guarantor to or be made aware of any event referred to in clause 6.3, any transaction between TfNSW, RailCorp and the Supplier, or any particulars concerning any Obligation.

6.6 Appropriation

(a) TfNSW is under no obligation to marshal or appropriate in favour of any Guarantor, or to exercise, apply, transfer or recover in favour of any Guarantor, any Security or any funds or assets that TfNSW holds, has a claim on, or has received or is entitled to receive, but may do so in the manner and order as TfNSW determines in its absolute discretion.

(b) TfNSW may hold in a suspense account (without liability to pay interest) any money which it receives from the Guarantor, or which it receives on account of the Guarantor’s liability under this Deed, and which TfNSW may, at its discretion, appropriate in reduction of the Guarantor’s liability under this Deed.

6.7 Void or voidable transactions

If:

(a) TfNSW or any other Beneficiary has at any time released or discharged:

(i) the Guarantor from its obligations under this Deed; or
(ii) any assets of the Guarantor from a Security,

in either case in reliance on a payment, receipt or other transaction to or in favour of TfNSW; or

(b) any payment or other transaction to or in favour of TfNSW or any other Beneficiary has the effect of releasing or discharging:

(i) the Guarantor from its obligations under this Deed; or

(ii) any assets of the Guarantor from a Security;

and

(c) that payment, receipt or other transaction is subsequently claimed by any person to be void, voidable or capable of being set aside for any reason, including under an Insolvency Provision or under the general law; and

(d) that claim is upheld or is conceded or compromised by TfNSW or any other Beneficiary,

then:

(e) the relevant Beneficiary will immediately become entitled against the Guarantor to all rights (including under any Security) as it had immediately before that release or discharge;

(f) the Guarantor must immediately do all things and execute all documents as the relevant Beneficiary may reasonably require to restore to the relevant Beneficiary all those rights; and

(g) the Guarantor must indemnify the relevant Beneficiary against costs, losses and expenses suffered or incurred by the relevant Beneficiary in or in connection with any negotiations or proceedings relating to the claim or as a result of the upholding, concession or compromise of the claim.

6.8 No set-off, counterclaim

The liability of the Guarantor under this Deed will not be reduced or avoided by any set-off or counterclaim available to the Supplier against any Beneficiary.

6.9 Claim on the Guarantor

TfNSW is not required to make any claim or demand on the Supplier, or to enforce a Project Agreement, or any other right, power or remedy against the Supplier, before making any demand or claim on the Guarantor.

6.10 No representation by Principal etc.

The Guarantor acknowledges that it has not entered into this Deed as a result of any representation, promise, statement or inducement to the Guarantor by or on behalf of TfNSW (or any other Beneficiary), the Supplier or any other person.
7. Representations and Warranties

7.1 General representations and warranties

The Guarantor or, if there is more than one Guarantor, each Guarantor represents and warrants to the Beneficiaries that:

(a) this Deed constitutes a valid and legally binding obligation of the Guarantor in accordance with its terms;

(b) the execution, delivery and performance of this Deed by the Guarantor does not breach any law binding on it, or any document or agreement to which the Guarantor is a party or which is binding on it or any of its assets;

(c) no litigation, arbitration, mediation, conciliation, criminal or administrative proceedings are current, pending or, to the knowledge of the Guarantor, threatened, which, if adversely determined, may have a material adverse effect on the ability of the Guarantor to perform its obligations under this Deed;

(d) all information relating to the Guarantor provided to any Beneficiary in connection with this Deed is true in all material respects and is not, by omission or otherwise, misleading in any material respect; and

(e) the Guarantor has not entered into this Deed as the trustee of any trust.

7.2 Corporate representations and warranties

The Guarantor, or if there is more than one Guarantor, each Guarantor, that is or purports to be a body corporate, further represents and warrants to the Beneficiaries that:

(a) it is duly incorporated and has the corporate power to own its property and to carry on its business as is now being conducted;

(b) the execution, delivery and performance of this Deed does not breach the constitution of the Guarantor and, if the Guarantor or any of its subsidiaries is listed on the Australian Stock Exchange Limited or on any other stock exchange, those listing requirements or business rules;

(c) it has the power, and has taken all corporate and other action required, to enter into this Deed and to authorise the execution and delivery of this Deed and the performance of its obligations under this Deed; and

(d) the Guarantor has filed all corporate notices and effected all registrations with the Australian Securities and Investments Commission and all of those filings and registrations are current, complete and accurate to the extent they are material to the performance of the obligations of the Guarantor under this Deed.

7.3 Representations and warranties repeated

Each representation and warranty in this Deed will be repeated on each day whilst any of the Guaranteed Money remains outstanding (whether or not then due for payment) with reference to the facts and circumstances then subsisting, as if made on each such day.
8. Payments

8.1 On demand

All money payable by the Guarantor under this Deed must be paid by the Guarantor on demand by TfNSW in immediately available funds to the account and in the manner notified by TfNSW to the Guarantor.

8.2 Payment in gross

All money received or recovered by TfNSW on account of the Guaranteed Money will be treated as payments in gross without any right on the part of the Guarantor to claim the benefit of any money received or recovered by TfNSW or any Security, until TfNSW has been paid 100 cents in the dollar in respect of the Guaranteed Money.

8.3 Interest

As a liability separate and distinct from the Guarantor's liability under clauses 2 and 3, the Guarantor must on demand by TfNSW pay interest on all amounts due and payable by it and unpaid under or in respect of this Deed. Interest will accrue on those amounts from day to day from the due date up to the date of actual payment, before and (as a separate and independent obligation) after judgment, at the Specified Rate for successive 90 day interest periods commencing on the date of default and, if not paid when due, will itself bear interest in accordance with this clause 8.3, provided that interest will not be payable under this clause to the extent that interest for late payment to TfNSW is incorporated into the calculation of the amount payable under a Project Agreement.

8.4 Merger

If the liability of the Guarantor to pay to TfNSW any money under this Deed becomes merged in any judgment or order, then, as an independent obligation, the Guarantor will pay interest on the amount of that money at the rate which is the higher of that payable under clause 8.3 and that fixed by or payable under the judgment or order.

8.5 No set-off or deduction

All payments by the Guarantor to TfNSW under this Deed must be:

(a) free of any set-off or counterclaim; and

(b) without deduction or withholding for or on account of any present or future Taxes, unless the Guarantor is compelled by law to make any deduction or withholding.

If the Guarantor is compelled by law to make any deduction or withholding for or on account of any present or future Taxes (not being Taxes on the overall net income of TfNSW), then the Guarantor must:

(c) pay to TfNSW any additional amounts necessary to enable the relevant Beneficiary to receive (after all deductions and withholdings for those Taxes) a net amount equal to the full amount which would otherwise be payable to that Beneficiary if no deduction or withholding was required to be made;

(d) promptly (and within the time prescribed by law) pay to the relevant taxing authority the amount of those Taxes which it is compelled by law to deduct or withhold, and indemnify TfNSW for any Taxes and interest or penalties to which any Beneficiary may become liable consequent on the failure of the Guarantor to pay those Taxes; and
8.6 Certificate of TfNSW

A certificate in writing of TfNSW certifying the amount payable by the Supplier or the Guarantor to TfNSW or stating any other act, matter or thing relating to this Deed or the Delivery Deed will be prima facie evidence of the contents of the certificate.

8.7 Currency indemnity

(a) The Australian Dollar is the currency of payment by the Guarantor under or in connection with this Deed, except that payment by the Guarantor of or in relation to any Obligation which is denominated in a foreign currency must be made in that foreign currency.

(b) If for any reason any amount payable by the Guarantor under or in connection with this Deed is received by TfNSW in a currency (Payment Currency) other than the currency (Agreed Currency) in which that amount is required to be paid under this Deed (whether as a result of any judgment or order, the liquidation of the Guarantor or otherwise), and the amount obtained (net of charges) by TfNSW on its conversion of the amount of the Payment Currency received into the Agreed Currency at market rates prevailing at or about the time of its receipt of the amount of the Payment Currency is less than the amount payable under this Deed in the Agreed Currency, then the Guarantor will, as an independent and additional obligation, indemnify TfNSW and the ultimate receiving Beneficiary (where applicable) for that deficiency and for any loss sustained as a result of that deficiency.

9. Expenses and stamp duties

9.1 Expenses

The Guarantor must on demand reimburse the Beneficiaries for and keep the Beneficiaries indemnified against all expenses, including legal fees, costs and disbursements on a solicitor/own client basis (or on a full indemnity basis, whichever is the higher) assessed without the necessity of taxation, incurred by any Beneficiary in connection with:

(a) any consent, agreement, approval, waiver, amendment to or discharge of this Deed; and

(b) any exercise, enforcement or preservation, or attempted exercise, enforcement or preservation, of any rights under this Deed.

9.2 Stamp duties

(a) The Guarantor must pay all stamp duties, transaction, registration and similar Taxes, including fines and penalties, financial institutions duty and debits tax, which may be payable to or required to be paid by any appropriate authority, or determined to be payable in connection with the execution, delivery, performance or enforcement of this Deed or any payment, receipt or other transaction contemplated by this Deed; and

(b) the Guarantor must indemnify the Beneficiaries against any loss or liability incurred or suffered by it as a result of the delay or failure by the Guarantor to pay Taxes.
9.3 **Goods and Services Tax**

If a Beneficiary is or becomes liable to pay any GST (including any penalty) in respect of any supply it makes under, or in connection with, this Deed (GST Liability) then:

(a) to the extent that an amount is payable by the Guarantor to TfNSW under this Deed for that supply - the amount will be increased by the full amount of the GST Liability; and

(b) otherwise - the Guarantor will indemnify and keep the Beneficiaries indemnified for the full amount of the GST Liability.

10. **Assignment**

10.1 **By Guarantor**

The Guarantor may not assign, transfer or otherwise deal with its rights, interests or obligations under this Deed without TfNSW’s prior written consent.

10.2 **By TfNSW**

TfNSW may assign, transfer, novate or otherwise deal with all or any of its rights and obligations under the Project Agreements, and may disclose to a proposed assignee or transferee any information in TfNSW’s possession relating to the Guarantor, in each case without the consent of any person.

11. **TfNSW’s role as trustee and agent**

(a) TfNSW’s role as trustee and agent for the Beneficiaries is limited solely to those express rights and obligations provided in this Deed.

(b) Except as expressly required in this Deed, any dealings which TfNSW has with any other party, including the Obligors, is in its own right and not as agent of the Beneficiaries. No Obligor can rely on any act or omission of any Beneficiary as binding any other Beneficiary, except as expressly provided in this Deed.

(c) Except to the extent expressly required by law, and taking account of the limited nature of TfNSW’s agency contemplated in this Deed, nothing in this Deed constitutes TfNSW acting as a trustee or fiduciary of any other person.

12. **Governing law, jurisdiction and arbitration**

12.1 **Governing law**

This Deed and where applicable, the arbitration reference contained in clause 12.3, is governed by and must be construed according to the laws of New South Wales.

12.2 **Jurisdiction**

(a) This clause 12.2 only applies where clauses 12.3 to 12.9 do not apply.

(b) The Guarantor irrevocably submits to the non-exclusive jurisdiction of the courts and appellate courts of New South Wales, and the courts competent to determine appeals from those courts, with respect to any proceedings which may be brought relating in any way to this Deed.

(c) The Guarantor irrevocably waives any objection it may now or in the future have to the venue of any proceedings, and any claim it may now or in the future have that
any proceeding has been brought in an inconvenient forum, where that venue is a venue described in clause 12.2(b).

12.3 Reference to arbitration

(a) Clauses 12.3 to 12.9 will only apply where the Guarantor is a foreign company (as defined in section 9 of the Corporations Act).

(b) Any controversy, claim or dispute directly or indirectly based upon, arising out of, relating to or in connection with this Deed (including but not limited to any question relating to the existence, validity or termination of this Deed) shall be referred to and finally resolved by arbitration in accordance with the arbitration rules of the Australian Centre for International Commercial Arbitration (known as the ACICA Arbitration Rules).

(c) The seat of the arbitration will be Sydney.

(d) The number of arbitrators will be one.

(e) The language of the arbitration will be English.

12.4 Powers of the arbitrator

The arbitral tribunal has the power to grant all legal, equitable and statutory remedies, except punitive damages.

12.5 Consolidation

The parties agree that section 24 of the International Arbitration Act 1974 (Cth) will apply in respect of consolidations.

12.6 Joinder

The arbitral tribunal has the power, on the application of any party to this Deed, to allow a third party who the arbitrator considers has a sufficient interest in the outcome of the arbitration to be joined in the arbitration as a party. Each party to this Deed hereby consents to such joinder. In the event of such joinder of parties in the arbitration, the arbitrator has the power to make a single final award, or separate awards, in respect of all parties so joined in the arbitration.

12.7 Arbitration – Related arbitral proceedings

Where any claim or dispute is to be resolved by arbitration in accordance with clause 12.3(b) and that claim or dispute involves issues that are substantially the same as, or connected with issues raised in a related dispute or difference between TfNSW or RailCorp and any other party or parties involved in the Project, and arbitral proceedings have already commenced in respect of the related dispute or disputes, TfNSW may, in its absolute discretion:

(a) join the dispute to those existing arbitral proceedings by giving notice to all parties concerned and the arbitral tribunal, and the arbitral tribunal in such proceedings will have the power to make such directions as are necessary to join the parties and the cause of action to enable the arbitral tribunal to make an award in respect of the dispute; or

(b) join the related dispute or disputes to the existing arbitral proceedings concerning the dispute by giving notice to all parties concerned and the arbitral tribunal, and such parties will be considered parties to the existing arbitral proceedings and the ACICA Arbitration Rules or ACICA Expedited Arbitration Rules, and such rules will, to the extent possible, be modified to accommodate this, and the arbitral tribunal in such proceedings will have the power to make such directions as are necessary to
join the parties and the cause or causes of action to enable the arbitral tribunal to make an award in respect of the dispute and the related dispute or disputes.

12.8 Exclusion from determination or award

(a) The powers conferred and restrictions imposed on a court by Part 4 of the Civil Liability Act 2002 (NSW) are not conferred on an arbitral tribunal appointed in accordance with clause 12.3.

(b) The arbitral tribunal has no power to make a binding or non-binding determination or any award in respect of a dispute by applying or considering the provisions of Part 4 of the Civil Liability Act 2002 (NSW) (and any equivalent statutory provisions in any other state or territory) which might, in the absence of this provision, have applied to any dispute referred to the arbitral tribunal.

12.9 Award final and binding

Any award will be final and binding upon the parties.

13. Notices, demands and communications

13.1 How to give a notice

(a) Wherever referred to in this clause, Notice means each communication (including each notice, consent, approval, request, direction and demand) under or in connection with this Deed.

(b) Each Notice must:

(i) be in writing;

(ii) be:

A. in the case of a Notice from the Guarantor, addressed to TfNSW's Representative; or

B. in the case of a Notice from TfNSW, addressed to the Guarantor;

(iii) be signed by the party making it or (on that party's behalf) by the solicitor for, or any attorney, director, secretary or authorised agent of, that party; and

(iv) be delivered or posted to the relevant address shown below (or to any new address notified by the intended recipient):

TfNSW

Name: TfNSW, a New South Wales Government agency
Address: Level 2, 1 Prince Albert Road, Sydney NSW 2000
For the attention of: Project Director, Sydney Growth Trains

Guarantor

Name: Downer EDI Limited
Address: T3, Triniti Business Campus 39 Delhi Road, North Ryde NSW 2113
For the attention of: The Company Secretary
A notice, consent or other communication under this Deed is only effective if it is:

(i) in writing, signed by or on behalf of the person giving it;

(ii) addressed to the person to whom it is to be given; and

(iii) sent or delivered in one of the following ways:

A. delivered or sent by pre-paid mail (by airmail, if the addressee is overseas) to that person's address; or

B. sent by fax to that person's fax number and the machine from which it is sent produces a report that states that it was sent in full.

13.2 When a notice is received

A communication is taken to be received by the addressee:

(a) (in the case of prepaid post sent to an address in the same country) two Business Days after the date of posting;

(b) (in the case of international post) seven Business Days after the date of posting; and

(c) (in the case of delivery by hand) on delivery,

provided that if the communication would be deemed to be received on a day which is not a Business Day or after 5.00pm on a Business Day, it is deemed to be received at 9.00am on the next Business Day.

14. Miscellaneous

14.1 Continuing obligation

This Deed is a continuing obligation notwithstanding any termination by the Guarantor, settlement of account, intervening payment, express or implied revocation or any other matter or thing, and TfNSW and the Beneficiaries will continue to be entitled to the benefit of this Deed as regards the due and punctual performance of all the Obligations until a final discharge has been given to the Guarantor.

14.2 Further assurance

The Guarantor must immediately on the request of TfNSW, and at the cost of the Guarantor, do and perform all further acts and things and execute and deliver all further documents as TfNSW reasonably requires, or as are required by law, to perfect or to give effect to the rights and powers of TfNSW created, or intended to be created, by this Deed.

14.3 Form of demand

A demand on the Guarantor for payment under this Deed may be in the form and contain any information as TfNSW determines, provided it includes particulars of the relevant default in the due and punctual performance of the Obligations.
14.4 **Entire agreement**

This Deed constitutes the entire agreement and understanding between the parties in relation to the subject matter of this Deed and will take effect according to its tenor despite, and supersedes:

(a) any prior agreement (whether in writing or not), negotiations and discussions between the parties in relation to the subject matter of this Deed; or

(b) any correspondence or other documents relating to the subject matter of this Deed that may have passed between the parties prior to the date of this Deed and that are not expressly included in this Deed.

14.5 **Joint and several liability**

The obligations of the Guarantor, if more than one person, under this Deed, are joint and several. Each person constituting the Guarantor acknowledges and agrees that it will be causally responsible for the acts and omissions (including breaches of this Deed) of the other as if those acts or omissions were its own and TfNSW may proceed against any or all of them. This Deed binds each person who signs as a "Guarantor" even if another person who was intended to become a "Guarantor" does not become a "Guarantor" or is not bound by this Deed.

14.6 **Severance**

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

(a) the legality, validity or enforceability in that jurisdiction of any other provision of this Deed; or

(b) the legality, validity or enforceability under the law of any other jurisdiction of that or any other provision of this Deed.

14.7 **Remedies cumulative**

Each Power is cumulative and in addition to each other Power available to TfNSW.

14.8 **Principal and independent obligation**

Each guarantee, indemnity and other obligation of the Guarantor in this Deed is:

(a) a principal and independent obligation and is not ancillary, collateral or limited by reference to any other obligation and, without limiting in any way the operation of any of the other provisions of this Deed, any limitation on the liability of the Guarantor which would otherwise arise by reason of its status as a guarantor, co-guarantor, indemnifier or co-indemnifier, is negatived; and

(b) is in addition to, and not prejudiced by, any other Guarantee now or later held by any Beneficiary.

14.9 **Waiver**

(a) Failure to exercise or enforce or a delay in exercising or enforcing or the partial exercise or enforcement of any right, power or remedy provided by law or under this Deed by TfNSW will not in any way preclude, or operate as a waiver of, any exercise or enforcement, or further exercise or enforcement of that or any other right, power or remedy provided by law or under this Deed.
(b) Any waiver or consent given by TfNSW under this Deed will only be effective and binding on TfNSW if it is given or confirmed in writing by TfNSW.

(c) No waiver by TfNSW of:

(i) a breach of any term of this Deed; or

(ii) any other failure by the Guarantor to comply with a requirement of this Deed,

will operate as a waiver of another breach of that term or failure to comply with that requirement or of a breach of any other term of this Deed or failure to comply with any other requirement of this Deed.

14.10 Consents

Any consent of TfNSW referred to in, or required under, this Deed may be given or withheld, or may be given subject to any conditions, as TfNSW (in its absolute discretion) thinks fit, unless this Deed expressly provides otherwise.

14.11 Vienna Convention

The United Nations Convention on Contracts for the International Sale of Goods does not apply to this Deed.

14.12 Moratorium legislation

To the fullest extent permitted by law, the provisions of all laws operating directly or indirectly to lessen or affect in favour of the Guarantor any obligation under this Deed, or to delay or otherwise prevent or prejudicially affect the exercise of any Power, are expressly waived.

14.13 Variations

This Deed may only be varied by a document signed by or on behalf of both TfNSW and the Guarantor.

14.14 Provisions limiting or excluding liability

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

14.15 Set-off

(a) TfNSW may (without prior notice at any time) set off any obligation then due and payable by the Guarantor under this Deed against any obligation (whether or not due and payable) by TfNSW to the Guarantor, regardless of the place or currency of payment of either obligation or the office or branch through which either obligation is booked. If the obligations are in different currencies, TfNSW may convert either obligation into the currency of the other obligation at a market rate of exchange determined by it for the purpose of the set-off. If either obligation is unliquidated or unascertained, TfNSW may effect the set off in an amount estimated by it in good faith to be the amount of that obligation.

(b) TfNSW is not obliged to exercise any right of set off pursuant to paragraph (a), which is in addition to its other rights of combination of account, set-off or lien (by contract or operation of law).

(c) On its exercise of any set off pursuant to paragraph (a), against the Guarantor, TfNSW will promptly notify the Guarantor of details of that set-off.
14.16 Counterparts

(a) This Deed need not be executed by TfNSW.

(b) If the Guarantor is more than one person, a Guarantor may execute this Deed in one or more separate counterparts, each of which constitutes the deed of that Guarantor.

14.17 Confidentiality

(a) Subject to clause 14.17(b), each party must keep the terms of this Deed confidential.

(b) A party may make any disclosure in relation to this Deed:

(i) to a professional adviser, financial adviser, insurer, rating agency, financier or auditor if that person is obliged to keep the information disclosed confidential;

(ii) to the extent required to comply with any law, a requirement of a regulatory body (including any relevant stock exchange) or pursuant to an administrative request or Parliamentary requirement;

(iii) to any of its employees or officers to whom it is necessary to disclose the information;

(iv) in connection with any legal or arbitral proceeding under or in relation to this Deed;

(v) to obtain the consent of a third party to a term of, or to an act under, this Deed;

(vi) to a "related body corporate", as defined in section 9 of the Corporations Act, as long as it advises that related body corporate of the confidential nature of the terms of this Deed;

(vii) (in the case of TfNSW) to a potential assignee provided they agree to keep the terms of this Deed confidential;

(viii) (in the case of TfNSW) to a related agency or to its responsible Minister;

(ix) with the prior consent of the other party to this Deed; or

(x) if the information disclosed has come into the public domain through no fault of the party (or its employees, officers or related bodies corporate) making the disclosure.
Schedule 1

Part 1 - Supplier

Name: Downer EDI Rail Pty Limited
ABN: 92 000 002 031
Address: T3, Triniti Business Campus, 39 Delhi Road, North Ryde NSW 2113

Part 2 – Project Agreements

1. The Delivery Deed;
2. The MF Works Deed;
3. each of the following documents as defined in the Delivery Deed:
   (a) Collateral Warranty Deed Poll executed or required to be executed under the Delivery Deed;
   (b) the Escrow Agreement; and
   (c) each Significant Contractor Escrow Agreement.
Signed, sealed and delivered for and on behalf of Downer EDI Limited (ABN 97 003 872 848) by its attorneys under a power of attorney dated in the presence of:

Signature of witness

Full name of witness

Signature of witness

Full name of witness

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

Full name of witness (print)

Position held

Signature of authorised delegate

Full name of authorised delegate (print)

Position held

Sydney Growth Trains
(ISD-16-5312A)
Schedule 17 – Forms of Collateral Warranty Deed Poll

Part A – Form of Subcontractor Collateral Warranty Deed Poll to be given by CRRC Changchun Railway Vehicles Co. Ltd

Collateral Warranty Deed Poll

Sydney Growth Trains Project

CRRC Changchun Railway Vehicles Co. Ltd (Subcontractor)
Details

Date

This Deed Poll is made by:

Name: CRRC Changchun Railway Vehicles Co. Ltd
Short form name: Subcontractor
Notice details: No.2001 Changke Road, Changchun, Jilin Province, the People's Republic of China

In favour of:

Name: Transport for NSW (ABN 18 804 239 602)
Short form name: TfNSW
Notice details: Level 2, 1 Prince Albert Road, Sydney NSW 2000

Background

A. TfNSW, RailCorp and the Supplier are parties to a delivery deed dated [Insert date] (Delivery Deed) under which TfNSW has agreed to procure, and the Supplier has agreed to design, develop, manufacture, test, commission, supply and deliver new passenger rolling stock and other related assets.

B. The Supplier and the Subcontractor have entered into or will enter into the Subcontract.

C. The Subcontractor has agreed that it will, in addition to its obligations to the Supplier under the Subcontract, owe obligations directly to TfNSW and RailCorp as set out in this Deed Poll.

Terms

1. Defined terms & interpretation

1.1 Defined terms

In this Deed Poll:

Beneficiary means TfNSW, RailCorp, the State, the Operator, each other NSW Rail Entity and each of their Associates and Beneficiaries means all of them.

New Subcontract means the new Subcontract that comes into existence between the Subcontractor and the Suitable Substitute Supplier pursuant to clause 3.1(c).

Notice of Novation has the meaning given in clause 3.1(a).
Novation Deed means a deed in the form of Schedule 1.

Novation Date has the meaning given in clause 3.1(b).

Power means any right, power, authority, discretion, remedy or privilege, whether express or implied conferred on any person.

Delivery Deed has the meaning given in Paragraph A of the Background and includes all schedules, exhibits, attachments, appendices and annexures to that document, including the SPR.

RailCorp means the body corporate known as Rail Corporation New South Wales which was constituted under the Transport Administration Act 1988 (NSW) and all present and future iterations of that body corporate which continue to exist under that Act or any other legislation or another entity appointed to undertake some or all of the functions of that body.

Secondary Subcontractor means the party who made and executed the Secondary Subcontractor Collateral Warranty Deed Poll and who is a party to a subcontract with the Subcontractor (but does not include the Supplier).


Secondary Subcontractor Novation Deed means a deed in the form of Schedule 1 to the Secondary Subcontractor Collateral Warranty Deed Poll.

Subcontract means the subcontract entered into between the Supplier and the Subcontractor dated on or about the date of this Deed Poll.

Subcontract Deliverable means any works, asset, product, materials, documentation or any other item or service to be provided by or on behalf of the Subcontractor pursuant to the Subcontract.

Suitable Substitute Party has the same meaning as defined in the Secondary Subcontractor Collateral Warranty Deed Poll.

Suitable Substitute Supplier means a person nominated by TfNSW or RailCorp who:

(a) has the legal capacity, power and authority to become a party to and perform the obligations of the Supplier under the Subcontract; and

(b) employs persons having the appropriate qualifications, experience and technical competence and having the resources available to it (including committed financial resources and sub contracts) which are sufficient to enable it to perform the obligations of the Supplier under the Subcontract.

Supplier means Downer EDI Rail Pty Limited ABN 92 000 002 031.

1.2 Interpretation

In this Deed Poll:

(a) headings and subheadings are for convenience only and do not affect interpretation,

and the following rules apply in interpreting this Deed Poll unless the context makes it clear that a rule is not intended to apply:

(b) person includes an individual, the estate of an individual, a corporation, an authority or agency, an association or a joint venture (whether incorporated or unincorporated), a partnership, a trust and other entity;
a reference to a party to a document includes that party's executors, administrators, successors and permitted assigns, including persons taking by way of novation;

a reference to a document or instrument (including this Deed Poll) is to that document or instrument as varied, novated, ratified or replaced from time to time;

a reference to any Authority, institute, association or body is:

(i) if that Authority, institute, association or body is reconstituted, renamed or replaced or if the powers or functions of that Authority, institute, association or body are transferred to another organisation, deemed to refer to the reconstituted, renamed or replaced organisation or the organisation to which the powers or functions are transferred, as the case may be; and

(ii) if that Authority, institute, association or body ceases to exist, deemed to refer to the organisation which serves substantially the same purposes or object as that authority, institute, association or body;

a reference to a statute includes its delegated legislation and a reference to a statute or delegated legislation or any section or provision of either of these includes:

(i) all ordinances, by-laws, regulations of and other statutory instruments (however described) issued under the statute or delegated legislation; and

(ii) any consolidations, amendments, re-enactments and replacements;

a word importing the singular includes the plural (and vice versa), and a word indicating a gender includes every other gender;

a reference to a clause or schedule is a reference to a clause or schedule of this Deed Poll;

if a party is obliged to do something it must do so at its own cost unless expressly provided otherwise in this Deed Poll;

any agreement, representation, warranty or indemnity by two or more parties (including where two or more persons are included in the same defined term) binds them jointly and severally;

any agreement, representation, warranty or indemnity in favour of two or more parties (including where two or more persons are included in the same defined term) is for the benefit of them jointly and severally;

if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;

the meaning of general words is not limited by specific examples introduced by including, for example or similar expressions;

a word or expression defined in the Corporations Act has the meaning given to it in the Corporations Act;

a reference to time is to Sydney, Australia time; and

a month means a calendar month.
1.3 Delivery Deed
The Subcontractor acknowledges that it has been provided with and has reviewed a [redacted] copy of the Delivery Deed.

1.4 Terms defined in Delivery Deed
Subject to clause 1.1 of this Deed Poll which, for the purpose of interpreting this Deed Poll, takes precedence to the extent of any inconsistency (notwithstanding any contrary provision of any Project Agreement), terms defined in the Delivery Deed have the same meanings when used in this Deed Poll.

1.5 Rights and benefits of TfNSW
The rights and benefits of TfNSW provided for under this Deed Poll are intended to be for, and are held by TfNSW for, the benefit of TfNSW in its own right to support the discharge of its duties in relation to, and liabilities arising from, the performance of the Operations Functions, and also for the benefit of:

(a) RailCorp as the owner of the Assets; and
(b) the Operator and the other NSW Rail Entities to support the discharge of their respective duties in relation to and liabilities arising from performance of the Operations Functions.

1.6 Benefits held on trust
The Subcontractor acknowledges:

(a) that TfNSW holds on trust for the Beneficiaries the benefit of:
   (i) each indemnity and release given by the Subcontractor under this Deed Poll in favour of the Beneficiaries; and
   (ii) each right of TfNSW under this Deed Poll;

(b) the existence of the trusts mentioned in clause 1.6(a); and

(c) that the Beneficiaries rely on those rights granted on their behalf which are mentioned in clause 1.6(a),

and consents to:

(d) TfNSW exercising rights in relation to, or otherwise enforcing such indemnities, releases and rights on behalf of the Beneficiaries; and

(e) the Beneficiaries in their own right exercising rights in relation, or otherwise enforcing the indemnities, releases and those rights.

1.7 Transfer of functions
The Subcontractor:

(a) acknowledges that TfNSW or RailCorp may be reconstituted, renamed, dissolved, replaced or restructured and that some or all of the powers, functions, assets, liabilities or responsibilities of any of them may be transferred to or vested in another entity.
(b) agrees to do anything (including execute any document), and must procure that its Associates do anything (including execute any document), required to give full effect to any of the matters contemplated in clause 1.7(a); and

(c) shall have no Claim or entitlement to payment of any costs arising from any of the above.

1.8 **Nothing to affect rights**

The Subcontractor acknowledges and agrees that nothing in this Deed Poll or any other Project Agreement in any way limits, derogates from or affects any right, power, privilege or immunity in whatever form that TfNSW, RailCorp or any Authority or any other person has or may have under or by virtue of any law and no action will lie against TfNSW or RailCorp for the exercise of any such right, power, privilege or immunity.

1.9 **Approvals and consents**

The Subcontractor acknowledges and agrees that all approvals, consents, decisions or exercises of discretion required (whether expressly or impliedly) or able to be given or made by TfNSW may be given, not given, made, not made, exercised, not exercised, withheld or conditioned by TfNSW in its absolute discretion and the Subcontractor acknowledges that TfNSW and TfNSW’s Representative, in granting any approval or consent or making any decisions or exercising any discretion under or in connection with this Deed Poll in relation to such matters will not assume any duty of care, responsibility or liability to the Subcontractor or any other person and will not be taken to have agreed that any matter that is the subject of any approval, consent, decision or exercise of a discretion is in compliance with the Project Agreements.

1.10 **Precedence**

The Subcontractor acknowledges and agrees that the provisions of clause 1.10 of the Delivery Deed will apply to resolve any ambiguity, discrepancy or inconsistency between this Deed Poll and any other Project Agreement.

1.11 **No Claim**

The Subcontractor acknowledges and agrees any direction given by TfNSW’s Representative in accordance with clause 1.10(b) of the Delivery Deed in respect of this Deed Poll will not:

(a) entitle the Subcontractor to make any Claim arising out of or in connection with the direction;

(b) relieve the Subcontractor from or alter its liabilities or obligations whether under any Project Agreement or otherwise according to law; or

(c) prejudice or limit TfNSW’s rights against the Subcontractor whether under a Project Agreement or otherwise according to law.

1.12 **No bias against drafter**

No provision of this Deed Poll is to be interpreted to the disadvantage of a person because that person (or its representative) drafted that provision.

1.13 **Business Day**

If the day on or by which anything is to be done under this Deed Poll is not a Business Day, that thing must be done no later than the next Business Day.
1.14 Excluding liability

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

2. Subcontractor Representations and Warranties

The Subcontractor represents and warrants to TfNSW that:

(a) it is validly incorporated and has the power to carry on its business as it is now being conducted;
(b) it has the power to enter into and perform its obligations under this Deed Poll and the Subcontract;
(c) it has taken all action which is necessary to authorise the entry into and performance of its obligations under this Deed Poll and the Subcontract;
(d) its obligations under this Deed Poll and the Subcontract are legal, valid and binding obligations, enforceable in accordance with their terms;
(e) it will fully comply with all of its obligations under the Subcontract and this Deed Poll in accordance with their terms;
(f) each warranty and each representation made to the Supplier under the Subcontract is repeated and made directly in favour of TfNSW under this Deed Poll;
(g) it is reputable and has, or has access to, sufficient experience, expertise and ability to perform its obligations to the standards required by the Subcontract;
(h) it has exercised and will continue to exercise, in accordance with good industry practice, the level of skill, care and diligence in performing its duties under the Subcontract which may reasonably be expected of a contractor experienced in the performance of the same or similar works or services as those it is required to provide under the Subcontract, provided that, other than as expressly set out in this Deed Poll, the Subcontractor will have no greater obligations to TfNSW by virtue of this Deed Poll than it would have had if TfNSW had been named as the Supplier under the Subcontract;
(i) the Subcontractor will carry out and complete its obligations under the Subcontract:
   (i) in accordance with the Subcontract and this Deed Poll;
   (ii) in accordance with all Approvals and Mandatory Requirements;
   (iii) in a good and workmanlike manner;
   (iv) using (including installing) materials that will be to the quality and standard specified in the Subcontract, but if no standard is specified, new and of merchantable quality and which are and will remain at all relevant times safe and fit for their intended purposes; and
   (v) so that the works carried out or performed by the Subcontractor, when completed, will be and will remain at all relevant times fit for their intended purposes;
   (j) it has exercised and will continue to exercise reasonable skill, care and diligence in connection with the selection and supervision of its employees, agents, subcontractors and suppliers;
(k) if at any time requested to do so by TfNSW, it will:

   (i) extend to TfNSW any guarantee of performance by the Subcontractor or any warranty given to the Supplier by the Subcontractor;

   (ii) provide TfNSW or any person authorised by TfNSW, with such information related to the Subcontractor's obligations under the Subcontract and its performance of those obligations as TfNSW may reasonably require; and

   (iii) allow TfNSW or any person authorised by TfNSW, on reasonable notice, to inspect the works or services the Subcontractor is performing or providing under the Subcontract as TfNSW may reasonably require;

(l) it will promptly inform TfNSW of any default by the Supplier under the Subcontract;

(m) it will not do anything that may invalidate any insurance policy held by TfNSW and/or the Supplier in relation to the Project;

(n) the copy documents annexed to this Deed Poll confirm the details of the relevant all risks, indemnity and liability insurances required to be taken out by the Subcontractor under the Subcontract and:

   (i) such insurances are valid and the premiums for the current periods of insurance have been duly paid;

   (ii) the Subcontractor is not aware (after having made due and careful enquiry) as at the date of this Deed Poll of any circumstances likely to give rise to any claim under such insurances; and

   (iii) the Subcontractor will maintain and keep current such insurances (or equivalent replacement insurances) for so long as any liability may arise under this Deed Poll and will promptly notify TfNSW's Representative in relation to any renewals, amendments, replacement or revocations of such insurance policies;

(o) the Subcontract Deliverables supplied by it to the Supplier under the Subcontract conform or will conform with the requirements of the Subcontract; and

(p) title in and ownership of the Subcontract Deliverables identified in a progress claim under the Subcontract pass to or will pass to the Supplier no later than upon the payment for the Subcontract Deliverables.

3. Novation

3.1 Novation

(a) If at any time:

   (i) the Delivery Deed is terminated; or

   (ii) there is an event of default (howsoever described) that entitles the Subcontractor to terminate the Subcontract, or would entitle the Subcontractor to do so subject to giving a requisite notice or with the passage of time,

TfNSW may exercise its rights under this clause 3 by giving a notice of novation (Notice of Novation) to the Subcontractor requiring that the Subcontract be novated to a Suitable Substitute Supplier.
(b) With effect on and from the day that the Notice of Novation is given to the Subcontractor (the Novation Date), the Subcontractor agrees that (subject to clause 4) the Subcontract is discharged and the New Subcontract is created on the same terms and conditions as the Subcontract except that:

(i) the Suitable Substitute Supplier is substituted for the Supplier as a party to the New Subcontract; and

(ii) each reference in the Subcontract to the Supplier will be read as a reference to the Suitable Substitute Supplier in the New Subcontract.

(c) The Subcontractor agrees that if TfNSW issues a notice of novation pursuant to a Secondary Subcontractor Collateral Warranty Deed, it will enter into a Secondary Subcontractor Novation Deed with a Suitable Substitute Party and the Secondary Subcontractor.

3.2 Rights and benefits

With effect on and from the Novation Date, the Suitable Substitute Supplier:

(a) is bound by the New Subcontract as the Subcontract relates to the Supplier provided that, despite clause 3.1(c), the Suitable Substitute Supplier is bound to perform only those obligations under the New Subcontract that are outstanding as at the Novation Date or which occur on or after the Novation Date; and

(b) enjoys under the New Subcontract all the rights and benefits conferred on the Supplier under the Subcontract.

TfNSW must use all reasonable endeavours to procure the Supplier, within 10 Business Days from the Novation Date, to assign to the Suitable Substitute Supplier any Security Interest which it holds from the Subcontractor in respect of the Subcontract and which is capable of assignment and any such Security Interest effectively assigned will reduce the Subcontractor’s obligation to provide security under the New Subcontract.

3.3 Limitation of Liability

The Subcontractor acknowledges and agrees that the liability of the Subcontractor under this Deed Poll is not affected by TfNSW or RailCorp exercising or refraining from exercising any or all of TfNSW's or RailCorp's rights against the Supplier under the Delivery Deed, under any other Project Agreement or pursuant to any Mandatory Requirement.

Any information provided to, and any inspection undertaken by, TfNSW pursuant to this Deed Poll will not limit or discharge the obligations of the Subcontractor under the Subcontract nor will it relieve the Subcontractor from any liability which it may have in respect of any defect or default arising under the Subcontract.

3.4 New Security Interest

The Subcontractor will promptly do all further acts and execute and deliver all further documents as the Suitable Substitute Supplier reasonably requires to perfect any Security Interest provided by the Subcontractor to the Supplier to be transferred to a Suitable Substitute Supplier in respect of the New Subcontract.

3.5 Release from future performance

On and from the Novation Date, the Subcontractor releases the Supplier from any obligation under the Subcontract to be performed on or after the Novation Date.
3.6 Subcontractor acknowledgement

The Subcontractor acknowledges and agrees that nothing in this Deed Poll or any of the transactions contemplated by this Deed Poll constitutes:

(a) a breach of any term of the Subcontract;
(b) an event of default under the Subcontract; or
(c) any other event or circumstance which, with the giving of notice, lapse of time, or fulfilment of any condition, would cause the acceleration of any payment to be made under, or the termination or enforcement of, the Subcontract.

3.7 Novation Deed

If TfNSW gives the Subcontractor a Notice of Novation, the Subcontractor agrees that it will enter into a Novation Deed with a Suitable Substitute Supplier and will use its best endeavours to procure that the Supplier enters into a Novation Deed.

4. Accrued Rights

The novation and release under clause 3 do not prejudice any accrued rights, obligations, claims or liabilities arising under the Subcontract in connection with the performance of the Subcontract before the Novation Date which the Supplier and the Subcontractor may have against each other.

5. Indemnity

5.1 Indemnity from the Subcontractor

The Subcontractor indemnifies and holds harmless TfNSW and each Beneficiary from and against any Claim or Loss arising out of, or in connection with, a breach by the Subcontractor of any of the representations and warranties given under this Deed Poll or a failure by the Subcontractor to comply with any of its other obligations under this Deed Poll.

5.2 Continuing indemnities

(a) Each indemnity in this Deed Poll is a continuing obligation, separate and independent from the other obligations of the Subcontractor, and survives termination, completion or expiration of this Deed Poll.
(b) It is not necessary for a Beneficiary to incur expense or to make any payment before enforcing a right of indemnity conferred by this Deed Poll.
(c) The Subcontractor must pay on demand any amount it must pay under an indemnity in this Deed Poll.

6. Miscellaneous

6.1 Legal costs

The Subcontractor must bear its own legal and other costs and expenses relating directly or indirectly to the preparation of, and performance of its obligations under, this Deed Poll.

6.2 Assignment

At any time, TfNSW may assign or create a Security Interest over the benefits and rights accrued under this Deed Poll. The Subcontractor must not assign, novate, transfer, mortgage,
charge or otherwise deal with its rights or obligations under any Project Agreement, without TfNSW's prior written approval.

6.3 Amendment

The Subcontractor must not:

(a) make or permit any amendment to, replacement of or waiver of a provision of or any supplement or agreement collateral to;

(b) terminate, surrender, rescind or accept the repudiation of;

(c) permit the novation, assignment or substitution of any counterparty's right, obligation or interest in; or

(d) enter into any agreement or arrangement which affects the operation or interpretation of,

any Project Agreement to which TfNSW is not a party, without TfNSW's prior written consent (which consent will not be unreasonably withheld or delayed).

6.4 Restrictions on related party contracts

The Subcontractor must not enter into any contract relating to the Supplier's Activities with a Related Body Corporate (other than on arm's length commercial terms) without TfNSW's prior written consent.

6.5 Waiver and exercise of rights

A right may only be waived in writing, signed by the person giving the waiver, and:

(a) no other conduct (including failure to exercise or enforce, or a delay in exercising or enforcing, or the partial exercise or enforcement of, a right, power or remedy provided by law or under or in connection with this Deed Poll by a person) precludes, or operates as a waiver of, the exercise or enforcement, or further exercise or enforcement, of that or any other right, power or remedy provided by law or under this Deed Poll;

(b) a waiver or consent given by a person under or in accordance with this Deed Poll is only effective and binding on that person if it is given or confirmed in writing by that person;

(c) a waiver of a right on one or more occasions does not operate as a waiver of that right if it arises again; and

(d) no waiver of a breach of a term of this Deed Poll operates as a waiver of another breach of that term or of a breach of any other term of this Deed Poll.

6.6 Rights cumulative

Subject to any express provision in this Deed Poll to the contrary, the rights of a person under or in accordance with this Deed Poll are cumulative and are in addition to any other rights of that person.

6.7 Consents

A consent required from a person under or in accordance with this Deed Poll may be given or withheld, or may be given subject to any conditions, as that person (in its absolute discretion) thinks fit, unless this Deed Poll expressly provides otherwise.
6.8 Further assurance

The Subcontractor must promptly execute all documents and do all things that TfNSW from time to time reasonably require of it (including providing any information that a Suitable Substitute Supplier may reasonably request) to effect, perfect or complete the provisions of this Deed Poll and any transaction contemplated by it.

6.9 Power of attorney

The Subcontractor irrevocably appoints, with effect from the date TfNSW gives a Notice of Novation, TfNSW or the Suitable Substitute Supplier (as applicable) and such persons as are from time to time nominated by TfNSW or the Suitable Substitute Supplier (as applicable), jointly and severally, as its attorney with full power and authority to execute and deliver any document contemplated by this Deed Poll if the Subcontractor does not do so within two Business Days of being requested to do so.

6.10 Operation of this Deed Poll

(a) If at any time any provision of this Deed Poll is or becomes illegal, invalid or unenforceable in any respect under applicable law, that provision is to be severed to the extent necessary to make this Deed Poll enforceable, and it will not affect or impair the legality, validity or enforceability of any other provision of this Deed Poll.

(b) The Subcontractor acknowledges and agrees that to the extent permitted by law, in relation to its subject matter, this Deed Poll:

(i) embodies the entire understanding of the Subcontractor, and constitutes the entire terms on which the Subcontractor agrees to be bound by this Deed Poll; and

(ii) supersedes any prior written or other agreement, with respect to its subject matter.

(c) Any right that a person may have under this Deed Poll is in addition to, and does not replace or limit, any other right that the person may have.

6.11 Governing law and jurisdiction

(a) This Deed Poll is governed by and must be construed according to the laws applying in New South Wales.

(b) The Subcontractor irrevocably:

(i) submits to the non-exclusive jurisdiction of the courts of New South Wales, and the courts competent to determine appeals from those courts, with respect to any proceedings that may be brought at any time relating to this Deed Poll; and

(ii) waives any objection it may now or in the future have to the venue of any proceedings, and any claim it may now or in the future have that any proceedings have been brought in an inconvenient forum, if that venue falls within clause 6.11(b)(i).

6.12 Process Agent

(a) The Subcontractor:

(i) appoints the Supplier as its agent to receive on its behalf service of process of any proceedings in Australia (Process Agent);
(ii) may from time to time appoint a replacement of the Process Agent or any replacement Process Agent by giving notice to TfNSW, each such replacement to have an address in the Commonwealth of Australia;

(iii) acknowledges that service will be taken to be completed on delivery to the Process Agent or any replacement Process Agent (whether or not it is forwarded to and received by the Subcontractor); and

(iv) if for any reason the Process Agent or any replacement Process Agent ceases to be able to act, or ceases to have an address in the Commonwealth of Australia, agrees to appoint a substitute Process Agent acceptable to TfNSW and to deliver to TfNSW a copy of the new Process Agent's acceptance of that appointment.

(b) The Subcontractor acknowledges that the appointment of the Process Agent or a replacement Process Agent cannot be revoked without the simultaneous appointment of a replacement Process Agent.

(c) Nothing in this Deed limits TfNSW's right to serve process in any other manner permitted by law.

6.13 Provisions binding

The terms and provisions of this Deed are binding on the Subcontractor immediately upon execution of the Deed by the Subcontractor.

6.14 Attorneys

Each person who executes this Deed on behalf of a person 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.

7. Limitation on Subcontractor's liability

(a) Notwithstanding any other provision of this Deed, the Subcontractor shall have no greater liability to the Beneficiaries and the Suitable Substitute Supplier under or in connection with this Deed than the liability it would have to the Beneficiaries and the Suitable Substitute Supplier if the Beneficiaries and the Suitable Substitute Supplier were jointly named with the Supplier as the supplier under the Subcontract.

(b) The Subcontractor is entitled to rely on all rights, defences, exclusions and limitations available to the Subcontractor under the Subcontract.
Schedule 1 – Novation Deed

Date

Parties

Name: Downer EDI Rail Pty Limited
ABN: 92 000 002 031
Short form name: Supplier
Notice details: T3, Triniti Business Campus 39 Delhi Road, North Ryde NSW 2113

Name: CRRC Changchun Railway Vehicles Co. Ltd
ABN: [Insert]
Short form name: Subcontractor
Notice details: No. 2001 Changke Road, Changchun, Jilin Province, the People’s Republic of China

Name: [Insert]
ABN: [Insert]
Short form name: Substitute Supplier
Notice details: [Insert]

Recitals

A. The Supplier wishes to novate its rights and liabilities under the Subcontract to the Substitute Supplier.

B. The Subcontractor consents to the novation of the Supplier’s rights and liabilities under the Subcontract to the Substitute Supplier.

1. Defined terms & interpretation

1.1 Defined terms from Collateral Warranty Deed Poll

Terms defined in the Collateral Warranty Deed Poll (as defined below), including definitions incorporated into the Collateral Warranty Deed Poll from the Delivery Deed under clause 1.3 of the Collateral Warranty Deed Poll, have the same meanings when used in this deed unless otherwise defined in this deed.

1.2 Other defined terms

In this deed:
Collateral Warranty Deed Poll means the deed poll entered into by the Subcontractor dated [Insert].

Novation Date means the date of execution of this deed on behalf of the Supplier.

Delivery Deed means the agreement between TfNSW, RailCorp and the Supplier dated [Insert] under which TfNSW has agreed to procure, and the Supplier has agreed to design, develop, manufacture, test, commission, supply and deliver new passenger rolling stock and other related assets.

Subcontract has the meaning given in the Collateral Warranty Deed Poll.

1.3 Interpretation

(a) The provisions of clause 1.3 of the Delivery Deed are incorporated in, and apply to, this deed as if set out in full with any necessary amendments.

(b) In this deed, a reference to identical rights or obligations means rights or obligations which are identical in character, rather than identical as to the person entitled to them or obliged to perform them.

2. Novation

2.1 Rights and obligations – Subcontract Documents

Subject to clause 2.2, with effect on and from the Novation Date:

(a) no party to the Subcontract has any further obligation to the Supplier;

(b) the Supplier has no further rights and no further obligations to any other party to the Subcontract;

(c) the Substitute Supplier has rights which are identical to the rights which the Supplier had under the Subcontract;

(d) the Substitute Supplier assumes, from immediately before the acknowledgement in paragraph (b) was given, obligations towards each of the parties to the Subcontract as if the Substitute Supplier were originally named in the Subcontract in place of the Supplier; and

(e) the Subcontractor accepts the liability of the Substitute Supplier in place of the liability of the Supplier.

2.2 Accrued rights and obligations before Novation Date

All parties to the Subcontract remain entitled to their rights and bound by their obligations in respect of the Subcontract which have accrued before the Novation Date.

2.3 Security

Upon the execution and exchange of this deed:

(a) the Supplier must release any security given to it by the Subcontractor in accordance with the Subcontract;

(b) the Subcontractor must give the Substitute Supplier security in the same form and for the same amounts as any security required by the Subcontract; and
(c) the Subcontractor must ensure that the Substitute Supplier is appropriately noted on all relevant insurance policies as required by the Subcontract.

3. **Costs and Duty**

   Each party must bear their own costs of and incidental to this deed. The Substitute Supplier must pay all stamp duty and any penalties in respect of this deed.

4. **Notices and other communications**

   The notice details of the Substitute Supplier for the purposes of the Subcontract are [Insert].

5. **Governing law and jurisdiction**

   This deed is governed by and must be construed according to the laws applying in New South Wales and each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of that place.
Sydney Growth Trains
(ISD-16-5312A)

Signing page

EXECUTED as a deed. Each attorney signing this deed under a power of attorney certifies, by the attorney's signature, that the attorney has no notice of the revocation of the power of attorney.

Signed, sealed and delivered for and on behalf of Downer EDI Rail Pty Ltd (ABN 92 000 002 031) by its attorneys under a power of attorney dated in the presence of:

Signature of attorney who declares that the attorney has not received any notice of the revocation of the power of attorney

Full name of attorney

Signature of witness

Signature of attorney who declares that the attorney has not received any notice of the revocation of the power of attorney

Full name of witness

Full name of witness

Full name of attorney

[Insert execution clauses for the Subcontractor and Substitute Supplier]
Signing page

EXECUTED as a deed poll. An attorney signing this Deed Poll under a power of attorney certifies, by the attorney's signature, that the attorney has no notice of the revocation of the power of attorney.

[Insert execution clause for the Subcontractor]
Secondary Subcontractor Collateral Warranty Deed Poll
Sydney Growth Trains Project

[Insert] (Secondary Subcontractor)
This Deed Poll is made by:

Name
[Insert]

Short form name
Secondary Subcontractor

Notice details
[Insert]

In favour of:

Name
Transport for NSW (ABN 18 804 239 602)

Short form name
TfNSW

Notice details
Level 2, 1 Prince Albert Road, Sydney NSW 2000

Background

A. TfNSW, RailCorp and the Supplier are parties to a delivery deed dated [insert date] (Delivery Deed) under which TfNSW has agreed to procure, and the Supplier has agreed to design, develop, manufacture, test, commission, supply and deliver new passenger rolling stock and other related assets.

B. The Supplier and the Subcontractor have entered into or will enter into the Subcontract.

C. The Secondary Subcontractor and the Subcontractor have entered into or will enter into the Secondary Subcontract.

D. The Secondary Subcontractor has agreed that it will, in addition to its obligations to the Subcontractor under the Secondary Subcontract, owe obligations directly to TfNSW and RailCorp as set out in this Deed Poll.

Terms

1. Defined terms & interpretation

1.1 Defined terms

In this Deed Poll:

Beneficiary means TfNSW, RailCorp, the State, the Operator, each other NSW Rail Entity and each of their Associates and Beneficiaries means all of them.
New Secondary Subcontract means the new Secondary Subcontract that comes into existence between the Secondary Subcontractor and the Suitable Substitute Party pursuant to clause 3.1(c).

Notice of Novation has the meaning given in clause 3.1(b).

Novation Deed means a deed in the form of Schedule 1.

Novation Date has the meaning given in clause 3.1(c).

Power means any right, power, authority, discretion, remedy or privilege, whether express or implied conferred on any person.

Delivery Deed has the meaning given in Paragraph A of the Background and includes all schedules, exhibits, attachments, appendices and annexures to that document, including the SPR.

RailCorp means the body corporate known as Rail Corporation New South Wales which was constituted under the Transport Administration Act 1988 (NSW) and all present and future iterations of that body corporate which continue to exist under that Act or any other legislation or another entity appointed to undertake some or all of the functions of that body.

Secondary Subcontract means the subcontract entered into between the Subcontractor and the Secondary Subcontractor dated on or about the date of this Deed Poll.

Secondary Subcontract Deliverable means any works, asset, product, materials, documentation or any other item or service to be provided by or on behalf of the Subcontractor pursuant to the Subcontract.

Subcontract means the subcontract entered into between the Supplier and the Subcontractor dated on or about the date of this Deed Poll.

Subcontractor means the [Insert name of Subcontractor] and any replacement person who becomes a party to and performs the obligations of the Subcontractor under the Subcontract.

Suitable Substitute Party means a person nominated by TfNSW or RailCorp who:

(a) has the legal capacity, power and authority to become a party to and perform the obligations of the Subcontractor under the Secondary Subcontract; and

(b) employs persons having the appropriate qualifications, experience and technical competence and having the resources available to it (including committed financial resources and subcontracts) which are sufficient to enable it to perform the obligations of the Subcontractor under the Secondary Subcontract.

Supplier means Downer EDI Rail Pty Limited ABN 92 000 002 031.

1.2 Interpretation

In this Deed Poll:

(a) headings and subheadings are for convenience only and do not affect interpretation,

and the following rules apply in interpreting this Deed Poll unless the context makes it clear that a rule is not intended to apply:

(b) person includes an individual, the estate of an individual, a corporation, an authority or agency, an association or a joint venture (whether incorporated or unincorporated), a partnership, a trust and other entity;
(c) a reference to a party to a document includes that party’s executors, administrators, successors and permitted assigns, including persons taking by way of novation;

(d) a reference to a document or instrument (including this Deed Poll) is to that document or instrument as varied, novated, ratified or replaced from time to time;

(e) a reference to any Authority, institute, association or body is:

(i) if that Authority, institute, association or body is reconstituted, renamed or replaced or if the powers or functions of that Authority, institute, association or body are transferred to another organisation, deemed to refer to the reconstituted, renamed or replaced organisation or the organisation to which the powers or functions are transferred, as the case may be; and

(ii) if that Authority, institute, association or body ceases to exist, deemed to refer to the organisation which serves substantially the same purposes or object as that authority, institute, association or body;

(f) a reference to a statute includes its delegated legislation and a reference to a statute or delegated legislation or any section or provision of either of these includes:

(i) all ordinances, by-laws, regulations of and other statutory instruments (however described) issued under the statute or delegated legislation; and

(ii) any consolidations, amendments, re-enactments and replacements;

(g) a word importing the singular includes the plural (and vice versa), and a word indicating a gender includes every other gender;

(h) a reference to a clause or schedule is a reference to a clause or schedule of this Deed Poll;

(i) if a party is obliged to do something it must do so at its own cost unless expressly provided otherwise in this Deed Poll;

(j) any agreement, representation, warranty or indemnity by two or more parties (including where two or more persons are included in the same defined term) binds them jointly and severally;

(k) any agreement, representation, warranty or indemnity in favour of two or more parties (including where two or more persons are included in the same defined term) is for the benefit of them jointly and severally;

(l) if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;

(m) the meaning of general words is not limited by specific examples introduced by including, for example or similar expressions;

(n) a word or expression defined in the Corporations Act has the meaning given to it in the Corporations Act;

(o) a reference to time is to Sydney, Australia time; and

(p) a month means a calendar month.
1.3 Delivery Deed

The Secondary Subcontractor acknowledges that it has been provided with and has reviewed a [redacted] copy of the Delivery Deed.

1.4 Terms defined in Delivery Deed

Subject to clause 1.1 of this Deed Poll which, for the purpose of interpreting this Deed Poll, takes precedence to the extent of any inconsistency (notwithstanding any contrary provision of any Project Agreement), terms defined in the Delivery Deed have the same meanings when used in this Deed Poll.

1.5 Rights and benefits of TfNSW

The rights and benefits of TfNSW provided for under this Deed Poll are intended to be for, and are held by TfNSW for, the benefit of TfNSW in its own right to support the discharge of its duties in relation to, and liabilities arising from, the performance of the Operations Functions, and also for the benefit of:

(a) RailCorp as the owner of the Assets; and

(b) the Operator and the other NSW Rail Entities to support the discharge of their respective duties in relation to and liabilities arising from performance of the Operations Functions.

1.6 Benefits held on trust

The Secondary Subcontractor acknowledges:

(a) that TfNSW holds on trust for the Beneficiaries the benefit of:
   
(i) each indemnity and release given by the Secondary Subcontractor under this Deed Poll in favour of the Beneficiaries; and

(ii) each right of TfNSW under this Deed Poll;

(b) the existence of the trusts mentioned in clause 1.6(a); and

(c) that the Beneficiaries rely on those rights granted on their behalf which are mentioned in clause 1.6(a),

and consents to:

(d) TfNSW exercising rights in relation to, or otherwise enforcing such indemnities, releases and rights on behalf of the Beneficiaries; and

(e) the Beneficiaries in their own right exercising rights in relation, or otherwise enforcing the indemnities, releases and those rights.

1.7 Transfer of functions

The Secondary Subcontractor:

(a) acknowledges that TfNSW or RailCorp may be reconstituted, renamed, dissolved, replaced or restructured and that some or all of the powers, functions, assets, liabilities or responsibilities of any of them may be transferred to or vested in another entity;
(b) agrees to do anything (including execute any document), and must procure that its Associates do anything (including execute any document), required to give full effect to any of the matters contemplated in clause 1.7(a); and

(c) shall have no Claim or entitlement to payment of any costs arising from any of the above.

1.8 Nothing to affect rights

The Secondary Subcontractor acknowledges and agrees that nothing in this Deed Poll, the Secondary Subcontract or any other Project Agreement in any way limits, derogates from or affects any right, power, privilege or immunity in whatever form that TfNSW, RailCorp or any Authority or any other person has or may have under or by virtue of any law and no action will lie against TfNSW or RailCorp for the exercise of any such right, power, privilege or immunity.

1.9 Approvals and consents

The Secondary Subcontractor acknowledges and agrees that all approvals, consents, decisions or exercises of discretion required (whether expressly or impliedly) or able to be given or made by TfNSW may be given, not given, made, not made, exercised, not exercised, withheld or conditioned by TfNSW in its absolute discretion and the Secondary Subcontractor acknowledges that TfNSW and TfNSW's Representative, in granting any approval or consent or making any decisions or exercising any discretion under or in connection with this Deed Poll in relation to such matters will not assume any duty of care, responsibility or liability to the Secondary Subcontractor or any other person and will not be taken to have agreed that any matter that is the subject of any approval, consent, decision or exercise of a discretion is in compliance with the Project Agreements.

1.10 Precedence

The Secondary Subcontractor acknowledges and agrees that the provisions of clause 1.10 of the Delivery Deed will apply to resolve any ambiguity, discrepancy or inconsistency between this Deed Poll, the Secondary Subcontract and any other Project Agreement.

1.11 No Claim

The Secondary Subcontractor acknowledges and agrees any direction given by TfNSW's Representative in accordance with clause 1.10(b) of the Delivery Deed in respect of this Deed Poll will not:

(a) entitle the Secondary Subcontractor to make any Claim arising out of or in connection with the direction;

(b) relieve the Secondary Subcontractor from or alter its liabilities or obligations whether under any Project Agreement or otherwise according to law; or

(c) prejudice or limit TfNSW's rights against the Secondary Subcontractor whether under a Project Agreement or otherwise according to law.

1.12 No bias against drafter

No provision of this Deed Poll is to be interpreted to the disadvantage of a person because that person (or its representative) drafted that provision.

1.13 Business Day

If the day on or by which anything is to be done under this Deed Poll is not a Business Day, that thing must be done no later than the next Business Day.
1.14 Excluding liability

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

2. Secondary Subcontractor Representations and Warranties

The Secondary Subcontractor represents and warrants to TfNSW that:

(a) it is validly incorporated and has the power to carry on its business as it is now being conducted;

(b) it has the power to enter into and perform its obligations under this Deed Poll and the Secondary Subcontract;

(c) it has taken all action which is necessary to authorise the entry into and performance of its obligations under this Deed Poll and the Secondary Subcontract;

(d) its obligations under this Deed Poll and the Secondary Subcontract are legal, valid and binding obligations, enforceable in accordance with their terms;

(e) it will fully comply with all of its obligations under the Secondary Subcontract and this Deed Poll in accordance with their terms;

(f) each warranty and each representation made to the Subcontractor under the Secondary Subcontract is repeated and made directly in favour of TfNSW under this Deed Poll;

(g) it is reputable and has, or has access to, sufficient experience, expertise and ability to perform its obligations to the standards required by the Secondary Subcontract;

(h) it has exercised and will continue to exercise, in accordance with good industry practice, the level of skill, care and diligence in performing its duties under the Secondary Subcontract which may reasonably be expected of a contractor experienced in the performance of the same or similar works or services as those it is required to provide under the Secondary Subcontract, provided that, other than as expressly set out in this Deed Poll, the Secondary Subcontractor will have no greater obligations to TNSW by virtue of this Deed Poll than it would have had if TNSW had been named as the Subcontractor under the Secondary Subcontract;

(i) the Secondary Subcontractor will carry out and complete its obligations under the Secondary Subcontract:

   (i) in accordance with the Secondary Subcontract and this Deed Poll;

   (ii) in accordance with all Approvals and Mandatory Requirements;

   (iii) in a good and workmanlike manner;

   (iv) using (including installing) materials that will be to the quality and standard specified in the Secondary Subcontract, but if no standard is specified, new and of merchantable quality and which are and will remain at all relevant times safe and fit for their intended purposes; and

   (v) so that the works carried out or performed by the Secondary Subcontractor, when completed, will be and will remain at all relevant times fit for their intended purposes;
(j) it has exercised and will continue to exercise reasonable skill, care and diligence in connection with the selection and supervision of its employees, agents, subcontractors and suppliers;

(k) if at any time requested to do so by TfNSW, it will:

(i) extend to TfNSW any guarantee of performance by the Secondary Subcontractor or any warranty given to the Subcontractor by the Secondary Subcontractor;

(ii) provide TfNSW or any person authorised by TfNSW, with such information related to the Secondary Subcontractor's obligations under the Secondary Subcontract and its performance of those obligations as TfNSW may reasonably require; and

(iii) allow TfNSW or any person authorised by TfNSW, on reasonable notice, to inspect the works or services the Secondary Subcontractor is performing or providing under the Secondary Subcontract as TfNSW may reasonably require;

(l) it will promptly inform TfNSW of any default by the Subcontractor under the Secondary Subcontract;

(m) it will not do anything that may invalidate any insurance policy held by TfNSW and/or the Supplier and/or the Subcontractor in relation to the Project;

(n) the copy documents annexed to this Deed Poll confirm the details of the relevant all risks, indemnity and liability insurances required to be taken out by the Secondary Subcontractor under the Secondary Subcontract and:

(i) such insurances are valid and the premiums for the current periods of insurance have been duly paid;

(ii) the Secondary Subcontractor is not aware (after having made due and careful enquiry) as at the date of this Deed Poll of any circumstances likely to give rise to any claim under such insurances; and

(iii) the Secondary Subcontractor will maintain and keep current such insurances (or equivalent replacement insurances) for so long as any liability may arise under this Deed Poll and will promptly notify TfNSW's Representative in relation to any renewals, amendments, replacement or revocations of such insurance policies;

(o) the Secondary Subcontract Deliverables supplied by it to the Subcontractor under the Secondary Subcontract conform or will conform with the requirements of the Secondary Subcontract; and

(p) title in and ownership of the Secondary Subcontract Deliverables identified in a progress claim under the Secondary Subcontract pass to or will pass to the Subcontractor no later than upon the payment for the Secondary Subcontract Deliverables.

3. Novation

3.1 Novation

(a) If at any time:

(i) the Subcontract is terminated; or
(ii) there is an event of default (howsoever described) that entitles the Secondary Subcontractor to terminate the Secondary Subcontract, or would entitle the Secondary Subcontractor to do so subject to giving a requisite notice or with the passage of time, TfNSW may exercise its rights under this clause 3 by giving a notice of novation (Notice of Novation) to the Secondary Subcontractor requiring that the Secondary Subcontract be novated to a Suitable Substitute Party.

(b) With effect on and from the day that the Notice of Novation is given to the Secondary Subcontractor (the Novation Date), the Secondary Subcontractor agrees that (subject to clause 4) the Secondary Subcontract is discharged and the New Secondary Subcontract is created on the same terms and conditions as the Secondary Subcontract except that:

(i) the Suitable Substitute Party, is substituted for the Subcontractor as a party to the New Secondary Subcontract; and

(ii) each reference in the Secondary Subcontract to the Subcontractor will be read as a reference to the Suitable Substitute Party, in the New Secondary Subcontract.

3.2 Rights and benefits

With effect on and from the Novation Date, the Suitable Substitute Party:

(a) is bound by the New Secondary Subcontract as the Secondary Subcontract relates to the Subcontractor provided that, despite clause 3.1(c), the Suitable Substitute Party is bound to perform only those obligations under the New Secondary Subcontract that are outstanding as at the Novation Date or which occur on or after the Novation Date; and

(b) enjoys under the New Secondary Subcontract all the rights and benefits conferred on the Subcontractor under the Secondary Subcontract.

TfNSW must use all reasonable endeavours to procure the Subcontractor, within 10 Business Days from the Novation Date, to assign to the Suitable Substitute Party any Security Interest which it holds from the Secondary Subcontractor in respect of the Secondary Subcontract and which is capable of assignment and any such Security Interest effectively assigned will reduce the Secondary Subcontractor's obligation to provide security under the New Secondary Subcontract.

3.3 Limitation of Liability

The Secondary Subcontractor acknowledges and agrees that the liability of the Secondary Subcontractor under this Deed Poll is not affected by TfNSW or RailCorp exercising or refraining from exercising any or all of TfNSW's or RailCorp's rights against the Supplier under the Delivery Deed, under any other Project Agreement or pursuant to any Mandatory Requirement.

Any information provided to, and any inspection undertaken by, TfNSW pursuant to this Deed Poll will not limit or discharge the obligations of the Secondary Subcontractor under the Secondary Subcontract nor will it relieve the Secondary Subcontractor from any liability which it may have in respect of any defect or default arising under the Secondary Subcontract.

3.4 New Security Interest

The Secondary Subcontractor will promptly do all further acts and execute and deliver all further documents as the Suitable Substitute Party reasonably requires to perfect any Security Interest provided by the Secondary Subcontractor to the Subcontractor to be transferred to a Suitable Substitute Party in respect of the New Secondary Subcontract.
3.5 Release from future performance

On and from the Novation Date, the Secondary Subcontractor releases the Subcontractor from any obligation under the Secondary Subcontract to be performed on or after the Novation Date.

3.6 Secondary Subcontractor acknowledgement

The Secondary Subcontractor acknowledges and agrees that nothing in this Deed Poll or any of the transactions contemplated by this Deed Poll constitutes:

(a) a breach of any term of the Secondary Subcontract;
(b) an event of default under the Secondary Subcontract; or
(c) any other event or circumstance which, with the giving of notice, lapse of time, or fulfilment of any condition, would cause the acceleration of any payment to be made under, or the termination or enforcement of, the Secondary Subcontract.

3.7 Novation Deed

If TfNSW gives the Secondary Subcontractor a Notice of Novation, the Secondary Subcontractor agrees that it will enter into a Novation Deed with a Suitable Substitute Party and will use its best endeavours to procure that the Subcontractor enters into a Novation Deed.

4. Accrued Rights

The novation and release under clause 3 do not prejudice any accrued rights, obligations, claims or liabilities arising under the Secondary Subcontract in connection with the performance of the Secondary Subcontract before the Novation Date which the Subcontractor and the Secondary Subcontractor may have against each other.

5. Indemnity

5.1 Indemnity from the Secondary Subcontractor

The Secondary Subcontractor indemnifies and holds harmless TfNSW and each Beneficiary from and against any Claim or Loss arising out of, or in connection with, a breach by the Secondary Subcontractor of any of the representations and warranties given under this Deed Poll or a failure by the Secondary Subcontractor to comply with any of its other obligations under this Deed Poll.

5.2 Continuing indemnities

(a) Each indemnity in this Deed Poll is a continuing obligation, separate and independent from the other obligations of the Secondary Subcontractor, and survives termination, completion or expiration of this Deed Poll.
(b) It is not necessary for a Beneficiary to incur expense or to make any payment before enforcing a right of indemnity conferred by this Deed Poll.
(c) The Secondary Subcontractor must pay on demand any amount it must pay under an indemnity in this Deed Poll.
6. Miscellaneous

6.1 Legal costs

The Secondary Subcontractor must bear its own legal and other costs and expenses relating directly or indirectly to the preparation of, and performance of its obligations under, this Deed Poll.

6.2 Assignment

At any time, TfNSW may assign or create a Security Interest over the benefits and rights accrued under this Deed Poll. The Secondary Subcontractor must not assign, novate, transfer, mortgage, charge or otherwise deal with its rights or obligations under the Secondary Subcontract or any Project Agreement, without TfNSW’s prior written approval.

6.3 Amendment

The Secondary Subcontractor must not:

(a) make or permit any amendment to, replacement of or waiver of a provision of or any supplement or agreement collateral to;
(b) terminate, surrender, rescind or accept the repudiation of;
(c) permit the novation, assignment or substitution of any counterparty’s right, obligation or interest in; or
(d) enter into any agreement or arrangement which affects the operation or interpretation of,

the Secondary Subcontract or any Project Agreement to which TfNSW is not a party, without TfNSW’s prior written consent (which consent will not be unreasonably withheld or delayed).

6.4 Restrictions on related party contracts

The Secondary Subcontractor must not enter into any contract relating to the Supplier’s Activities with a Related Body Corporate (other than on arm’s length commercial terms) without TfNSW’s prior written consent.

6.5 Waiver and exercise of rights

A right may only be waived in writing, signed by the person giving the waiver, and:

(a) no other conduct (including failure to exercise or enforce, or a delay in exercising or enforcing, or the partial exercise or enforcement of, a right, power or remedy provided by law or under or in connection with this Deed Poll by a person) precludes, or operates as a waiver of, the exercise or enforcement, or further exercise or enforcement, of that or any other right, power or remedy provided by law or under this Deed Poll;
(b) a waiver or consent given by a person under or in accordance with this Deed Poll is only effective and binding on that person if it is given or confirmed in writing by that person;
(c) a waiver of a right on one or more occasions does not operate as a waiver of that right if it arises again; and
(d) no waiver of a breach of a term of this Deed Poll operates as a waiver of another breach of that term or of a breach of any other term of this Deed Poll.
6.6 Rights cumulative

Subject to any express provision in this Deed Poll to the contrary, the rights of a person under or in accordance with this Deed Poll are cumulative and are in addition to any other rights of that person.

6.7 Consents

A consent required from a person under or in accordance with this Deed Poll may be given or withheld, or may be given subject to any conditions, as that person (in its absolute discretion) thinks fit, unless this Deed Poll expressly provides otherwise.

6.8 Further assurance

The Secondary Subcontractor must promptly execute all documents and do all things that TfNSW from time to time reasonably require of it (including providing any information that a Suitable Substitute Party may reasonably request) to effect, perfect or complete the provisions of this Deed Poll and any transaction contemplated by it.

6.9 Power of attorney

The Secondary Subcontractor irrevocably appoints, with effect from the date TfNSW gives a Notice of Novation, TfNSW or the Suitable Substitute Party (as applicable) and such persons as are from time to time nominated by TfNSW or the Suitable Substitute Party (as applicable), jointly and severally, as its attorney with full power and authority to execute and deliver any document contemplated by this Deed Poll if the Secondary Subcontractor does not do so within two Business Days of being requested to do so.

6.10 Operation of this Deed Poll

(a) If at any time any provision of this Deed Poll is or becomes illegal, invalid or unenforceable in any respect under applicable law, that provision is to be severed to the extent necessary to make this Deed Poll enforceable, and it will not affect or impair the legality, validity or enforceability of any other provision of this Deed Poll.

(b) The Secondary Subcontractor acknowledges and agrees that to the extent permitted by law, in relation to its subject matter, this Deed Poll:

(i) embodies the entire understanding of the Secondary Subcontractor, and constitutes the entire terms on which the Secondary Subcontractor agrees to be bound by this Deed Poll; and

(ii) supersedes any prior written or other agreement, with respect to its subject matter.

(c) Any right that a person may have under this Deed Poll is in addition to, and does not replace or limit, any other right that the person may have.

6.11 Governing law and jurisdiction

(a) This Deed Poll is governed by and must be construed according to the laws applying in New South Wales.

(b) The Secondary Subcontractor irrevocably:

(i) submits to the non-exclusive jurisdiction of the courts of New South Wales, and the courts competent to determine appeals from those courts, with respect to any proceedings that may be brought at any time relating to this Deed Poll; and
(ii) waives any objection it may now or in the future have to the venue of any proceedings, and any claim it may now or in the future have that any proceedings have been brought in an inconvenient forum, if that venue falls within clause 6.11(b)(i).

6.12 Process Agent

(a) The Secondary Subcontractor:

(i) appoints the Supplier as its agent to receive on its behalf service of process of any proceedings in Australia (Process Agent);

(ii) may from time to time appoint a replacement of the Process Agent or any replacement Process Agent by giving notice to TfNSW, each such replacement to have an address in the Commonwealth of Australia;

(iii) acknowledges that service will be taken to be completed on delivery to the Process Agent or any replacement Process Agent (whether or not it is forwarded to and received by the Subcontractor); and

(iv) if for any reason the Process Agent or any replacement Process Agent ceases to be able to act, or ceases to have an address in the Commonwealth of Australia, agrees to appoint a substitute Process Agent acceptable to TfNSW and to deliver to TfNSW a copy of the new Process Agent’s acceptance of that appointment.

(b) The Secondary Subcontractor acknowledges that the appointment of the Process Agent or a replacement Process Agent cannot be revoked without the simultaneous appointment of a replacement Process Agent.

(c) Nothing in this Deed limits TfNSW’s right to serve process in any other manner permitted by law.

6.13 Provisions binding

The terms and provisions of this Deed Poll are binding on the Secondary Subcontractor immediately upon execution of the Deed Poll by the Secondary Subcontractor.

6.14 Attorneys

Each person who executes this Deed Poll on behalf of a person 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.

7. Limitation on Subcontractor’s liability

(a) Notwithstanding any other provision of this Deed Poll, the Secondary Subcontractor shall have no greater liability to the Beneficiaries and the Suitable Substitute Party under or in connection with this Deed Poll than the liability it would have to the Beneficiaries and the Suitable Substitute Party if the Beneficiaries and the Suitable Substitute Party were jointly named with the Subcontractor as the subcontractor under the Secondary Subcontract.

(b) The Secondary Subcontractor is entitled to rely on all rights, defences, exclusions and limitations available to the Secondary Subcontractor under the Secondary Subcontract.
Schedule 1 – Novation Deed

Date

Parties

Name [Insert]
ABN [Insert]
Short form name Subcontractor
Notice details [Insert]

Name [Insert]
ABN [Insert]
Short form name Secondary Subcontractor
Notice details [Insert]

Name [Insert]
ABN [Insert]
Short form name Substitute Party
Notice details [Insert]

Recitals

A. The Subcontractor wishes to novate its rights and liabilities under the Secondary Subcontract to the Substitute Party.

B. The Secondary Subcontractor consents to the novation of the Subcontractor’s rights and liabilities under the Secondary Subcontract to the Substitute Party.

1. Defined terms & interpretation

1.1 Defined terms from Collateral Warranty Deed Poll

Terms defined in the Collateral Warranty Deed Poll (as defined below), including definitions incorporated into the Collateral Warranty Deed Poll from the Delivery Deed under clause 1.3 of the Collateral Warranty Deed Poll, have the same meanings when used in this deed unless otherwise defined in this deed.

1.2 Other defined terms

In this deed:

Collateral Warranty Deed Poll means the deed poll entered into by the Secondary Subcontractor dated [Insert].
Novation Date means the date of execution of this deed on behalf of the Subcontractor.

Delivery Deed means the agreement between TfNSW, RailCorp and the Supplier dated [insert] under which TfNSW has agreed to procure, and the Supplier has agreed to design, develop, manufacture, test, commission, supply and deliver new passenger rolling stock and other related assets.

Secondary Subcontract has the meaning given in the Collateral Warranty Deed Poll.

1.3 Interpretation
(a) The provisions of clause 1.3 of the Delivery Deed are incorporated in, and apply to, this deed as if set out in full with any necessary amendments.
(b) In this deed, a reference to identical rights or obligations means rights or obligations which are identical in character, rather than identical as to the person entitled to them or obliged to perform them.

2. Novation
2.1 Rights and obligations – Secondary Subcontract Documents
Subject to clause 2.2, with effect on and from the Novation Date:
(a) no party to the Secondary Subcontract has any further obligation to the Subcontractor;
(b) the Subcontractor has no further rights and no further obligations to any other party to the Secondary Subcontract;
(c) the Substitute Party has rights which are identical to the rights which the Subcontractor had under the Secondary Subcontract;
(d) the Substitute Party assumes, from immediately before the acknowledgement in paragraph (b) was given, obligations towards each of the parties to the Secondary Subcontract as if the Substitute Party were originally named in the Secondary Subcontract in place of the Subcontractor; and
(e) the Secondary Subcontractor accepts the liability of the Substitute Party in place of the liability of the Subcontractor.

2.2 Accrued rights and obligations before Novation Date
All parties to the Secondary Subcontract remain entitled to their rights and bound by their obligations in respect of the Secondary Subcontract which have accrued before the Novation Date.

2.3 Security
Upon the execution and exchange of this deed:
(a) the Subcontractor must release any security given to it by the Secondary Subcontractor in accordance with the Secondary Subcontract;
(b) the Secondary Subcontractor must give the Substitute Party security in the same form and for the same amounts as any security required by the Secondary Subcontract; and
the Secondary Subcontractor must ensure that the Substitute Party is appropriately noted on all relevant insurance policies as required by the Secondary Subcontract.

3. Costs and Duty

Each party must bear their own costs of and incidental to this deed. The Substitute Party must pay all stamp duty and any penalties in respect of this deed.

4. Notices and other communications

The notice details of the Substitute Party for the purposes of the Secondary Subcontract are [Insert].

5. Governing law and jurisdiction

This deed is governed by and must be construed according to the laws applying in New South Wales and each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of that place.
Signing page

EXECUTED as a deed. Each attorney signing this deed under a power of attorney certifies, by the attorney’s signature, that the attorney has no notice of the revocation of the power of attorney.

[Insert execution clauses for the Subcontractor, the Secondary Subcontractor and Substitute Party]
Signing page

EXECUTED as a deed poll. An attorney signing this Deed Poll under a power of attorney certifies, by the attorney's signature, that the attorney has no notice of the revocation of the power of attorney.

[Insert execution clause for the Secondary Subcontractor]
Schedule 18 – Form of Project Bond

Details

To: Transport for NSW, ABN 18 804 239 602 (TfNSW)

For: Downer EDI Rail Pty Limited ABN 92 000 002 031 (the Supplier)

From: [insert name and ABN of the issuer of the bond] (the Issuer)

Date: [Insert]

1. Recitals

(a) TfNSW and the Supplier are parties to a delivery deed dated [insert date] (Delivery Deed).

(b) Under the terms of the Delivery Deed, the Supplier is required to provide this bond to TfNSW.

2. Maximum Aggregate Sum

At the request of the Supplier and in respect of the Supplier’s obligations under the Delivery Deed, the Issuer unconditionally and irrevocably undertakes to pay to TfNSW, on demand by TfNSW, any sum or sums which may from time to time be demanded by TfNSW to a maximum aggregate sum of A$[insert] (Maximum Aggregate Sum).

3. Payment of the Maximum Aggregate Sum

Payment or payments under this bond must be made by the Issuer to TfNSW:

(a) without reference to the Supplier, any other person (other than the Issuer), the Delivery Deed or any other agreement between TfNSW and the Supplier;

(b) without enquiring into either or both of the Supplier’s or TfNSW’s performance or non-performance of the Delivery Deed or any other agreement between TfNSW and the Supplier;

(c) despite any notice by the Supplier or any other person to the Issuer not to pay the whole or any part of the Maximum Aggregate Sum;

(d) despite anything which, but for this provision, may operate to release, prejudicially affect, discharge, or in any way relieve the Issuer from any obligation including, without limitation:

(i) any variation or alteration to any contract between the Supplier and TfNSW (including the Delivery Deed and any other agreement between TfNSW and the Supplier); or

(ii) the grant to any person of any remedy, waiver or other indulgence, or the discharge or release of any person; and

(e) to an Australian dollar account in New South Wales nominated by TfNSW, or as TfNSW otherwise directs in a notice of demand given under clause 2.

4. Additional Requirements
This bond must be payable at an office of the Issuer in New South Wales (or such other place as TfNSW may approve in writing) which is open during normal business hours.

5. Expiry

The Issuer's liability under this bond will be a continuing liability and will continue until the earlier of:

(a) [Insert date];

(b) the date TfNSW notifies the Issuer in writing that this bond is no longer required; or

(c) the date the Issuer has paid the Maximum Aggregate Sum to TfNSW.

6. Issuer's liability

(a) The Issuer will have no liability in respect of any claim under this bond after the date upon which this bond expires under the above clause.

(b) However, the Issuer may at any time without being required to do so, pay to TfNSW the Maximum Aggregate Sum less any amount or amounts it may previously have paid under this bond, or such lesser sum as may be required and specified by TfNSW, and thereupon the liability of the Issuer under this bond shall immediately cease.

7. General

This bond is governed by the laws in force in New South Wales.

8. Execution

Executed and delivered as a deed.

[Insert execution clauses. Each attorney executing this deed states that he/she has no notice of revocation or suspension of his/her power of attorney.]
Software Escrow Agreement

Transport for NSW
TfNSW

Rail Corporation New South Wales
RailCorp

Downer EDI Rail Pty Limited
Supplier

Assurex Escrow Pty Limited
Escrow Agent

Clayton Utz,
Lawyers
Level 15, 1 Bligh Street
Sydney NSW 2000
GPO Box 9806
Sydney NSW 2001
Tel  +61 2 9353 4000
Fax  +61 2 8220 6700
www.claytonutz.com

Our reference 13647/80172419
Software Escrow Agreement

Date

Parties
Transport for NSW ABN18 804 239 602 of 18 Lee Street, Chippendale NSW 2008 (TfNSW)

Rail Corporation New South Wales ABN 59 325 778 353 of [insert details] (RailCorp)

Downer EDI Rail Pty Limited ABN 92 000 002 031 of T3, Triniti Business Campus 39 Delhi Road, North Ryde NSW 2113 (Supplier)

Assurex Escrow Pty Limited ABN 64 008 611 578 of Suite 93, Level 5, 330 Wattle Street, Ultimo NSW 2007 (Escrow Agent)

Background

A. On [Insert Date], TfNSW and RailCorp entered into a Delivery Deed with the Supplier for the design, development, manufacture, testing, commission, supply and delivery of new passenger rolling stock and other related Assets (Delivery Deed). Pursuant to paragraph 3 of Schedule 3 of the Delivery Deed, the Supplier has agreed to deposit the Relevant Source Code and Escrow Information with the Escrow Agent and keep it updated so that TfNSW is able to access it, for its own benefit and for the benefit of RailCorp, in accordance with this Agreement.

B. The Escrow Agent agrees to hold the Relevant Source Code and Escrow Information on the terms and conditions of this Agreement.

Operative provisions

1. Defined terms & interpretation

1.1 Defined terms

In this Agreement any other word, expression, reference or term used which is defined in the Delivery Deed and is not specifically defined in this clause 1.1 will, unless the context requires otherwise have the same meaning in this Agreement:

**Agreement** means this agreement evidenced by this document and includes all attachments.

**Business Hours** means from 9.00am to 5.00pm on a Business Day.

**Delivery Deed** has the meaning given in the Background to this Agreement.

**Deposit Package** means the Relevant Source Code and Escrow Information described in Schedule 2 of this Agreement together with any updates to the Relevant Source Code and Escrow Information deposited with the Escrow Agent from time to time in accordance with clause 4.2.

**Escrow Fee** means the amount set out or calculated in accordance with Schedule 1 to this Agreement.

**GST exclusive consideration** has the meaning given in clause 10.2.
Notice has the meaning given in clause 11.

Notice of Release has the meaning given in clause 7.2(b).

Objection Notice has the meaning given in clause 7.2(d).

Register has the meaning given in clause 5(e).

Release Event means an event, occurrence or circumstance where:

(a) the Supplier fails to comply with any of those obligations provided in clauses 4.1 or 4.2;

(b) an Insolvency Event occurs in relation to the Supplier;

(c) the Delivery Deed is terminated under clause 26.5 of the Delivery Deed;

(d) TfNSW and the Supplier agree in writing that the event, occurrence or circumstance is a release event.

Tests has the meaning given in clause 6(b).

1.2 Interpretation

In this Agreement, except where the context otherwise requires:

(a) the singular includes the plural and vice versa, and a gender includes other genders;

(b) another grammatical form of a defined word or expression has a corresponding meaning;

(c) a reference to a document or instrument includes the document or instrument as novated, altered, supplemented or replaced from time to time;

(d) a reference to A$, $A, dollar or $ is to Australian currency;

(e) a reference to time is to Sydney, New South Wales, Australia time;

(f) a reference to a party is to a party to this Agreement, and a reference to a party to a document includes the party’s executors, administrators, successors and permitted assigns and substitutes;

(g) the meaning of general words is not limited by specific examples introduced by including, for example or similar expressions;

(h) a rule of construction does not apply to the disadvantage of a party because the party was responsible for the preparation of this Agreement or any part of it; and

(i) if a day on or by which an obligation must be performed or an event must occur is not a Business Day, the obligation must be performed or the event must occur on or by the next Business Day.

1.3 Headings

Headings are for ease of reference only and do not affect interpretation.
1.4 Rights and benefits of TfNSW

The rights and benefits of TfNSW provided for under this Agreement and the other Project Agreements are intended to be for, and are held by TfNSW for, the benefit of TfNSW in its own right to support the discharge of its duties in relation to, and liabilities arising from, the performance of the Operations Functions, and also for the benefit of:

(a) RailCorp as the owner of the Assets; and

(b) the Operator and the NSW Rail Entities to support the discharge of their respective duties in relation to and liabilities arising from performance of the Operations Functions.

1.5 Benefits held on trust

(a) The rights of TfNSW under this Agreement are held, and the covenants of the Supplier and the Escrow Agent given to TfNSW under this agreement are enjoyed, by TfNSW in its own right and as trustee for RailCorp, the Operator and the NSW Rail Entities.

(b) The Supplier and the Escrow Agent acknowledge the existence of such trusts and consent to TfNSW exercising rights in relation to, or otherwise enforcing such obligations on behalf of, RailCorp, the Operator or any NSW other Rail Entity as if they were a party to this Agreement.

1.6 Transfer of functions

The Supplier and the Escrow Agent:

(a) acknowledge that TfNSW or RailCorp may be reconstituted, renamed, dissolved, replaced or restructured and that some or all of the powers, functions, assets, liabilities or responsibilities of either of them may be transferred to or vested in another entity;

(b) agree to do anything (including execute any document), and must procure that its Associates do anything (including execute any document), required to give full effect to any of the matters contemplated in clause 1.6(a);

(c) shall have no Claim or entitlement to payment of any costs arising from any of the above except that TfNSW must pay the Escrow Agent’s reasonable costs.

1.7 No bias against drafter

No provision of this deed is to be interpreted to the disadvantage of a party because that party (or its representative) drafted that provision.

2. Duration

2.1 Duration

This Agreement remains in force until the earlier of:

(a) the date on which:

(i) the Deposit Package is released in accordance with this Agreement; or

(ii) this Agreement is otherwise terminated in accordance with its terms; or

(b) 9.00am on the first Business Day after the last day of the TLS Phase.
2.2 Expiry or Termination

Subject to clause 9.3, if this Agreement expires or is terminated for any reason, the Escrow Agent will immediately release the Deposit Package to the Supplier.

3. Appointment of escrow agent

3.1 Appointment

TfNSW and the Supplier hereby appoint the Escrow Agent to hold the Deposit Package deposited by the Supplier on the terms and conditions of this Agreement.

3.2 Acceptance of appointment

The Escrow Agent agrees to hold the Deposit Package deposited by the Supplier on the terms and conditions of this Agreement.

4. Delivery of Deposit Package

4.1 Delivery

The Supplier must deposit with the Escrow Agent:

(a) one copy of the Deposit Package within 20 Business Days of the Commencement Date; and

(b) one copy of the Deposit Package within five Business Days of receiving a notice under clause 5(i).

4.2 Delivery of updated Deposit Package

Within 10 Business Days of the end of each quarter during the Contract Term, the Supplier must update the Deposit Package deposited with the Escrow Agent by depositing with the Escrow Agent a copy of all Relevant Source Code and Escrow Information which during that quarter has been created or newly incorporated into any Deliverable (including any Relevant Source Code or Escrow Information to which any modification or change has been made). This is to ensure that the Deposit Package deposited with the Escrow Agent is current and is updated as necessary at the end of each relevant quarter.

4.3 Acceptance of delivery

The Escrow Agent agrees to accept delivery of all deposits of the Deposit Package under this Agreement.

5. Obligations of Escrow Agent

The Escrow Agent must:

(a) store the Deposit Package securely;

(b) take all reasonable steps to ensure the preservation and care of the Deposit Package;

(c) not make public or disclose to any person any information about this Agreement or the Deposit Package except as permitted by this Agreement or as required by law;

(d) not use, reproduce, release, or cause to be used, reproduced or released, the Deposit Package or any part thereof except as permitted by this Agreement;
establish and maintain a register of all Relevant Source Code and Escrow Information which has been deposited, stored and released (Register) showing deposit and release dates and to whom the Relevant Source Code and Escrow Information has released;

allow TfNSW and the Supplier to examine the Register at any time during Business Hours or be provided with a copy of the Register;

notify TfNSW of any deposit made by the Supplier and the date on which the deposit was made;

issue a certificate of currency, upon request by TfNSW, confirming the status of the Escrow Agreement;

immediately notify TfNSW and the Supplier if the Deposit Package or any part thereof is lost, damaged or destroyed while in the possession, custody or control of the Escrow Agent or if the Escrow Agent has reasonable grounds for believing that the security of the Deposit Package has been compromised;

without limiting the rights of TfNSW or the Supplier under this Agreement or at law, where the loss, damage or destruction of the Deposit Package is caused by a breach of the Escrow Agent's obligations under this Agreement, the Escrow Agent must reimburse the Supplier for the reasonable cost of replacing the Deposit Package;

take out and maintain for the duration of this Agreement, and for seven years after the Escrow Agent ceases to provide such services, professional liability insurance for an insured amount of  or more in total covering the Escrow Agent for any claim against it by a person (including TfNSW, RailCorp and the Supplier) for any actual or alleged fault or negligence by the Escrow Agent or its personnel in carrying out the Escrow Agent's obligations under this Agreement; and

ensure that its employees comply with the obligations in this clause 5.

6. Verification of deposits

(a) The Escrow Agent is not required to verify the nature, completeness or accuracy of deposits of the Deposit Package.

(b) Upon 10 Business Days written notice to the Escrow Agent and the Supplier, TfNSW may analyse and conduct tests of the Deposit Package held by the Escrow Agent to verify the accuracy, completeness and currency of the Deposit Package (the Tests).

(c) TfNSW may engage a third party to conduct the Tests on TfNSW's or RailCorp's behalf, subject to approval of the third party by the Supplier, such approval not to be unreasonably delayed or withheld.

(d) The Supplier may, by written notice to TfNSW, require that the Tests be conducted in the presence of and under the supervision of the Supplier.

(e) The Escrow Agent must release the Deposit Package to TfNSW or a third party tester (as appropriate) upon receipt of a written notice signed by TfNSW and the Supplier.
7. **Release from escrow**

7.1 **Prohibition on release**

The Escrow Agent must not release or allow access to the Deposit Package except in accordance with the terms of this Agreement.

7.2 **Release**

(a) The Escrow Agent must not release, or allow access to, the Deposit Package to TfNSW except in accordance with clause 6 or this clause 7.2.

(b) The Escrow Agent must release the Deposit Package to TfNSW upon written notice from the Supplier.

(c) If TfNSW considers that a Release Event has occurred, then TfNSW may provide written notice to the Supplier and the Escrow Agent requiring the release of the Relevant Source Code, Escrow Information or a specified portion of either of them (Notice of Release).

(d) If the Supplier does not, within five Business Days of receiving a Notice of Release, issue to TfNSW and the Escrow Agent a written notice objecting to the release of Relevant Source Code, Escrow Information or the specified portion of either of them (Objection Notice), the Escrow Agent must release the Relevant Source Code, Escrow Information or the specified portion of either of them to TfNSW on the expiry of such five Business Day period.

(e) If the Supplier has issued to TfNSW and the Escrow Agent an Objection Notice, unless, in the period of 10 Business Days following its receipt of the Objection Notice, the Escrow Agent is otherwise directed by:

(i) the Supplier and TfNSW jointly in writing; or

(ii) a court order,

then the Escrow Agent must release the Relevant Source Code, Escrow Information or the specified portion of either of them to TfNSW on the expiry of such 10 Business Day period.

(f) For the removal of doubt, the Escrow Agent's obligations under this Agreement apply irrespective of whether a Release Event has occurred and no part of this Agreement obliges the Escrow Agent to make any determination as to whether a Release Event has occurred.

7.3 **Permitted Use**

If the whole or any part of the Relevant Source Code or Escrow Information is released to TfNSW in accordance with clause 7.2 of this Agreement, TfNSW and RailCorp will only use the Relevant Source Code or Escrow Information in accordance with their rights under the Delivery Deed.

8. **Escrow Fees**

TfNSW must pay the Escrow Agent for the services provided by the Escrow Agent under the Agreement as specified in Schedule 1 of this Agreement, plus GST as applicable in accordance with clause 10, within 20 Business Days of receipt of a correctly rendered tax invoice.
9. **Termination**

9.1 **Termination by TfNSW and the Supplier**

(a) This Agreement may be jointly terminated by TfNSW and the Supplier immediately if:

(i) the Escrow Agent breaches any provision of this Agreement and fails to remedy the breach within five Business Days after receiving notice requiring it to do so;

(ii) the Escrow Agent breaches a material provision of this Agreement where that breach is not capable of remedy; or

(iii) any event referred to in clause 9.1(b) happens to the Escrow Agent.

(b) The Escrow Agent must notify TfNSW and the Supplier immediately if:

(i) the Escrow Agent or any Related Body Corporate of the Escrow Agent:
   A. disposes of the whole or part of its assets, operations or business other than in the ordinary course of business;
   B. ceases to carry on business; or
   C. ceases to be able to pay its debts as they become due;

(ii) any step is taken by a mortgagee to take possession or dispose of the whole or part of the Escrow Agent's, or any Related Body Corporate of the Escrow Agent's, assets, operations or business;

(iii) any step is taken to enter into any arrangement between the Escrow Agent, or any Related Body Corporate of the Escrow Agent, and its creditors; or

(iv) any step is taken to appoint a receiver, a receiver and manager, a trustee in bankruptcy, a provisional liquidator, a liquidator, an administrator or other like person of the whole or part of the Escrow Agent's, or any Related Body Corporate of the Escrow Agent's, assets, operations or business.

(c) This Agreement may be jointly terminated by TfNSW and the Supplier giving 20 Business Days' written notice to the Escrow Agent.

9.2 **Termination by the Escrow Agent**

(a) The Escrow Agent may terminate this Agreement by giving three months' notice to each of TfNSW and the Supplier, subject to the pro-rata refund of any advance payments of the Escrow Fee.

(b) The Escrow Agent may terminate this Agreement if the Escrow Agent has given notice to TfNSW and the Supplier that TfNSW has not paid, or procured to be paid, the Escrow Fees due and payable in accordance with this Agreement and the Escrow Fees are not paid by any party within 20 Business Days after TfNSW receives such notice.

9.3 **Further Escrow Agreement**

(a) If this Agreement is terminated pursuant to clauses 9.1 or 9.2, then upon notification by TfNSW, the Supplier must enter into a new escrow agreement with TfNSW.
RailCorp and an escrow agent acceptable to TfNSW and the Supplier on terms substantially the same as this Agreement, or such other terms as may be agreed between TfNSW and the Supplier.

(b) If a new escrow agreement is entered into by TfNSW, RailCorp and the Supplier within five Business Days of the termination of this Agreement, the Escrow Agent must arrange for the transfer of the Deposit Package to the new escrow agent.

10. GST

10.1 Interpretation

In this clause 10, a word or expression defined in the *A New Tax System (Goods and Services Tax)* Act 1999 (Cth) has the meaning given to it in that Act.

10.2 GST gross up

If a party makes a supply under or in connection with this deed in respect of which GST is payable, the consideration for the supply but for the application of this clause 10.2 (GST exclusive consideration) is increased by an amount equal to the GST exclusive consideration multiplied by the rate of GST prevailing at the time the supply is made.

10.3 Reimbursements

If a party must reimburse or indemnify another party for a loss, cost or expense, the amount to be reimbursed or indemnified is first reduced by any input tax credit the other party is entitled to for the loss, cost or expense, and then increased in accordance with clause 10.2.

10.4 Tax invoice

A party need not make a payment for a taxable supply made under or in connection with this Agreement until it receives a tax invoice for the supply to which the payment relates.

11. Notices and other communications

11.1 How to give a notice

(a) Wherever referred to in this clause, Notice means each communication (including each notice, consent, approval, request, direction and demand) under or in connection with this Agreement.

(b) Each Notice must:

(i) be in writing;

(ii) be:

A. in the case of a Notice intended for TfNSW or RailCorp, addressed to the TfNSW's Representative;

B. in the case of a Notice intended for the Supplier, addressed to the Supplier's Representative; or

C. in the case of a Notice intended for the Escrow Agent, addressed to the Escrow Agent;

(iii) be signed by the party making it or (on that party's behalf) by the solicitor for, or any attorney, director, secretary or authorised agent of, that party; and
be delivered or posted to the relevant address shown below (or to any
new address notified by the intended recipient):

TfNSW
Name: TfNSW, a New South Wales Government agency
Address: Level 2, 1 Prince Albert Road, Sydney NSW 2000
For the attention of: Project Director, Sydney Growth Trains

Supplier
Name: Downer EDI Rail Pty Limited
Address: T3, Triniti Business Campus, 39 Delhi Road
North Ryde NSW 2113
For the attention of: The Company Secretary

Escrow Agent
Name: Assurex Escrow Pty Limited
Address: Suite 93, Level 5
330 Wattle Street
Ultimo NSW 2007
For the attention of: 

(c) A notice, consent or other communication under this document is only effective if it is:
   (i) in writing, signed by or on behalf of the person giving it;
   (ii) addressed to the person to whom it is to be given; and
   (iii) sent or delivered in one of the following ways:

   A. delivered or sent by pre-paid mail (by airmail, if the addressee
      is overseas) to that person's address; or

   B. sent by fax to that person's fax number and the machine from
      which it is sent produces a report that states that it was sent
      in full.

11.2 When a notice is received

A communication is taken to be received by the addressee:
   (a) (in the case of prepaid post sent to an address in the same country) two Business
      Days after the date of posting;

   (b) (in the case of international post) seven Business Days after the date of posting;

   (c) (in the case of delivery by hand) on delivery,

provided that if the communication would be deemed to be received on a day which is not a
Business Day or after 5.00pm on a Business Day, it is deemed to be received at 9.00am on
the next Business Day.
12. Miscellaneous

12.1 Amendments

This Agreement may be varied in writing signed by each party.

12.2 Assignment

(a) Neither the Supplier nor the Escrow Agent may assign this Agreement or a right under this Agreement or dispose of, declare a trust over or otherwise create an interest in its rights under this Agreement without first obtaining the prior written consent of TfNSW.

(b) TfNSW and RailCorp may assign this Agreement or a right under this Agreement or dispose of, declare a trust over or otherwise create an interest in their rights under this Agreement without the consent of any other party.

12.3 Survival

Any obligation of confidence under this Agreement is independent and survives termination of this Agreement. Any other term by its nature intended to survive termination of this Agreement survives termination of this Agreement.

12.4 Counterparts

This Agreement may be executed in any number of counterparts and by the parties on separate counterparts. All executed counterparts constitute one document.

12.5 Further acts and documents

Each party must do anything (including execute any document), and must ensure that its Associates do anything (including execute any document), required by law or that the other party may reasonably require to give full effect to this Agreement.

12.6 Severance

If at any time any provision of this Agreement is or becomes illegal, invalid or unenforceable in any respect under applicable law, that provision is to be severed to the extent necessary to make this Agreement enforceable, and it will not affect or impair the legality, validity or enforceability of any other provision of this Agreement.

12.7 Waiver

A right may only be waived in writing, signed by the party giving the waiver, and:

(a) no other conduct (including failure to exercise or enforce, or a delay in exercising or enforcing, or the partial exercise or enforcement of, a right, power or remedy provided by law or under or in connection with this Agreement by a party) precludes, or operates as a waiver of, the exercise or enforcement, or further exercise or enforcement, of that or any other right, power or remedy provided by law or under this Agreement;

(b) a waiver or consent given by a party under this Agreement is only effective and binding on that party if it is given or confirmed in writing by that party;

(c) a waiver of a right on one or more occasions does not operate as a waiver of that right if it arises again; and
(d) no waiver of a breach of a term of this Agreement operates as a waiver of another breach of that term or of a breach of any other term of this Agreement.

12.8 Confidentiality

A party may only use confidential information of another party provided under this Agreement for the purposes of this Agreement, and must keep the existence and the terms of this Agreement and any confidential information of another party confidential except where:

(a) the information is public knowledge (but not because of a breach of this Agreement) or the party has independently created the information;

(b) disclosure is required by law or a regulatory body (including a relevant stock exchange); or

(c) disclosure is made to a person who must know for the purposes of this Agreement on the basis that the person keeps the information confidential.

12.9 Governing law and jurisdiction

This Agreement is governed by the law of New South Wales, Australia and each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of New South Wales, Australia.
Schedule 1 - Escrow Fees

[To be inserted]
Schedule 2- Deposit Package

[To be inserted]
Signed, sealed and delivered for and on behalf of Downer EDI Rail Pty Ltd (ABN 92 000 002 031) by its attorneys under a power of attorney dated in the presence of:

Signature of witness

Full name of witness

Executed by Assurex Escrow Pty Limited (ABN 64 008 611 578) in accordance with section 127 of the Corporations Act 2001 (Cth):

Signature of director

Full name of director

Signature of company secretary/director

Full name of company secretary/director

[Execution clauses to be inserted]
Software Escrow Agreement
(Significant Contractor)

Transport for NSW
TfNSW
Rail Corporation New South Wales
RailCorp
[Insert full name of Significant Contractor]
Significant Contractor
Assurex Escrow Pty Ltd
Escrow Agent
Software Escrow Agreement (Significant Contractor)

Date

Parties

Transport for NSW ABN18 804 239 602 of 18 Lee Street
Chippendale NSW 2008 (TfNSW)

Rail Corporation New South Wales ABN 59 325 778 353 of Level 6, 18 Lee
Street, Chippendale NSW 2008 (RailCorp)

[Insert name of Significant Contractor] ABN/ACN [Insert ABN/ACN of
Significant Contractor] of [Insert Significant Contractor’s address details]
(Significant Contractor)

Assurex Escrow Pty Limited ABN 64 008 611 578 of Suite 93, Level 5, 330
Wattle Street, Ultimo NSW 2007 (Escrow Agent)

Background

A. On [Insert Date], TfNSW and RailCorp entered into a deed with Downer EDI Rail Pty Limited
ABN 92 000 002 031 of T3, Triniti Business Campus, 39 Delhi Road, North Ryde NSW 2113
(Supplier) for the design, development, manufacture, testing, commission, supply and delivery
of new passenger rolling stock and other related assets (Delivery Deed).

B. On [Insert Date], TfNSW and RailCorp entered into a further deed with the Supplier under
which the Supplier agreed to maintain and operate a maintenance facility for the maintenance
of the new passenger rolling stock, and to undertake planned and unplanned maintenance of
the rolling stock and other related assets, including rectifying defects and providing through life
support and spares (TLS Deed).

C. The Significant Contractor has entered into, or will enter into, one or more Significant
Contracts in connection with the activities required to be performed by the Supplier pursuant to
the Delivery Deed and/or the TLS Deed.

D. The Supplier has agreed with TfNSW and RailCorp to procure that the Significant Contractor
deposit the Relevant Source Code and Escrow Information in each deliverable to be
developed or delivered by the Significant Contractor under each Significant Contract
(Significant Contractor Escrow Information) with the Escrow Agent and keep it updated so
that TfNSW is able to access it, for its own benefit and for the benefit of RailCorp, in
accordance with this Agreement.

E. The Significant Contractor has agreed in each Significant Contract to deposit the Significant
Contractor Escrow Information with the Escrow Agent and keep it updated so that TfNSW (for
its own benefit and for the benefit of RailCorp) is able to access it, in accordance with this
Agreement.

F. The Escrow Agent agrees to hold the Significant Contractor Escrow Information on the terms
and conditions of this Agreement.

Operative provisions

1. Defined terms & interpretation

1.1 Defined terms

Agreement means this agreement evidenced by this document and includes all attachments.

Business Day means any day in New South Wales that:

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Schedule 20
Delivery Deed

TfNSW
(a) is not a Saturday, Sunday or public holiday; and
(b) does not fall during the period:
   (i) commencing on the Monday before 24 December in any given year; and
   (ii) ending on the Friday following 1 January of the following year.

**Business Hours** means from 9.00am to 5.00pm on a Business Day.

**Delivery Deed** has the meaning given in the Background to this Agreement.

**Deposit Package** means the Significant Contractor Escrow Information described in Schedule 2 of this Agreement together with any updates to the Significant Contractor Escrow Information deposited with the Escrow Agent from time to time in accordance with clause 4.2.

**Escrow Fee** means the amount set out in Schedule 1 to this Agreement.

**Escrow Information** means all Source Code for any computer program, computer interface or train operating system screen included in or required for any asset or deliverable which the Significant Contractor is obliged to manufacture or supply under any Significant Contract, and includes any software applications required for access to the same.

**Expiry Date** means, either:
(a) the last day of the TLS Deed Contract Term; or
(b) where applicable, the last day of the TLS Deed Contract Term (Extended).

**GST exclusive consideration** has the meaning given in clause 10.2.

**Initial Fleet Provisional Acceptance Date** has the meaning given in clause 2.3(a)(i)B.

**Network** means that part of the rail network described in ASA TS TOC.3 2015 issue 2 as used by Sydney Trains to provide passenger services in the metropolitan area.

**Notice** has the meaning given in clause 11.

**Notice of Release** has the meaning given in clause 7.2(b).

**NSW Rail Entity** means RailCorp, the Operator, NSW Trains and any other governmental, semi-governmental or local-government authority, administrative or judicial body or tribunal, department, commission, public authority, agency, minister, statutory corporation or instrumentality, body, or any other similar entity in New South Wales that owns or operates railway infrastructure or rolling stock.

**NSW Trains** means the body corporate known by that name which was constituted as a body corporate under the *Transport Administration (General) Regulation 2005* (NSW) and all present and future iterations of that body corporate which continue in existence under the *Transport Administration (General) Regulation 2013* (NSW) or any other legislation or another entity appointed to undertake some or all of the functions of that body.

**Objection Notice** has the meaning given in clause 7.2(e).

**Operations Functions** means the functions and responsibilities of TfNSW, the Operator and other NSW Rail Entities as passenger transport operators on the Network and elsewhere or as the owners or managers of rail infrastructure or rolling stock.

**Operator** means Sydney Trains or such other entity that may be appointed from time to time to operate some or all of the railway passenger services on the Network.
Register has the meaning given in clause 5(e).

Related Body Corporate has the same meaning as in the Corporations Act 2001 (Cth).

Release Event means an event, occurrence or circumstance where:

(a) the Significant Contractor fails to comply with any of those obligations provided in clauses 4.1 or 4.2;

(b) an Insolvency Event occurs in relation to the Significant Contractor;

(c) a Significant Contract is terminated as a direct or indirect result of (in TfNSW’s reasonable opinion) a Significant Contractor Event of Default in respect of that Significant Contract; or

(d) TfNSW and the Significant Contractor agree in writing that the event, occurrence or circumstance is a Release Event.

Relevant Source Code means all Source Code for any computer program or computer included in or required for any asset or deliverable which the Significant Contractor is obliged to deliver under a Significant Contract.

Significant Contract means any agreement to which the Significant Contractor is a party and pursuant to which the Significant Contractor undertakes to perform obligations in support of the Supplier’s obligations under the Delivery Deed or the TLS Deed.

Significant Contract Document means:

(a) each Significant Contract;

(b) the “Collateral Warranty Deed Poll” executed by the Significant Contractor in favour of TfNSW and RailCorp (if any);

(c) guarantees or other security in respect of the proposed Significant Contractor’s obligations under a Significant Contract, in form and substance reasonably satisfactory to TfNSW; and

(d) this Agreement.

Significant Contractor Escrow Information has the meaning given in the Background to this Agreement.

Significant Contractor Event of Default means:

(a) a breach by the Significant Contractor of a Significant Contract; or

(b) any other act or omission of the Significant Contractor,

which entitles the other party to the Significant Contract to terminate the Significant Contract.

Source Code means, in respect of a computer program, the human readable code of that computer program, and includes associated software including scripts and applets (collectively comprised in a complete copy of all of the foregoing in executable code) and all documentation necessary to operate, maintain and modify the executable code copy of that computer program including all technical documentation and specifications in respect of that computer program.

Supplier has the meaning given in the background to this Agreement.

Sydney Trains means the body corporate known by that name which was constituted as a body corporate under the Transport Administration (General) Regulation 2005 (NSW) and all
present and future iterations of that body corporate which continue in existence under the Transport Administration (General) Regulation 2013 (NSW) or any other legislation or another entity appointed to undertake some or all of the functions of that body corporate.

Tests has the meaning given in clause 6(b).

TLS Deed has the meaning given in the Background to this Agreement.

TLS Deed Contract Term has the meaning given in clause 2.3(a)(ii).

TLS Deed Contract Term (Extended) means:

(a) the TLS Deed Contract Term; plus

(b) any period by which the TLS Deed Contract Term is extended, as contemplated in clause 2.3(a)(iii).

1.2 Interpretation

In this Agreement, except where the context otherwise requires:

(a) the singular includes the plural and vice versa, and a gender includes other genders;

(b) another grammatical form of a defined word or expression has a corresponding meaning;

(c) a reference to a document or instrument includes the document or instrument as novated, altered, supplemented or replaced from time to time;

(d) a reference to A$, $A, dollar or $ is to Australian currency;

(e) a reference to time is to Sydney, New South Wales, Australia time;

(f) a reference to a party is to a party to this Agreement, and a reference to a party to a document includes the party’s executors, administrators, successors and permitted assigns and substitutes;

(g) the meaning of general words is not limited by specific examples introduced by including, for example or similar expressions;

(h) a rule of construction does not apply to the disadvantage of a party because the party was responsible for the preparation of this Agreement or any part of it; and

(i) if a day on or by which an obligation must be performed or an event must occur is not a Business Day, the obligation must be performed or the event must occur on or by the next Business Day.

1.3 Headings

Headings are for ease of reference only and do not affect interpretation.

1.4 Rights and benefits of TfNSW

The rights and benefits of TfNSW provided for under this Agreement and any other Significant Contract Document to which TfNSW is a party are intended to be for, and are held by TfNSW for, the benefit of TfNSW in its own right to support the discharge of its duties in relation to and liabilities arising from the performance of the Operations Functions, and also for the benefit of:
I Transport

(a) RailCorp as the owner of the rolling stock, maintenance facility, maintenance facility equipment and infrastructure, tools, spares, plant, equipment, consumables and chattels procured by TfNSW and RailCorp pursuant to or in connection with the Delivery Deed and the TLS Deed; and

(b) the Operator and the NSW Rail Entities to support the discharge of their respective duties in relation to and liabilities arising from performance of the Operations Functions.

1.5 Benefits held on trust

(a) The rights of TfNSW under this Agreement are held, and the covenants of the Significant Contractor and the Escrow Agent given to TfNSW under this Agreement are enjoyed, by TfNSW in its own right and as trustee for RailCorp, the Operator and the NSW Rail Entities.

(b) The Significant Contractor and the Escrow Agent acknowledge the existence of such trusts and consent to TfNSW exercising rights in relation to, or otherwise enforcing such obligations on behalf of RailCorp, the Operator or any other NSW Rail Entity as if they were a party to this Agreement.

1.6 Transfer of functions

The Significant Contractor and the Escrow Agent:

(a) acknowledge that TfNSW or RailCorp may be reconstituted, renamed, dissolved, replaced or restructured and that some or all of the powers, functions, assets, liabilities or responsibilities of either of them may be transferred to or vested in another entity;

(b) agree to do anything (including execute any document) required to give full effect to any of the matters contemplated in clause 1.6(a); and

(c) shall have no claim, action, demand or proceeding including for any claim, action, demand or proceeding, or entitlement to payment of any costs arising out of or in any way in connection with any of the above under, arising out of, or in any way in connection with this Agreement or otherwise at law or in equity except that TfNSW must pay the Escrow Agent’s reasonable costs.

1.7 No bias against drafter

No provision of this Agreement is to be interpreted to the disadvantage of a party because that party (or its representative) drafted that provision.

2. Duration

2.1 Duration

This Agreement remains in force until the earlier of:

(a) the date on which:

(i) the Deposit Package is released in accordance with this Agreement; or

(ii) this Agreement is otherwise terminated in accordance with its terms; or

(b) 9.00am on the first Business Day after the Expiry Date.
2.2 Expiry or Termination

Subject to clause 9.3, if this Agreement expires or is terminated for any reason, the Escrow Agent will immediately release the Deposit Package to the Significant Contractor.

2.3 Expiry Date

(a) The parties acknowledge that:

(i) pursuant to the Delivery Deed:

A. the Supplier is obliged to supply sets of rolling stock which achieve "Provisional Acceptance", being a stage of completion when certain acceptance criteria specified in the Delivery Deed have been satisfied; and

B. a representative of TfNSW will certify to the Supplier the date when the stage referred to in clause 2.3(a)(i)A has been achieved with respect to each set of rolling stock in the initial fleet to be supplied by the Supplier under the Delivery Deed (Initial Fleet Provisional Acceptance Date);

(ii) the term of the TLS Deed is a period of 25 years from the Initial Fleet Provisional Acceptance Date (TLS Deed Contract Term); and

(iii) the TLS Deed Contract Term may be extended by TfNSW pursuant to the TLS Deed, by a further 5 or 10 years in TfNSW’s absolute discretion.

(b) TfNSW will notify the Escrow Agent and the Significant Contractor of:

(i) the Initial Fleet Provisional Acceptance Date; and

(ii) any extension to the TLS Deed Contract Term.

3. Appointment of escrow agent

3.1 Appointment

TfNSW and the Significant Contractor hereby appoint the Escrow Agent to hold the Deposit Package deposited by the Significant Contractor on the terms and conditions of this Agreement.

3.2 Acceptance of appointment

The Escrow Agent agrees to hold the Deposit Package deposited by the Significant Contractor on the terms and conditions of this Agreement.

4. Delivery of Deposit Package

4.1 Delivery

The Significant Contractor must deposit with the Escrow Agent:

(a) two copies of the Deposit Package within 20 Business Days of the date of commencement of a Significant Contract; and

(b) two copies of the Deposit Package within five Business Days of receiving a notice under clause 5(i).
4.2 Delivery of updated Deposit Package

Within 10 Business Days of the end of each quarter from the date of this Agreement until the Expiry Date, the Significant Contractor must update the Deposit Package deposited with the Escrow Agent by depositing with the Escrow Agent a copy of all Significant Contractor Escrow Information which during that quarter has been created or newly incorporated into any asset or deliverable which the Significant Contractor is obliged to manufacture or supply under any Significant Contract (including any Significant Contractor Escrow Information to which any modification or change has been made). This is to ensure that the Deposit Package deposited with the Escrow Agent is current and is updated as necessary at the end of each relevant quarter.

4.3 Acceptance of delivery

The Escrow Agent agrees to accept delivery of all deposits of the Deposit Package under this Agreement.

5. Obligations of Escrow Agent

The Escrow Agent must:

(a) store the Deposit Package securely;

(b) take all reasonable steps to ensure the preservation and care of the Deposit Package;

(c) not make public or disclose to any person any information about this Agreement or the Deposit Package except as permitted by this Agreement or as required by law;

(d) not use, reproduce, release, or cause to be used, reproduced or released, the Deposit Package or any part thereof except as permitted by this Agreement;

(e) establish and maintain a register of all Significant Contractor Escrow Information which has been deposited, stored and released (Register) showing deposit and release dates and to whom the Significant Contractor Escrow Information has released;

(f) allow TfNSW and the Significant Contractor to examine the Register at any time during Business Hours or be provided with a copy of the Register;

(g) notify TfNSW of any deposit made by the Significant Contractor and the date on which the deposit was made;

(h) issue a certificate of currency, upon request by TfNSW, confirming the status of this Agreement;

(i) immediately notify TfNSW and the Significant Contractor if the Deposit Package or any part thereof is lost, damaged or destroyed while in the possession, custody or control of the Escrow Agent or if the Escrow Agent has reasonable grounds for believing that the security of the Deposit Package has been compromised;

(j) without limiting the rights of TfNSW or the Significant Contractor under this Agreement or at law, where the loss, damage or destruction of the Deposit Package is caused by a breach of the Escrow Agent's obligations under this Agreement, the Escrow Agent must reimburse the Significant Contractor for the reasonable cost of replacing the Deposit Package;

(k) take out and maintain for the duration of this Agreement, and for seven years after the Escrow Agent ceases to provide such services, professional liability insurance for an insured amount of $3,205,839.42 or more in total covering the Escrow Agent for...
any claim against it by a person (including TfNSW, RailCorp and the Significant Contractor) for any actual or alleged fault or negligence by the Escrow Agent or its personnel in carrying out the Escrow Agent’s obligations under this Agreement; and

(i) ensure that its employees comply with the obligations in this clause 5.

6. Verification of deposits

(a) The Escrow Agent is not required to verify the nature, completeness or accuracy of deposits of the Deposit Package.

(b) Upon 10 Business Days written notice to the Escrow Agent and the Significant Contractor, TfNSW may analyse and conduct tests of the Deposit Package held by the Escrow Agent to verify the accuracy, completeness and currency of the Deposit Package (the Tests).

(c) TfNSW may engage a third party to conduct the Tests on TfNSW’s or RailCorp’s behalf, subject to approval of the third party by the Significant Contractor, such approval not to be unreasonably delayed or withheld.

(d) The Significant Contractor may, by written notice to TfNSW, require that the Tests be conducted in the presence of and under the supervision of the Significant Contractor.

(e) The Escrow Agent must release the Deposit Package to TfNSW or a third party tester (as appropriate) upon receipt of a written notice signed by TfNSW and the Significant Contractor.

7. Release from escrow

7.1 Prohibition on release

The Escrow Agent must not release or allow access to the Deposit Package except in accordance with the terms of this Agreement.

7.2 Release

(a) The Escrow Agent must not release, or allow access to, the Deposit Package to TfNSW except in accordance with clause 6 or this clause 7.2.

(b) The Escrow Agent must release the Deposit Package to TfNSW upon written notice from the Significant Contractor.

(c) If TfNSW considers that a Release Event has occurred, then TfNSW may provide written notice to the Significant Contractor and the Escrow Agent requiring that the Escrow Agent release the Significant Contractor Escrow Information or a specified portion of it (Notice of Release).

(d) If the Significant Contractor does not, within five Business Days of receiving a Notice of Release, issue to TfNSW and the Escrow Agent a written notice objecting to the release of Significant Contractor Escrow Information or the specified portion of it (Objection Notice), the Escrow Agent must release the Significant Contractor Escrow Information or the specified portion of it to TfNSW on the expiry of such five Business Day period.

(e) If the Significant Contractor has issued an Objection Notice, unless, in the period of 10 Business Days following its receipt of the Objection Notice, the Escrow Agent is otherwise directed by:
(i) the Significant Contractor and TfNSW jointly in writing; or
(ii) a court order,

then the Escrow Agent must release the Significant Contractor Escrow Information or the specified portion of it to TfNSW on the expiry of such 10 Business Day period.

(f) For the removal of doubt, the Escrow Agent's obligations under this Agreement apply irrespective of whether a Release Event has occurred and no part of this Agreement obliges the Escrow Agent to make any determination as to whether a Release Event has occurred.

7.3 Permitted Use

If the whole or any part of the Significant Contractor Escrow Information is released to TfNSW in accordance with clause 7.2 of this Agreement, TfNSW and RailCorp will only use the Significant Contractor Escrow Information for purposes in connection with the design, development, manufacture, testing, commissioning, supply, delivery, operation, maintenance or use of passenger rolling stock or other related assets required to be provided by the Supplier under the Delivery Deed or the TLS Deed.

8. Escrow Fees

TfNSW must pay the Escrow Agent for the services provided by the Escrow Agent under this Agreement as specified in Schedule 1 of this Agreement, plus GST as applicable in accordance with clause 10, within 20 Business Days of receipt of a correctly rendered tax invoice.

9. Termination

9.1 Termination by TfNSW and the Significant Contractor

(a) This Agreement may be jointly terminated by TfNSW and the Significant Contractor immediately if:

(i) the Escrow Agent breaches any provision of this Agreement and fails to remedy the breach within five Business Days after receiving notice requiring it to do so;

(ii) the Escrow Agent breaches a material provision of this Agreement where that breach is not capable of remedy; or

(iii) any event referred to in clause 9.1(b) happens to the Escrow Agent.

(b) The Escrow Agent must notify TfNSW and the Significant Contractor immediately if:

(i) the Escrow Agent or any Related Body Corporate of the Escrow Agent:

A. disposes of the whole or part of its assets, operations or business other than in the ordinary course of business;

B. ceases to carry on business; or

C. ceases to be able to pay its debts as they become due;

(ii) any step is taken by a mortgagee to take possession or dispose of the whole or part of the Escrow Agent's, or any Related Body Corporate of the Escrow Agent's, assets, operations or business;
any step is taken to enter into any arrangement between the Escrow Agent, or any Related Body Corporate of the Escrow Agent, and its creditors; or

any step is taken to appoint a receiver, a receiver and manager, a trustee in bankruptcy, a provisional liquidator, a liquidator, an administrator or other like person of the whole or part of the Escrow Agent's, or any Related Body Corporate of the Escrow Agent's, assets, operations or business.

(c) This Agreement may be jointly terminated by TfNSW and the Significant Contractor giving 20 Business Days' written notice to the Escrow Agent.

9.2 Termination by the Escrow Agent

(a) The Escrow Agent may terminate this Agreement by giving three months' notice to each of TfNSW and the Significant Contractor, subject to the pro-rata refund of any advance payments of the Escrow Fee.

(b) The Escrow Agent may terminate this Agreement if the Escrow Agent has given notice to TfNSW and the Significant Contractor that TfNSW has not paid, or procured to be paid, the Escrow Fees due and payable in accordance with this Agreement and the Escrow Fees are not paid by any party within 20 Business Days after TfNSW receives such notice.

9.3 Further Escrow Agreement

(a) If this Agreement is terminated pursuant to clauses 9.1 or 9.2, then upon notification by TfNSW, the Significant Contractor must enter into a new escrow agreement with TfNSW, RailCorp and an escrow agent acceptable to TfNSW and the Significant Contractor on terms substantially the same as this Agreement, or such other terms as may be agreed between TfNSW and the Significant Contractor.

(b) If a new escrow agreement is entered into by TfNSW, RailCorp, the acceptable escrow agent and the Significant Contractor within five Business Days of the termination of this Agreement, the Escrow Agent must arrange for the transfer of the Deposit Package to the new escrow agent.

9.4 Termination by Significant Contractor

(a) The Significant Contractor may terminate this Agreement by giving 10 Business Days' written notice to TfNSW and the Escrow Agent if:

(i) the Significant Contract is terminated by the Significant Contractor as a direct or indirect result of (in the Significant Contractor's reasonable opinion) a breach by the other party to the Significant Contract, or any other act or omission of the other party to the Significant Contract, which entitles the Significant Contractor to terminate the Significant Contract; and

(ii) if applicable, TfNSW has not notified the other party to the Significant Contract of its intention to take a novation of the Significant Contract and the time given for TfNSW to exercise that right has expired,

and no Release Event has occurred in connection with the circumstances set out in paragraphs (i) and (ii).

(b) The Escrow Agent must, within 5 Business Days of receiving notice pursuant to paragraph (a), provide written notice to TfNSW and the Significant Contractor confirming that it has received a notice under paragraph (a), and:
specifying any Significant Contractor Escrow Information which the Escrow Agent continues to hold; or

(ii) stating that the Escrow Agent is not in possession of any part Significant Contractor Escrow Information.

(c) If TfNSW does not, within 10 Business Days of receiving a written notice pursuant to paragraph (b)(i), issue to each of the other parties a written notice objecting to the release to the Significant Contractor of the Significant Contractor Escrow Information held by the Escrow Agent, or such part of it as specified by TfNSW, the Escrow Agent must release the Significant Contractor Escrow Information or the specified portion of it to the Significant Contractor on the expiry of such 10 Business Day period.

(d) If TfNSW has issued an objection notice pursuant to paragraph (c), unless, in the period of 10 Business Days following its receipt of such notice, the Escrow Agent is otherwise directed by:

(i) the Significant Contractor and TfNSW jointly in writing; or

(ii) a court order,

the Escrow Agent must release the Significant Contractor Escrow Information or the specified portion of it to the Significant Contractor on the expiry of such 10 Business Day period.

10. GST

10.1 Interpretation

In clause 8 and this clause 10, a word or expression defined in the A New Tax System (Goods and Services Tax) Act 1999 (Cth) has the meaning given to it in that Act.

10.2 GST gross up

If a party makes a supply under or in connection with this Agreement in respect of which GST is payable, the consideration for the supply but for the application of this clause 10.2 (GST exclusive consideration) is increased by an amount equal to the GST exclusive consideration multiplied by the rate of GST prevailing at the time the supply is made.

10.3 Reimbursements

If a party must reimburse or indemnify another party for a loss, cost or expense, the amount to be reimbursed or indemnified is first reduced by any input tax credit the other party is entitled to for the loss, cost or expense, and then increased in accordance with clause 10.2.

10.4 Tax invoice

A party need not make a payment for a taxable supply made under or in connection with this Agreement until it receives a tax invoice for the supply to which the payment relates.

11. Notices and other communications

11.1 How to give a notice

(a) Wherever referred to in this clause, Notice means each communication (including each notice, consent, approval, request, direction and demand) under or in connection with this Agreement.
Each Notice must:

(i) be in writing;

(ii) be addressed to the relevant person specified in paragraph (iv);

(iii) be signed by the party making it or (on that party's behalf) by the solicitor for, or any attorney, director, secretary or authorised agent of, that party; and

(iv) be delivered or posted to the relevant address shown below (or to any new address notified by the intended recipient):

**TfNSW**

Name: TfNSW, a New South Wales Government agency

Address: Level 2, 1 Prince Albert Road, Sydney NSW 2000

For the attention of: Project Director, Sydney Growth Trains

**Significant Contractor**

Name: [ ]

Address: [ ]

For the attention of: [ ]

**Escrow Agent**

Name: Assurex Escrow Pty Limited

Address: Suite 93, Level 5
330 Wattle Street
Ultimo NSW 2007

For the attention of: [ ]

(c) A notice, consent or other communication under this document is only effective if it is:

(i) in writing, signed by or on behalf of the person giving it;

(ii) addressed to the person to whom it is to be given; and

(iii) sent or delivered in one of the following ways:

A. delivered or sent by pre-paid mail (by airmail, if the addressee is overseas) to that person's address; or

B. sent by fax to that person's fax number and the machine from which it is sent produces a report that states that it was sent in full.

**11.2 When a notice is received**

A communication is taken to be received by the addressee:
(a) (in the case of prepaid post sent to an address in the same country) two Business Days after the date of posting;

(b) (in the case of international post) seven Business Days after the date of posting; and

(c) (in the case of delivery by hand) on delivery,

provided that if the communication would be deemed to be received on a day which is not a Business Day or after 5.00pm on a Business Day, it is deemed to be received at 9.00am on the next Business Day.

12. Miscellaneous

12.1 Amendments

This Agreement may be varied in writing signed by each party.

12.2 Assignment

(a) Neither the Significant Contractor or the Escrow Agent may assign this Agreement or a right under this Agreement or dispose of, declare a trust over or otherwise create an interest in its rights under this Agreement without first obtaining the prior written consent of TfNSW.

(b) TfNSW and RailCorp may assign this Agreement or a right under this Agreement or dispose of, declare a trust over or otherwise create an interest in their rights under this Agreement without the consent of any other party.

12.3 Survival

Any obligation of confidence under this Agreement is independent and survives termination of this Agreement. Any other term by its nature intended to survive termination of this Agreement survives termination of this Agreement.

12.4 Counterparts

This Agreement may be executed in any number of counterparts and by the parties on separate counterparts. All executed counterparts constitute one document.

12.5 Further acts and documents

Each party must do anything (including execute any document) required by law or that the other party may reasonably require to give full effect to this Agreement.

12.6 Severance

If at any time any provision of this Agreement is or becomes illegal, invalid or unenforceable in any respect under applicable law, that provision is to be severed to the extent necessary to make this Agreement enforceable, and it will not affect or impair the legality, validity or enforceability of any other provision of this Agreement.

12.7 Waiver

A right may only be waived in writing, signed by the party giving the waiver, and:

(a) no other conduct (including failure to exercise or enforce, or a delay in exercising or enforcing, or the partial exercise or enforcement of, a right, power or remedy provided by law or under or in connection with this Agreement by a party)
precludes, or operates as a waiver of, the exercise or enforcement, or further exercise or enforcement, of that or any other right, power or remedy provided by law or under this Agreement;

(b) a waiver or consent given by a party under this Agreement is only effective and binding on that party if it is given or confirmed in writing by that party;

(c) a waiver of a right on one or more occasions does not operate as a waiver of that right if it arises again; and

(d) no waiver of a breach of a term of this Agreement operates as a waiver of another breach of that term or of a breach of any other term of this Agreement.

12.8 Confidentiality

A party may only use confidential information of another party provided under this Agreement for the purposes of this Agreement, and must keep the existence and the terms of this Agreement and any confidential information of another party confidential except where:

(a) the information is public knowledge (but not because of a breach of this Agreement) or the party has independently created the information;

(b) disclosure is required by law or a regulatory body (including a relevant stock exchange); or

(c) disclosure is made to a person who must know for the purposes of this Agreement on the basis that the person keeps the information confidential.

12.9 Governing law and jurisdiction

This Agreement is governed by and must be construed according to the laws applying in New South Wales, Australia and each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of New South Wales, Australia.
Schedule 1 - Escrow Fees

[To be inserted]
Schedule 2- Deposit Package

[To be inserted]
Executed as an agreement.

Executed by [Significant Contractor name] (ABN [insert]) in accordance with section 127 of the Corporations Act 2001 (Cth):

Signature of director
Full name of director

Executed by Assurex Escrow Pty Limited (ABN 64 008 611 578) in accordance with section 127 of the Corporations Act 2001 (Cth):

Signature of director
Full name of director

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
Full name of witness (print)
Position held

Signed sealed and delivered for and on behalf of Rail Corporation New South Wales (ABN 59 325 776 353) by its authorised delegate in the presence of:

Signature of witness
Full name of witness (print)
Position held

Signature of director
Full name of director

Signature of company secretary/director
Full name of company secretary/director

Signature of company secretary/director
Full name of company secretary/director

Signature of authorised delegate
Full name of authorised delegate (print)
Position held

Signature of authorised delegate
Full name of authorised delegate (print)
Position held
Schedule 21 – Form of Independent Expert Determination Agreement

Independent Expert Determination Agreement
Sydney Growth Trains Project

Transport for NSW
TfNSW

Supplier

Independent Expert
Details

Date

Parties

Name: Transport for NSW
Short form name: TfNSW
Notice details: Level 2, 1 Prince Albert Road, Sydney NSW 2000

Name: Downer EDI Rail Pty Limited
Short form name: Supplier
Notice details: T3, Triniti Business Campus, 39 Delhi Road, North Ryde NSW 2113

[Note: Name of Independent Expert as agreed between the parties or appointed pursuant to the Dispute Resolution Procedures contained in paragraph 1.4 of Schedule 8 of the Delivery Deed shall be inserted here]

Name: Independent Expert
Short form name: 
Notice details: [Insert details]

Background

A. TfNSW, RailCorp and the Supplier (together the Parties and each a Party) are parties to a delivery deed dated [Insert date] (Delivery Deed) under which TfNSW has agreed to procure, and the Supplier has agreed to design, develop, manufacture, test, commission, supply and deliver new passenger rolling stock and other related assets.

B. The Independent Expert is to be appointed in accordance with the terms of the Delivery Deed.

C. TfNSW, the Supplier and the Independent Expert agree that the Independent Expert will determine each Dispute referred to it from time to time under the Delivery Deed in accordance with the Dispute Resolution Procedures in Schedule 8 to the Delivery Deed and the process set out in this agreement.

Agreed terms

1. Appointment of Independent Expert

(a) The Parties appoint the Independent Expert to determine those Disputes which are referred to the Independent Expert from time to time under the Project Deed in the manner and within the times set out in this agreement. The Independent Expert accepts the appointment on the basis set out in this agreement.

(b) The Parties agree that:
(i) the Independent Expert will act as an expert and not as an arbitrator;

(ii) neither the determination of a Dispute, nor the process required by this agreement, is an arbitration, and any conference conducted during the determination is not a hearing conducted under any legislation or rules relating to any form of arbitration;

(iii) the rules of evidence do not apply to any determination; and

(iv) the Independent Expert must conduct the determination of each Dispute in accordance with the Independent Expert Determination Rules defined in clause 1.4(h) of Schedule 8 to the Delivery Deed, and as modified by the Delivery Deed.

(c) If, at any time during the determination, the Independent Expert becomes aware of a circumstance that might reasonably be considered by a Party to adversely affect the Independent Expert's capacity to act independently or impartially, the Independent Expert must inform the Parties immediately and, unless the Parties agree otherwise, terminate this agreement. On termination of this agreement pursuant to this clause the Parties will have no Claim against each other nor will the Independent Expert arising as a consequence of the termination but such termination will be without prejudice to Claims that the Parties or the Independent Expert may have in respect of breaches of this agreement occurring prior to the termination.

2. Confidentiality

(a) Subject to clause 2(b), all proceedings and submissions relating to any determination (including the fact that any step of the determination is occurring), and all documents prepared for the purposes of a determination (including the Independent Expert's determination), must be kept confidential between the Parties and the Independent Expert.

(b) No such proceedings, submissions or documents, nor any other information relating to or arising out of a determination, may be divulged to any other person, except with the prior written consent of both Parties or as may be required by law or to the extent necessary to give effect to, review or enforce the Independent Expert's determination.

3. Costs and fees

(a) As between the Parties and the Independent Expert, the Parties are jointly and severally liable for the payment of the Independent Expert's fees and disbursements, calculated in accordance with Schedule 1 unless otherwise determined by the Independent Expert.

(b) The Parties agree as between themselves that:

(i) unless otherwise determined by the Independent Expert, they will each pay one half of the Independent Expert's fees and disbursements, calculated in accordance with Schedule 1; and

(ii) they will each bear their own costs of and incidental to the preparation of this agreement and their participation in any determination.

4. Exclusion of liability and indemnity

Except in the case of fraud, the Independent Expert will not be liable to either Party for any act or omission by the Independent Expert in the performance or purported performance of this
agreement. The Parties release the Independent Expert from all Claims arising out of or in any way referable to any act or omission by the Independent Expert (except fraud) in the performance or purported performance by the Independent Expert of the terms of this agreement.

5. **Co-operation of the Parties**

Each Party agrees to take part in each determination in good faith and to comply with the reasonable requests and directions of the Independent Expert in relation to the conduct of each determination.

6. **Governing Law**

This agreement is governed by and must be construed in accordance with the laws applying in New South Wales.

7. **Jurisdiction**

(a) The Parties and the Independent Expert irrevocably submit to the non-exclusive jurisdiction of the courts of New South Wales and the courts to which the appeals from those courts may be made.

(b) The Parties and the Independent Expert irrevocably waive any objection they may now or in the future have to the venue of any proceedings, and any claim they may now or in the future have that any proceeding has been brought in an inconvenient forum, where that venue falls within clause 7(a).

8. **Definitions**

In this agreement, any term defined in the Delivery Deed and not defined in this agreement has the meaning given in the Delivery Deed, unless the contrary intention appears.
Schedule 1 – Schedule of Fees and Disbursements

[Note: To be inserted before this Independent Expert Determination Agreement is signed.]
Signing page

EXECUTED as an agreement.

Signed, sealed and delivered for and on behalf of Downer EDI Rail Pty Ltd (ABN 92 000 002 031) by its attorneys under a power of attorney dated in the presence of:

Signature of attorney who declares that the attorney has not received any notice of the revocation of the power of attorney

Full name of attorney

Signature of witness

Signature of attorney who declares that the attorney has not received any notice of the revocation of the power of attorney

Full name of witness

Full name of attorney

[Note: Execution clauses to be inserted]
Schedule 22 – Pro Forma Notices and Certificates

1. Form of Provisional Acceptance Certificate

Provisional Acceptance Certificate

[Insert date]

To: Downer EDI Rail Pty Limited (ABN 92 000 002 031) (Supplier)

From: Transport for NSW (ABN 18 804 239 602) (TfNSW) and

[Insert] (TfNSW’s Representative)

This certificate is given in accordance with the Delivery Deed between TfNSW, RailCorp and the Supplier dated [insert], with respect to the Project (Delivery Deed). Words defined in the Delivery Deed have the same meaning in this certificate.

In accordance with the terms of clause 14.1(f) of the Delivery Deed, TfNSW’s Representative certifies that [Insert description of Set(s)] meet/meets the Provisional Acceptance Criteria.

TfNSW’s Representative hereby gives notice of the Minor Defects affecting the abovementioned [Set(s)], as identified in the attached list.

For the purposes of the Delivery Deed, the date of this certificate is the Date of Provisional Acceptance in respect of the above [Set(s)].

Signed for and on behalf of TfNSW by:

Signature: ____________________________

Name: ________________________________

Position: ______________________________

(TfNSW’s Representative)

Date: ________________________________
## Attachment - List of Minor Defects

<table>
<thead>
<tr>
<th>No.</th>
<th>Minor Defect</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>[Insert]</td>
</tr>
</tbody>
</table>
2. Form of Final Acceptance Certificate

Final Acceptance Certificate

[Insert date]

To: Downer EDI Rail Pty Limited (ABN 92 000 002 031) (Supplier)

From: Transport for NSW (ABN 18 804 239 602) (TfNSW) and

[Insert] (TfNSW's Representative)

This certificate is given in accordance with the Delivery Deed for the Project between TfNSW, RailCorp and the Supplier dated [Insert] (Delivery Deed). Words defined in the Delivery Deed have the same meaning in this certificate.

In accordance with the terms of clause 14.4(c)(i) of the Delivery Deed, TfNSW's Representative certifies that [Insert description of Set(s)] [meet/meets] the Final Acceptance Criteria.

For the purposes of the Delivery Deed, the date of this certificate is the Date of Final Acceptance in respect of the above [Set(s)].

Signed for and on behalf of TfNSW by:

Signature: ____________________________________________

Name: _______________________________________________

Position: __________________ (TfNSW's Representative)

Date: ___________________________
3. Form of Fleet Acceptance Certificate

Fleet Acceptance Certificate

[Insert date]

To: Downer EDI Rail Pty Limited (ABN 92 000 002 031) (Supplier)

From: Transport for NSW (ABN 18 804 239 602) (TfNSW) and

[Insert] (TfNSW's Representative)

This certificate is given in accordance with the Delivery Deed for the Project between TfNSW, RailCorp and the Supplier dated [Insert] (Delivery Deed). Words defined in the Delivery Deed have the same meaning in this certificate.

In accordance with the terms of clause 14.4(d)(i) of the Delivery Deed, TfNSW’s Representative certifies that the [Continuous Production / Non-continuous Production] Fleet meets the Fleet Acceptance Criteria.

For the purposes of the Delivery Deed, the date of this certificate is the Date of Fleet Acceptance in respect of the [Continuous Production / Non-continuous Production] Fleet.

Signed for and on behalf of TfNSW by:

Signature: __________________________

Name: __________________________

Position: (TfNSW's Representative)

Date: __________________________
4. Form of Rejection Certificate

Rejection Certificate

[Insert date]

To: Downer EDI Rail Pty Limited (ABN 92 000 002 031) (Supplier)

From: Transport for NSW (ABN 18 804 239 602) (TfNSW) and

[Insert] (TfNSW's Representative)

This certificate is given in accordance with the Delivery Deed between TfNSW, RailCorp and the Supplier dated [Insert], with respect to the Project (Delivery Deed). Words defined in the Delivery Deed have the same meaning in this certificate.

In accordance with the terms of clause 14.1(g) / 14.4(c)(ii) / 14.4(d)(ii), of the Delivery Deed, TfNSW's Representative gives notice that [Insert description of Set(s)/Spares] does not meet the Provisional Acceptance Criteria / Final Acceptance Criteria / Fleet Acceptance Criteria.

This certificate is a Remedial Direction for the purposes of the Delivery Deed.

TfNSW's Representative hereby gives notice of the required rectification work which must be completed before the above [Set(s)/Spares] may be re-submitted for Provisional Acceptance/ Final Acceptance Criteria / Fleet Acceptance Criteria, as identified in the attached list.

Signed for and on behalf of TfNSW by:

Signature: __________________________

Name: __________________________

Position: (TfNSW's Representative)

Date: __________________________
<table>
<thead>
<tr>
<th>No.</th>
<th>Description of Required Rectification Work</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>[Insert]</td>
</tr>
</tbody>
</table>
5. Form of Statutory Declaration of Supplier regarding Payment of Workers and Subcontractors

Statutory Declaration

Oaths Act (NSW) Ninth Schedule

I, [Insert full name of Declarant] of [Insert address] do solemnly and sincerely declare that:

1. I am the representative of [Insert] ABN [Insert ABN] ('the Contractor') in the Office Bearer capacity of [Insert position title of Declarant].

2. The Contractor has a contract with Transport for NSW (ABN 18 804 239 602) and Rail Corporation of New South Wales (ABN 59 325 778 353): Delivery Deed in respect of the Project ('the Contract').

3. I personally know the facts which I have set out in this declaration.

4. All employees who have at any time been engaged by the Contractor for work done under the Contract:
   (a) have been paid all remuneration and benefits to the date of this declaration payable to them by the Contractor in respect of their employment on work under the Contract, and
   (b) have otherwise had accrued to their account all benefits to which they are entitled from the Contractor as at the date of this declaration in respect of their employment on work under the Contract pursuant to any award, enterprise agreement, act or regulation, with the exception of the employees and respective amounts unpaid or not accrued for each employee listed below:

   Employee: Amount unpaid or not accrued:

   [Insert names and addresses of the unpaid employees, the amounts unpaid, and whether in respect of wages, allowances, holiday pay, long service leave payments and superannuation entitlement, etc.]

5. Attached to and forming part of this declaration, as Annexure A, is a supporting statement for the purposes of section 13(7) of the Building and Construction Industry Security of Payment Act 1999 (NSW).

6. In all cases where a subcontractor or supplier to the Contractor has provided services and/or materials in respect of the Contract and has submitted a claim to the Contractor for these services or materials which as at the date of this statutory declaration would have been due and payable but which the Contractor disputes, the reasons for such dispute have been notified in writing to the subcontractor or supplier by the Contractor prior to the date of this statutory declaration. Where such dispute relates to part only of the subcontractor or supplier's claim, that part of the claim not in dispute has been paid by the Contractor to the subcontractor or supplier as at the date of this statutory declaration except for the amounts listed in 5 above.

7. The provisions of the Contract relating to the payment of employees, subcontractors and suppliers of the Contractor have been complied with by the Contractor.
8. The Contractor has been informed by each subcontractor to the Contractor (except for subcontracts not exceeding $25,000 at their commencement) by statutory declaration in equivalent terms to this declaration (made no earlier than the date 14 days before the date of this declaration):

(a) that their subcontracts with their subcontractors and suppliers comply with the requirements of the Contract relating to payment of employees and subcontractors;

(b) that all their employees and subcontractors, as at the date of the making of such a declaration:

(i) have been paid all remuneration and benefits due and payable to them by; or

(ii) had accrued to their account all benefits to which they are entitled from;

the subcontractor of the Contractor or from any other subcontractor (except for subcontracts not exceeding $25,000 at their commencement) in respect of any work under the Contract; and

(c) of details of any amounts due and payable or benefits due to be received or accrued described in 8(b) above which have not been paid, received or accrued, except for the following subcontractors to the Contractor who have failed to provide such a declaration:

[Insert names and addresses of the Contractor’s subcontractors who have not submitted a declaration, and unpaid amounts due or otherwise due to each of them by the Contractor in respect of this claim.]

<table>
<thead>
<tr>
<th>Subcontractor</th>
<th>Due amount paid</th>
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</thead>
<tbody>
<tr>
<td></td>
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</table>

9. Where a subcontractor to the Contractor has provided a declaration as in 8 above, and it includes unpaid amounts or benefits either not received or not accrued, details of the subcontractor, details of the affected employees, suppliers and subcontractors of the subcontractor, and the respective amounts or benefits either unpaid or not accrued are as follows:

[Insert names and addresses of the subcontractors, the names and addresses of the unpaid employees, subcontractors and suppliers and amounts listed as unpaid or not accrued to them.]

<table>
<thead>
<tr>
<th>Employee, subcontractor or supplier</th>
<th>Amount unpaid or not accrued</th>
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</table>

10. In relation to the statutory declaration provided by each subcontractor to the Contractor, I am not aware of anything to the contrary of what is contained therein, and on the basis of the contents of those statutory declarations, I believe that information to be true.
11. Attached to and forming part of this declaration, as Annexure B, is a 'Subcontractor's Statement' given by the Contractor in its capacity as 'subcontractor' (as that term is defined in the Workers Compensation Act 1987 (NSW), Payroll Tax Act 2007 (NSW) and Industrial Relations Act 1996 (NSW) which is a written statement:

(a) under section 175B of the Workers Compensation Act 1987 in the form and providing the detail required by that legislation;

(b) under section 18(6) of schedule 2 of part 5 of the Payroll Tax Act 2007 in the form and providing the detail required by that legislation; and

(c) under section 127 of the Industrial Relations Act 1996 in the form and providing the detail required by that legislation.

12. I personally know the truth of the matters which are contained in this declaration and the attached Subcontractor's Statement.

13. All statutory declarations and Subcontractor's Statements received by the Contractor from subcontractors were:

(a) given to the Contractor in its capacity as 'principal contractor' as defined in the Workers Compensation Act 1987 (NSW), the Payroll Tax Act 2007 (NSW) and the Industrial Relations Act 1996 (NSW) ('Acts'); and

(b) given by the subcontractors in their capacity as 'subcontractors' as defined in the Acts.

14. I am not aware of anything which would contradict the statements made in the statutory declarations or written statements provided to the Contractor by its subcontractors, as referred to in this declaration.

And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Oaths Act 1900.

Declared at ................................ this ......................................... day of ........................................ 20...... before me

Signature of declarant

Name of witness

Address of witness

Capacity of witness [Justice of the peace~ Notary public~ Legal practitioner]

And as a witness, I certify the following matters concerning the person who made this declaration (declarant):

[*strike out the text that does not apply]*

15. *I saw the face of the person.

OR

*I did not see the face of the person because the declarant was wearing a face covering, but I am satisfied that the person had a special justification for not removing the covering.*
16. *I have known the person for at least 12 months.

OR

*I confirm the declarant's identity using the following identification document:

Identification document relied on (may be original or certified copy).

Declared at .................................. this .................................. day of .................................. 20.... before me

Signature of declarant

Name of witness

Address of witness

Capacity of witness [Justice of the peace, Notary public, Legal practitioner]

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

- where the declaration is sworn within the State of New South Wales:
  
  (i) a justice of the peace of the State of New South Wales;
  
  (ii) a solicitor of the Supreme Court of New South Wales with a current practising certificate; or
  
  (iii) a notary public.

- where the declaration is sworn in a place outside the State of New South Wales:
  
  (i) a notary public; or
  
  (ii) any person having authority to administer an oath in that place.
Annexure A

Supporting statement by head contractor regarding payment to subcontractors

This statement must accompany any payment claim served on a principal to a construction contract by a head contractor.

For the purposes of this statement, the terms “principal”, “head contractor”, “subcontractor”, and “construction contract” have the meanings given in section 4 of the Building and Construction Industry Security of Payment Act 1999.

Head contractor: ................................................................. [business name of head contractor]

ABN: ................................................................. [ABN]

* 1. has entered into a contract with: .................................................. [business name of subcontractor]

ABN: ................................................................. [ABN]

Contract number/identifier: ................................................................. [contract number/identifier]

OR

* 2. has entered into a contract with the subcontractors listed in the attachment to this statement.

* [Delete whichever of the above does not apply]

This statement applies for work between ..............................................[start date] and ..............................................[end date] inclusive (the construction work concerned), subject of the payment claim dated ..............................................

I, ................................................................. [full name], being the head contractor, a director of the head contractor or a person authorised by the head contractor on whose behalf this declaration is made, hereby declare that I am in a position to know the truth of the matters that are contained in this supporting statement and declare that, to the best of my knowledge and belief, all amounts due and payable to subcontractors have been paid (not including any amount identified in the attachment as an amount in dispute).

Signature: ................................................................. Date: .................................................................

Full name: ................................................................. Position/Title: .................................................................

Penalties

The Building and Construction Security of Payment Act 1999 provides that:

Section 13(7) A head contractor must not serve a payment claim on the principal unless the claim is accompanied by a supporting statement that indicates that it relates to that payment claim.

Maximum penalty: 200 penalty units.

And:

Section 13(8) A head contractor must not serve a payment claim on the principal accompanied by a supporting statement knowing that the statement is false or misleading in a material particular in the particular circumstances.

Maximum penalty: 200 penalty units or 3 months imprisonment, or both.
## Schedule of subcontractors paid all amounts due and payable

<table>
<thead>
<tr>
<th>Subcontractor</th>
<th>ABN</th>
<th>Contract number/identifier</th>
<th>Date of works (period)</th>
<th>Date of payment claim (head contractor claim)</th>
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## Schedule of subcontractors for which an amount is in dispute and has not been paid

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<tr>
<th>Subcontractor</th>
<th>ABN</th>
<th>Contract number/identifier</th>
<th>Date of works (period)</th>
<th>Date of payment claim (head contractor claim)</th>
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Annexure B

SUBCONTRACTOR'S STATEMENT
REGARDING WORKER'S COMPENSATION, PAYROLL TAX AND REMUNERATION (Note1 - see back of form)

New South Wales

For the purposes of this Statement a "subcontractor" is a person (or other legal entity) that has entered into a contract with a "principal contractor" to carry out work.

This Statement must be signed by a "subcontractor" (or by a person who is authorised, or held out as being authorised, to sign the statement by the subcontractor) referred to in any of s175B Workers Compensation Act 1987, Schedule 2 Part 5 Payroll Tax Act 2007, and s127 Industrial Relations Act 1996 where the "subcontractor" has employed or engaged workers or subcontractors during the period of the contract to which the form applies under the relevant Act(s). The signed Statement is to be submitted to the relevant principal contractor.

SUBCONTRACTOR'S STATEMENT  (Refer to the back of this form for Notes, period of Statement retention, and Offences under various Acts.

Subcontractor:  .................................................................................. (Business name):

ABN:  .........................................................................................

of:  ...............................................................................................

ABN:  ...........................................................................................

Address of subcontractor  ..........................................................................

Address of principal contractor  .................................................................

Contract number/identifier  ......................................................................

(Note 2)

This Statement applies for work between: .../.../... and .../.../... inclusive,

(Note 4)

subject of the payment claim dated: .../.../...

(Note 5)

I, .................................................................................. a Director or a person authorised by the Subcontractor on whose behalf this declaration is made, hereby declare that I am in a position to know the truth of the matters which are contained in this Subcontractor's Statement and declare the following to the best of my knowledge and belief:

(a) The abovementioned Subcontractor has either employed or engaged workers or subcontractors during the above period of this contract. Tick [ ] if true and comply with (b) to (g) below, as applicable. If it is not the case that workers or subcontractors are involved or you are an exempt employer for workers compensation purposes tick [ ] and only complete (f) and (g) below. You must tick one box. (Note 6)

(b) All workers compensation insurance premiums payable by the Subcontractor in respect of the work done under the contract have been paid. The Certificate of Currency for that insurance is attached and is dated .../.../...

(Note 7)

(c) All remuneration payable to relevant employees for work under the contract for the above period has been paid. (Note 8)

(d) Where the Subcontractor is required to be registered as an employer under the Payroll Tax Act 2007, the Subcontractor has paid all payroll tax due in respect of employees who performed work under the contract, as required at the date of this Subcontractor’s Statement. (Note 9)

(e) Where the Subcontractor is also a principal contractor in connection with the work, the Subcontractor has in its capacity as a principal contractor been given a written Subcontractor's Statement by its subcontractor(s) in connection with that work for the period stated above. (Note 10)

(f) Signature  ............................................................................. Full name

(g) Position/Title  ............................................................................. Date .../.../...

NOTE: Where required above, this Statement must be accompanied by the relevant Certificate of Currency to comply with section 175B of the Workers Compensation Act 1987.
Notes
1. This form is prepared for the purpose of section 175B of the Workers’ Compensation Act 1987, Schedule 2 Part 5 Payroll Tax Act 2007 and section 127 of the Industrial Relations Act 1996. If this form is completed in accordance with these provisions, a principal contractor is relieved of liability for workers compensation premiums, payroll tax and remuneration payable by the subcontractor.

A principal contractor can be generally defined to include any person who has entered into a contract for the carrying out of work by another person (or other legal entity called the subcontractor) and where employees of the subcontractor are engaged in carrying out the work which is in connection with the principal contractor’s business.

2. For the purpose of this Subcontractor’s Statement, a principal contractor is a person (or other legal entity), who has entered into a contract with another person (or other legal entity) referred to as the subcontractor, and employees/workers of that subcontractor will perform the work under contract. The work must be connected to the business undertaking of the principal contractor.

3. Provide the unique contract number, title, or other information that identifies the contract.

4. In order to meet the requirements of s127 Industrial Relations Act 1996, a statement in relation to remuneration must state the period to which the statement relates. For sequential Statements ensure that the dates provide continuous coverage.

Section 127(6) of the Industrial Relations Act 1996 defines remuneration ‘as remuneration or other amounts payable to relevant employees by legislation, or under an industrial instrument, in connection with work done by the employees.’

Section 127(11) of the Industrial Relations Act 1996 states ‘to avoid doubt, this section extends to a principal contractor who is the owner or occupier of a building for the carrying out of work in connection with the building so long as the building is owned or occupied by the principal contractor in connection with a business undertaking of the principal contractor.’

5. Provide the date of the most recent payment claim.

6. For Workers Compensation purposes an exempt employer is an employer who pays less than $7500 annually, who does not employ an apprentice or trainee and is not a member of a group.

7. In completing the Subcontractor’s Statement, a subcontractor declares that workers compensation insurance premiums payable up to and including the date(s) on the Statement have been paid, and all premiums owing during the term of the contract will be paid.

8. In completing the Subcontractor’s Statement, a subcontractor declares that all remuneration payable to relevant employees for work under the contract has been paid.

9. In completing the Subcontractor’s Statement, a subcontractor declares that all payroll tax payable relating to the work undertaken has been paid.

10. It is important to note that a business could be both a subcontractor and a principal contractor, if a business ‘in turn’ engages subcontractors to carry out the work. If your business engages a subcontractor you are to also obtain Subcontractor’s Statements from your subcontractors.

Statement Retention
The principal contractor receiving a Subcontractor’s Statement must keep a copy of the Statement for the periods stated in the respective legislation. This is currently up to seven years.

Offences in respect of a false Statement
In terms of s127(8) of the Industrial Relations Act 1996, a person who gives the principal contractor a written statement knowing it to be false is guilty of an offence if:
(a) the person is the subcontractor;
(b) the person is authorised by the subcontractor to give the statement on behalf of the subcontractor; or
(c) the person holds out or represents that the person is authorised by the subcontractor to give the statement on behalf of the subcontractor.

In terms of s175B of the Workers Compensation Act and clause 18 of Schedule 2 of the Payroll Tax Act 2007 a person who gives the principal contractor a written statement knowing it to be false is guilty of an offence.

Further Information
6. Form of Statutory Declaration of Significant Contractor regarding Payment of Workers and Subcontractors

Statutory Declaration

Oaths Act (NSW) Ninth Schedule

I, [Insert full name of Declarant] of [Insert address] do solemnly and sincerely declare that:

1. I am the representative of [Insert] ABN [Insert ABN] ('the Contractor') in the Office Bearer capacity of [Insert position title of Declarant].

2. The Contractor has a contract with Transport for NSW (ABN 18 804 239 602) and Rail Corporation of New South Wales (ABN 59 325 778 353): Delivery Deed in respect of the Project ('the Contract').

3. I personally know the facts which I have set out in this declaration.

4. All employees who have at any time been engaged by the Contractor for work done under the Contract:

   (a) have been paid all remuneration and benefits to the date of this declaration payable to them by the Contractor in respect of their employment on work under the Contract, and

   (b) have otherwise had accrued to their account all benefits to which they are entitled from the Contractor as at the date of this declaration in respect of their employment on work under the Contract pursuant to any award, enterprise agreement, act or regulation, with the exception of the employees and respective amounts unpaid or not accrued for each employee listed below:

   Employee: Amount unpaid or not accrued:

   [Insert names and addresses of the unpaid employees, the amounts unpaid, and whether in respect of wages, allowances, holiday pay, long service leave payments and superannuation entitlement, etc.]

5. Attached to and forming part of this declaration, as Annexure A, is a supporting statement for the purposes of section 13(7) of the Building and Construction Industry Security of Payment Act 1999 (NSW).

6. In all cases where a subcontractor or supplier to the Contractor has provided services and/or materials in respect of the Contract and has submitted a claim to the Contractor for these services or materials which as at the date of this statutory declaration would have been due and payable but which the Contractor disputes, the reasons for such dispute have been notified in writing to the subcontractor or supplier by the Contractor prior to the date of this statutory declaration. Where such dispute relates to part only of the subcontractor or supplier's claim, that part of the claim not in dispute has been paid by the Contractor to the subcontractor or supplier as at the date of this statutory declaration except for the amounts listed in 5 above.

7. The provisions of the Contract relating to the payment of employees, subcontractors and suppliers of the Contractor have been complied with by the Contractor.
8. The Contractor has been informed by each subcontractor to the Contractor (except for subcontracts not exceeding $25,000 at their commencement) by statutory declaration in equivalent terms to this declaration (made no earlier than the date 14 days before the date of this declaration):

(a) that their subcontracts with their subcontractors and suppliers comply with the requirements of the Contract relating to payment of employees and subcontractors;

(b) that all their employees and subcontractors, as at the date of the making of such a declaration:

(i) have been paid all remuneration and benefits due and payable to them by; or

(ii) had accrued to their account all benefits to which they are entitled from;

the subcontractor of the Contractor or from any other subcontractor (except for subcontracts not exceeding $25,000 at their commencement) in respect of any work under the Contract; and

(c) of details of any amounts due and payable or benefits due to be received or accrued described in 8(b) above which have not been paid, received or accrued, except for the following subcontractors to the Contractor who have failed to provide such a declaration:

[Insert names and addresses of the Contractor's subcontractors who have not submitted a declaration, and unpaid amounts due or otherwise due to each of them by the Contractor in respect of this claim.]

<table>
<thead>
<tr>
<th>Subcontractor</th>
<th>Due amount paid</th>
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</table>

9. Where a subcontractor to the Contractor has provided a declaration as in 8 above, and it includes unpaid amounts or benefits either not received or not accrued, details of the subcontractor, details of the affected employees, suppliers and subcontractors of the subcontractor, and the respective amounts or benefits either unpaid or not accrued are as follows:

[Insert names and addresses of the subcontractors, the names and addresses of the unpaid employees, subcontractors and suppliers and amounts listed as unpaid or not accrued to them.]

<table>
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<tr>
<th>Employee, subcontractor or supplier</th>
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10. In relation to the statutory declaration provided by each subcontractor to the Contractor, I am not aware of anything to the contrary of what is contained therein, and on the basis of the contents of those statutory declarations, I believe that information to be true.

11. Attached to and forming part of this declaration, as Annexure B, is a 'Subcontractor's Statement' given by the Contractor in its capacity as 'subcontractor' (as that term is defined in the Workers Compensation Act 1987 (NSW), Payroll Tax Act 2007 (NSW) and Industrial Relations Act 1996 (NSW) which is a written statement:

(a) under section 175B of the Workers Compensation Act 1987 in the form and providing the detail required by that legislation;

(b) under section 18(6) of schedule 2 of part 5 of the Payroll Tax Act 2007 in the form and providing the detail required by that legislation; and

(c) under section 127 of the Industrial Relations Act 1996 in the form and providing the detail required by that legislation.

12. I personally know the truth of the matters which are contained in this declaration and the attached Subcontractor's Statement.

13. All statutory declarations and Subcontractor's Statements received by the Contractor from subcontractors were:

(a) given to the Contractor in its capacity as 'principal contractor' as defined in the Workers Compensation Act 1987 (NSW), the Payroll Tax Act 2007 (NSW) and the Industrial Relations Act 1996 (NSW) ('Acts'); and

(b) given by the subcontractors in their capacity as 'subcontractors' as defined in the Acts.

14. I am not aware of anything which would contradict the statements made in the statutory declarations or written statements provided to the Contractor by its subcontractors, as referred to in this declaration.

And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Oaths Act 1900.

Declared at ..................................... day of .................................. 20...... before me

Signature of declarant

Name of witness

Address of witness

Capacity of witness [Justice of the peace/Notary public/Legal practitioner]

And as a witness, I certify the following matters concerning the person who made this declaration (declarant):

[*strike out the text that does not apply]

1. *I saw the face of the person.

OR
*I did not see the face of the person because the declarant was wearing a face covering, but I am satisfied that the person had a special justification for not removing the covering.

2. *I have known the person for at least 12 months.

OR

*I confirm the declarant's identity using the following identification document:

Identification document relied on (may be original or certified copy).

Declared at .................................. this ........................................... day of .................................. 20..... before me

Signature of declarant

Name of witness

Address of witness

Capacity of witness [Justice of the peace/Notary public/Legal practitioner]

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

- where the declaration is sworn within the State of New South Wales:
  (i) a justice of the peace of the State of New South Wales;
  (ii) a solicitor of the Supreme Court of New South Wales with a current practising certificate; or
  (iii) a notary public.

- where the declaration is sworn in a place outside the State of New South Wales:
  (i) a notary public; or
  (ii) any person having authority to administer an oath in that place.
Annexure B

Supporting statement by head contractor regarding payment to subcontractors

This statement must accompany any payment claim served on a principal to a construction contract by a head contractor.

For the purposes of this statement, the terms "principal", "head contractor", "subcontractor", and "construction contract" have the meanings given in section 4 of the Building and Construction Industry Security of Payment Act 1999.

Head contractor: .................................................... [business name of head contractor]
ABN: ............................................................... [ABN]

* 1. has entered into a contract with: ........................................ [business name of subcontractor]
ABN: ............................................................... [ABN]
Contract number/identifier: .................................................................. [contract number/identifier]

OR

* 2. has entered into a contract with the subcontractors listed in the attachment to this statement.

*[Delete whichever of the above does not apply]*

This statement applies for work between .................................................. [start date] and .................................................. [end date] inclusive (the construction work concerned), subject of the payment claim dated ............................................................... .

I, .................................................. [full name], being the head contractor, a director of the head contractor or a person authorised by the head contractor on whose behalf this declaration is made, hereby declare that I am in a position to know the truth of the matters that are contained in this supporting statement and declare that, to the best of my knowledge and belief, all amounts due and payable to subcontractors have been paid (not including any amount identified in the attachment as an amount in dispute).

Signature: .................................................. Date: ..................................................
Full name: .................................................. Position/Title: ..................................
## Attachment

### Schedule of subcontractors paid all amounts due and payable

<table>
<thead>
<tr>
<th>Subcontractor</th>
<th>ABN</th>
<th>Contract number/identifier</th>
<th>Date of works (period)</th>
<th>Date of payment claim (head contractor claim)</th>
</tr>
</thead>
<tbody>
<tr>
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</tr>
</tbody>
</table>

### Schedule of subcontractors for which an amount is in dispute and has not been paid

<table>
<thead>
<tr>
<th>Subcontractor</th>
<th>ABN</th>
<th>Contract number/identifier</th>
<th>Date of works (period)</th>
<th>Date of payment claim (head contractor claim)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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</tr>
</tbody>
</table>
Annexure C

SUBCONTRACTOR’S STATEMENT
REGARDING WORKER’S COMPENSATION, PAYROLL TAX AND
RENUMERATION (Note 1 – see back of form)

For the purposes of this Statement a "subcontractor" is a person (or other legal entity) that has entered into a
contract with a "principal contractor" to carry out work.

This Statement must be signed by a "subcontractor" (or by a person who is authorised, or held out as being
authorised, to sign the statement by the subcontractor) referred to in any of s175B Workers Compensation Act
1987; Schedule 2 Part 5 Payroll Tax Act 2007; and s127 Industrial Relations Act 1996 where the "subcontractor"
has employed or engaged workers or subcontractors during the period of the contract to which the form applies
under the relevant Act(s). The signed Statement is to be submitted to the relevant principal contractor.

SUBCONTRACTOR’S STATEMENT  (Refer to the back of this form for Notes; period of Statement
retention, and Offences under various Acts.)

Subcontractor: .................................................................................. ABN: ..................................................
of ........................................................................................................ (Note 2)

has entered into a contract with .......................................................................... ABN: ..................................................

Contract number/identifier .................................................................................. (Note 3)

This Statement applies for work between: …/…/…… and …/…/…… inclusive, (Note 4)

subject of the payment claim dated: …/…/……  (Note 5)

I ……………………………………………………………………………………………, a Director or a person authorised by the Subcontractor
on whose behalf this declaration is made, hereby declare that I am in a position to know the truth of the
matters which are contained in this Subcontractor’s Statement and declare the following to the best of my
knowledge and belief:

(a) The abovementioned Subcontractor has either employed or engaged workers or subcontractors during the
above period of this contract. Tick [ ] if true and comply with (b) to (g) below, as applicable. If it is not
the case that workers or subcontractors are involved or you are an exempt employer for workers
compensation purposes tick [ ] and only complete (f) and (g) below. You must tick one box. (Note 6)

(b) All workers compensation insurance premiums payable by the Subcontractor in respect of the work done
under the contract have been paid. The Certificate of Currency for that insurance is attached and is dated
……/……/……. (Note 7)

(c) All remuneration payable to relevant employees for work under the contract for the above period has been
paid. (Note 8)

(d) Where the Subcontractor is required to be registered as an employer under the Payroll Tax Act 2007, the
Subcontractor has paid all payroll tax due in respect of employees who performed work under the contract,
as required at the date of this Subcontractor’s Statement. (Note 9)

(e) Where the Subcontractor is also a principal contractor in connection with the work, the Subcontractor has in
its capacity of principal contractor been given a written Subcontractor’s Statement by its subcontractor(s) in
connection with that work for the period stated above. (Note 10)

(f) Signature …………………………………………………………………………….... Full name ……………………………………………………………………………....

(g) Position/Title …………………………………………………………………………….... Date …/…/……

NOTE: Where required above, this Statement must be accompanied by the relevant Certificate of Currency to
comply with section 175B of the Workers Compensation Act 1987.
Notes

1. This form is prepared for the purpose of section 175B of the Workers Compensation Act 1987, Schedule 2 Part 5 Payroll Tax Act 2007 and section 127 of the Industrial Relations Act 1996. If this form is completed in accordance with these provisions, a principal contractor is relieved of liability for workers compensation premiums, payroll tax and remuneration payable by the subcontractor.

A principal contractor can be generally defined to include any person who has entered into a contract for the carrying out of work by another person (or other legal entity called the subcontractor) and where employees of the subcontractor are engaged in carrying out the work which is in connection with the principal contractor’s business.

2. For the purpose of this Subcontractor’s Statement, a principal contractor is a person (or other legal entity), who has entered into a contract with another person (or other legal entity) referred to as the subcontractor, and employees/workers of that subcontractor will perform the work under contract. The work must be connected to the business undertaking of the principal contractor.

3. Provide the unique contract number, title, or other information that identifies the contract.

4. In order to meet the requirements of s127 Industrial Relations Act 1996, a statement in relation to remuneration must state the period to which the statement relates. For sequential Statements ensure that the dates provide continuous coverage.

Section 127(6) of the Industrial Relations Act 1996 defines remuneration ‘as remuneration or other amounts payable to relevant employees by legislation, or under an industrial instrument, in connection with work done by the employees.’

Section 127(11) of the Industrial Relations Act 1996 states ‘to avoid doubt, this section extends to a principal contractor who is the owner or occupier of a building for the carrying out of work in connection with the building so long as the building is owned or occupied by the principal contractor in connection with a business undertaking of the principal contractor.’

5. Provide the date of the most recent payment claim.

6. For Workers Compensation purposes an exempt employer is an employer who pays less than $7500 annually, who does not employ an apprentice or trainee and is not a member of a group.

7. In completing the Subcontractor’s Statement, a subcontractor declares that workers compensation insurance premiums payable up to and including the date(s) on the Statement have been paid, and all premiums owing during the term of the contract will be paid.

8. In completing the Subcontractor’s Statement, a subcontractor declares that all remuneration payable to relevant employees for work under the contract has been paid.

9. In completing the Subcontractor’s Statement, a subcontractor declares that all payroll tax payable relating to the work undertaken has been paid.

10. It is important to note that a business could be both a subcontractor and a principal contractor, if a business ‘in turn’ engages subcontractors to carry out the work. If your business engages a subcontractor you are to also obtain Subcontractor’s Statements from your subcontractors.

Statement Retention

The principal contractor receiving a Subcontractor’s Statement must keep a copy of the Statement for the periods stated in the respective legislation. This is currently up to seven years.

Offences in respect of a false Statement

In terms of s127(8) of the Industrial Relations Act 1996, a person who gives the principal contractor a written statement knowing it to be false is guilty of an offence if:

(a) the person is the subcontractor;

(b) the person is authorised by the subcontractor to give the statement on behalf of the subcontractor or

(c) the person holds out or represents that the person is authorised by the subcontractor to give the statement on behalf of the subcontractor.

In terms of s175B of the Workers Compensation Act and clause 18 of Schedule 2 of the Payroll Tax Act 2007 a person who gives the principal contractor a written statement knowing it to be false is guilty of an offence.

Further Information

7. Form of Written Statement

SUBCONTRACTOR’S STATEMENT
REGARDING WORKER’S COMPENSATION, PAYROLL TAX AND REMUNERATION (Note 1 – see back of form)

For the purposes of this Statement, a “subcontractor” is a person (or other legal entity) that has entered into a contract with a “principal contractor” to carry out work.

This Statement must be signed by a “subcontractor” (or by a person who is authorised, or held out as being authorised, to sign the statement by the subcontractor) referred to in any of s175B Workers Compensation Act 1987, Schedule 2 Part 5 Payroll Tax Act 2007, and s127 Industrial Relations Act 1996 where the “subcontractor” has employed or engaged workers or subcontractors during the period of the contract to which the form applies under the relevant Act(s). The signed Statement is to be submitted to the relevant principal contractor.

SUBCONTRACTOR’S STATEMENT (Refer to the back of this form for Notes, period of Statement retention, and Offences under various Acts.

Subcontractor: .................................................................................. ABN: ........................................

of ........................................................................................................... ABN: ........................................ (Note 2)

Contract number/identifier ........................................................................ (Note 3)

This Statement applies for work between: ……../……../…… and ……../……../…… inclusive. (Note 4)

subject of the payment claim dated: ……../……../……. (Note 5)

I ……..……………………………………………………………………………………….. …….., a Director or a person authorised by the Subcontractor on whose behalf this declaration is made, hereby declare that I am in a position to know the truth of the matters which are contained in this Subcontractor’s Statement and declare the following to the best of my knowledge and belief:

(a) The abovementioned Subcontractor has either employed or engaged workers or subcontractors during the above period of this contract. Tick [ ] if true and comply with (b) to (g) below, as applicable. If it is not the case that workers or subcontractors are involved or you are an exempt employer for workers compensation purposes tick [ ] and only complete (f) and (g) below. You must tick one box. (Note 6)

(b) All workers compensation insurance premiums payable by the Subcontractor in respect of the work done under the contract have been paid. The Certificate of Currency for that insurance is attached and is dated ……../……../…….. (Note 7)

(c) All remuneration payable to relevant employees for work under the contract for the above period has been paid. (Note 8)

(d) Where the Subcontractor is required to be registered as an employer under the Payroll Tax Act 2007, the Subcontractor has paid all payroll tax due in respect of employees who performed work under the contract, as required at the date of this Subcontractor’s Statement. (Note 9)

(e) Where the Subcontractor is also a principal contractor in connection with the work, the Subcontractor has in its capacity as a principal contractor been given a written Subcontractor’s Statement by its subcontractor(s) in connection with that work for the period stated above. (Note 10)

(f) Signature ……..………………………………………………………………….. Full name ……..…………………………………………………………………..

(g) Position/Title ……..………………………………………………………………….. Date ……../……../……..

NOTE: Where required above, this Statement must be accompanied by the relevant Certificate of Currency to comply with section 175B of the Workers Compensation Act 1987.
Notes

1. This form is prepared for the purpose of section 175B of the Workers Compensation Act 1987, Schedule 2 Part 5 Payroll Tax Act 2007 and section 127 of the Industrial Relations Act 1996. If this form is completed in accordance with these provisions, a principal contractor is relieved of liability for workers compensation premiums, payroll tax and remuneration payable by the subcontractor.

A principal contractor can be generally defined to include any person who has entered into a contract for the carrying out of work by another person (or other legal entity called the subcontractor) and where employees of the subcontractor are engaged in carrying out the work which is in connection with the principal contractor’s business.

2. For the purpose of this Subcontractor’s Statement, a principal contractor is a person (or other legal entity), who has entered into a contract with another person (or other legal entity) referred to as the subcontractor, and employees/workers of that subcontractor will perform the work under contract. The work must be connected to the business undertaking of the principal contractor.

3. Provide the unique contract number, title, or other information that identifies the contract.

4. In order to meet the requirements of s127 Industrial Relations Act 1996, a statement in relation to remuneration must state the period to which the statement relates. For sequential Statements ensure that the dates provide continuous coverage.

   Section 127(6) of the Industrial Relations Act 1996 defines remuneration ‘as remuneration or other amounts payable to relevant employees by legislation, or under an industrial instrument, in connection with work done by the employees.’

   Section 127(11) of the Industrial Relations Act 1996 states ‘to avoid doubt, this section extends to a principal contractor who is the owner or occupier of a building for the carrying out of work in connection with the building so long as the building is owned or occupied by the principal contractor in connection with a business undertaking of the principal contractor.’

5. Provide the date of the most recent payment claim.

6. For Workers Compensation purposes an exempt employer is an employer who pays less than $7500 annually, who does not employ an apprentice or trainee and is not a member of a group.

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8. In completing the Subcontractor’s Statement, a subcontractor declares that all remuneration payable to relevant employees for work under the contract has been paid.

9. In completing the Subcontractor’s Statement, a subcontractor declares that all payroll tax payable relating to the work undertaken has been paid.

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(b) the person is authorised by the subcontractor to give the statement on behalf of the subcontractor; or

(c) the person holds out or represents that the person is authorised by the subcontractor to give the statement on behalf of the subcontractor.

In terms of s175B of the Workers Compensation Act and clause 18 of Schedule 2 of the Payroll Tax Act 2007 a person who gives the principal contractor a written statement knowing it to be false is guilty of an offence.

Further Information

Sydney Growth Trains
(ISD-16-5312A)

Schedule 23 – Options

<table>
<thead>
<tr>
<th>Option 1</th>
<th>Powered USB Sockets</th>
</tr>
</thead>
<tbody>
<tr>
<td>Description</td>
<td>This Option is for the provision of powered USB sockets at each seat location to facilitate charging of mobile devices.</td>
</tr>
<tr>
<td>Date by which TfNSW’s Representative must give notice under clause 21.16(b) of this deed</td>
<td>The date which is [redacted].</td>
</tr>
</tbody>
</table>

Amendments

1. Table 1.1 of Schedule 11 is amended as follows:
   The Initial Fleet Contract Value set out in Table 1.1 in Schedule 11 is increased by an amount equal to [redacted] Nominal.
   The Initial Fleet Set Price set out in Table 1.1 in Schedule 11 is increased by an amount equal to [redacted] Nominal per Set.

2. Table 2.1 and Table 2.2 of Schedule 11 are amended as follows:
   The Option Fleet Set Prices set out in Table 2.1 and Table 2.2 in Schedule 11 will be increased by the relevant amounts set out in the table below.

<table>
<thead>
<tr>
<th>Set No.</th>
<th>Increase in Option Fleet Set Price ($ Nominal per Set)</th>
</tr>
</thead>
<tbody>
<tr>
<td>25 to 39</td>
<td>[redacted]</td>
</tr>
<tr>
<td>40 to 55</td>
<td>[redacted]</td>
</tr>
<tr>
<td>56 to 69</td>
<td>[redacted]</td>
</tr>
</tbody>
</table>

3. Schedule 26 is amended as follows:
   Insert new row at the end of the table in Schedule 26:

<table>
<thead>
<tr>
<th>Option 1 – Powered USB Sockets</th>
</tr>
</thead>
<tbody>
<tr>
<td>Category</td>
</tr>
<tr>
<td>----------</td>
</tr>
<tr>
<td>Option 1 - Powered USB Sockets</td>
</tr>
</tbody>
</table>
### Option 1  
**Powered USB Sockets**

<table>
<thead>
<tr>
<th>Description</th>
<th>Date by which TfNSW's Representative must give notice under clause 21.16(b) of this deed</th>
<th>Amendments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Option 1 - Powered USB Sockets</td>
<td></td>
<td></td>
</tr>
<tr>
<td>B7.2.2 - 2 - USB power supply</td>
<td></td>
<td></td>
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<tr>
<td>each</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Option 1 - Powered USB Sockets</td>
<td></td>
<td></td>
</tr>
<tr>
<td>B7.2.3 - Special Tool - dongle for testing</td>
<td></td>
<td></td>
</tr>
<tr>
<td>each</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

4. SPR Appendix 02 - Rolling Stock Specification, section 5.1 (Seating) is amended as follows:

Insert new sub-clauses (p) - (r) at the end of section 5.1:

(p) Each Set must include USB 3.0 (900 mA) power sockets for charging portable computing devices such as phones and tablets which are accessible from each seat location.

(q) One USB 3.0 (900 mA) power socket must be installed per set of two or three transverse seats.

(r) One USB 3.0 (900 mA) power socket must be installed per set of longitudinal seats.

### Option 2  
**Integrated Condition Monitoring System**

<table>
<thead>
<tr>
<th>Description</th>
<th>The date of the Option Set Notice issued by RailCorp (or TfNSW’s Representative on behalf of RailCorp) under clause 20.2 of this deed.</th>
<th>The Option Fleet Contract Value will be increased by an amount equal to per Option Set for each Option Set to be fitted with an integrated condition monitoring system which complies with SPR Appendix 02 - Rolling Stock Specification, section 3.15.7 (Integrated Condition Monitoring Systems).</th>
</tr>
</thead>
<tbody>
<tr>
<td>Description</td>
<td>The date of the Option Set Notice issued by RailCorp (or TfNSW’s Representative on behalf of RailCorp) under clause 20.2 of this deed.</td>
<td>The Option Fleet Contract Value will be increased by an amount equal to per Option Set for each Option Set to be fitted with an integrated condition monitoring system which complies with SPR Appendix 02 - Rolling Stock Specification, section 3.15.7 (Integrated Condition Monitoring Systems).</td>
</tr>
<tr>
<td>Date by which TfNSW’s Representative must give notice under clause 21.16(b) of this deed</td>
<td>The date of the Option Set Notice issued by RailCorp (or TfNSW’s Representative on behalf of RailCorp) under clause 20.2 of this deed.</td>
<td>The Option Fleet Contract Value will be increased by an amount equal to per Option Set for each Option Set to be fitted with an integrated condition monitoring system which complies with SPR Appendix 02 - Rolling Stock Specification, section 3.15.7 (Integrated Condition Monitoring Systems).</td>
</tr>
<tr>
<td>Amendments</td>
<td>The date of the Option Set Notice issued by RailCorp (or TfNSW’s Representative on behalf of RailCorp) under clause 20.2 of this deed.</td>
<td>The Option Fleet Contract Value will be increased by an amount equal to per Option Set for each Option Set to be fitted with an integrated condition monitoring system which complies with SPR Appendix 02 - Rolling Stock Specification, section 3.15.7 (Integrated Condition Monitoring Systems).</td>
</tr>
</tbody>
</table>
Schedule 24 – Form of SPR Amendment Letter

[Date]
[Addressee]
Downer EDI Rail Pty Limited
T3, Triniti Business Campus, 39 Delhi Road
North Ryde NSW 2113

Dear [ ]

Sydney Growth Trains Project
Re: Delivery Deed and TLS Deed SPR

Proposed amendment to SPR pursuant to clause 46.4(b) of the Delivery Deed and clause [insert] of the TLS Deed

This is a letter pursuant to clause 46.4(b) of the "Sydney Growth Trains Project - Delivery Deed" dated [insert] (Delivery Deed) and clause [insert] of the "Sydney Growth Trains Project - TLS Deed" dated [insert] (TLS Deed).

Pursuant to clause 46.4(b) of the Delivery Deed and clause [insert] of the TLS Deed, and in consideration for TfNSW promising to pay [ ] to the Supplier upon the Supplier's request, TfNSW requests your agreement to make the amendments to the SPR which are set out in the Attachment to this letter.

Please sign and return every page of the enclosed copy of this letter and its attachment if you agree to the amendments.

In accordance with clause 46.4(b) of the Delivery Deed and clause [insert] of the TLS Deed, the SPR will be amended with effect from the date of your reply.

Capitalised terms used in this letter have the meanings given in the Delivery Deed.

Yours faithfully

[Name]
TfNSW's Representative
Sydney Growth Trains Project

Transport for NSW

Signed for and on behalf of the Supplier by:

............................................

Name: ..................................

Position: Supplier’s Representative

Date: .................................
Attachment 1 - Amendments to SPR

Exhibit 1 (Scope and Performance Requirements) to the Delivery Deed and the TLS Deed is amended as follows:

[insert details of proposed amendments]
Schedule 25 – TfNSW Supplied Items

<table>
<thead>
<tr>
<th>TfNSW Supplied Items</th>
<th>ICT Telemetry Units</th>
</tr>
</thead>
<tbody>
<tr>
<td>Quantity of Items</td>
<td>2 units per Set</td>
</tr>
<tr>
<td>Place of Availability</td>
<td>Maintenance Facility Site</td>
</tr>
<tr>
<td>Date of Availability</td>
<td>A date which is no later than 60 Business Days prior to the Date for Provisional Acceptance of each Set.</td>
</tr>
</tbody>
</table>
### Schedule 26 – Spares Lists

<table>
<thead>
<tr>
<th>Description</th>
<th>Unit Price</th>
<th>Lead Time</th>
<th>First Set Spares List</th>
<th>Initial Fleet Spares List</th>
<th>Option Fleet Spares List</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No of days</td>
<td>Quantity for 1 Set</td>
<td>Quantity for 24 Sets</td>
<td>Quantity for Option Sets 1 to 15</td>
<td>Quantity for Option Sets 16 to 30</td>
</tr>
<tr>
<td><strong>B 1.6.1 HVAC</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>001 060500032 - AIR CONDITIONING UNIT ASSEMBLY</td>
<td>each</td>
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<tr>
<td>002 260500238 - END SALOON DUCT HEATER ASSEMBLY</td>
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<td></td>
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<tr>
<td>003 360501078 - FOOT HEATER ASSY</td>
<td>each</td>
<td></td>
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<tr>
<td>004 360501086 - CAB HEATER</td>
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<tr>
<td>005 360501682 - CONTROLLER A C UNIT</td>
<td>each</td>
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<tr>
<td>006 CAB AIR SUPPLY UNIT</td>
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<tr>
<td>007 CAB FRESH AIR SUPPLY UNIT</td>
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<td><strong>B1.6.2 BRAKE SYSTEM</strong></td>
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<tr>
<td>008 361000207 - RESERVOIR 2 LITRE</td>
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## B1.6.7 ELECTRICAL - MAIN POWER

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Schedule 26
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Sydney Growth Trains
(ISD-16-5312A)

LI320583942.6
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Sydney Growth Trains
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Sydney Growth Trains
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Schedule 26
Delivery Deed
Schedule 27 – AMC Option
Exhibit 1 - Scope and Performance Requirements

This exhibit has been disclosed separately.