

*NOTE: some clauses and Schedules have been partly or completely removed under the provisions of the GIPA Act. For details, refer to TfNSW's Government Contracts Register – Project Deed.*

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# Project Deed

## Electronic Ticketing System for the Greater Sydney region

Transport for NSW ABN 18 804 239 602

Cubic Transportation Systems (Australia) Pty Limited ABN 82 003 617 561

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Exhibit A – Insurance Policies

Date:

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## Parties

- 1 Transport for NSW (ABN 18 804 239 602) of Level 1, 18 Lee Street, Chippendale NSW 2008
  - 2 Cubic Transportation Systems (Australia) Pty Limited (ABN 82 003 617 561) of Level 23, 219 – 227 Elizabeth Street, Sydney NSW 2000 (**Contractor**)
- 

## Background

- A TfNSW has sought proposals from the private sector for a multi-modal electronic ticketing system for public transport for Greater Sydney.
  - B TfNSW has selected the Contractor to perform the ETS Project.
  - C The Contractor has agreed to do so on the terms and conditions of this Deed.
  - D The Guarantor has agreed to guarantee to TfNSW the due performance by the Contractor of its obligations under this Deed.
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## 1 Definitions and interpretation

### 1.1 Definitions

In this Deed:

**Abatement** has the meaning given to it in Schedule 9.

**Account-Based** means a system where fare calculation is made subsequent to and remotely from the travel undertaken and fare payment is made directly from the Cardholder's bank account or credit/debit card facilities.

**Active Smartcard** means a Smartcard that creates at least one Transaction in any month.

**Airport Link** means Airport Link Company Pty Ltd (ABN 88 058 436 801) of Mascot Station, corner of John and Bourke Streets, Mascot, New South Wales.

**Approvals** means all approvals, authorisations, orders, permits, consents, licences, exemptions and the like which are required to be issued by or obtained from any Authority in connection with the ETS Project including in respect of any Site on which any part of the ETS Project is performed. For clarification, this definition does not include such approvals which this Deed requires the Contractor to obtain from TfNSW under this Deed.

**Approved Subcontractor** means those subcontractors listed in Schedule 20, as may be updated by TfNSW notifying the Contractor from time to time, and any other subcontractor which becomes an "Approved Subcontractor" under clause 4.7(b).

**Australian Payments Systems** means a funds transfer system that facilitates the circulation of money, and includes any instruments and procedures that relate to the system, including the cheque system, direct debit schemes, direct credit schemes, BPay

and debit card and credit card schemes (including the Visa, MasterCard, American Express and Diners Club payment schemes).

**Authority** means any governmental, semi-governmental, municipal, statutory or other public authority or entity, and any other entity which in any way governs, regulates, controls or affects any aspect of the ETS Project.

**Balance** means the value in the Purse of a Smartcard.

**Bank** means the Approved Subcontractor who provides merchant services and other receivable products in relation to the ETS.

**Bank Charges** means the bank charges described in paragraph 4 of Schedule 6.

**Branding** means all goodwill associated with the ETS, including:

- (a) all registered and unregistered trade marks and brands (other than those trade marks and brands of the Contractor or any of its Subcontractors which are used in their businesses generally and which are ordinarily applied by them to the goods or services they supply, but which are not created or developed in connection with the ETS);
- (b) all names including trade names, business names, domain names and company names; and
- (c) all telephone numbers, email addresses and all other addresses used by Cardholders to make contact with the Contractor in connection with the ETS.

**Business Continuity Plan** means the business continuity plan set out in Schedule 24, as updated from time to time in accordance with clause 45.4.

**Business Day** means a day that is not a Saturday, Sunday or a public holiday in Sydney, New South Wales.

**Cardholder** means a person who has been issued with a Smartcard.

**Certificate of Completion** means a certificate issued by TfNSW in the form set out in part B of Schedule 36 certifying that Completion of a Planned Value Category or Stage has occurred in accordance with this Deed.

**Change in Control** means a change in “control”, as that term is defined in section 50AA of the Corporations Act.

**Change in Law** means a change to, or the coming into effect, or implementation, after the Execution Date of:

- (a) an existing Law;
  - (b) a new Law; or
  - (c) the interpretation or application of any Law resulting from a decision of an Authority (but not any other change in the way a Law is interpreted),
- (a **Change**) and compliance with which:
- (d) has a direct effect on the Contractor performing its obligations under this Deed; and

- (e) directly results in a material increase or decrease in the Contractor's costs of so doing,

but excludes any such Change:

- (f) which directly results in an increase or decrease in any category of costs or charges, where changes to such costs or charges are provided for under this Deed;
- (g) in a jurisdiction other than New South Wales or the Commonwealth of Australia;
- (h) which applies to businesses operating in New South Wales or the Commonwealth of Australia generally; or
- (i) that a person experienced and competent in the delivery of works and/or services similar to the ETS Project, should have been aware of or anticipated prior to the Execution Date.

**Charges** means:

■ [REDACTED]

■ [REDACTED]

**Claim** means any claim, action, proceeding or demand.

**Commencement Date** means the date on which each of the conditions precedent in clause 2.1 have been satisfied or waived, as confirmed in writing by TfNSW to the Contractor.

**Completion** means in respect of a:

- (a) Planned Value Category within a Stage, when an Extent of Completion Certificate indicates that the Contractor has met the Entitlement to Claim Criteria for all of that Planned Value Category; or
- (b) Stage, when paragraph (a) has been satisfied for all Planned Value Categories for that Stage other than the Stability Period,

except (other than for those Planned Value Categories that require rectification of all Defects, including minor Defects) for minor Defects in that Stage or Planned Value Category:

- (c) which do not prevent the Stage or Planned Value Category from being reasonably capable of being Fit for ETS Purposes;
- (d) in relation to which there are reasonable grounds for not rectifying them prior to completion of the Stage or Planned Value Category; and
- (e) rectification of which will not prejudice the operation of the relevant part or component of the ETS following completion of the Stage or Planned Value Category,

with the matters referred to in paragraphs (c) to (e) being determined in the opinion of the Independent Certifier for a Planned Value Category Requiring Certification.



**Confidential Information** means any information (whether or not in material form and whether or not disclosed before or after the Execution Date) of whatever kind disclosed or revealed by one Party (the **Disclosing Party**) to the other Party (the **Receiving Party**) under or in relation to this Deed or any other Project Agreement, including information about the Disclosing Party's or a third party's business, operations, dealings, transactions, contracts, customers, commercial or financial arrangements, products, marketing strategies and future development plans, that:

- (a) is by its nature confidential;
- (b) is designated by the Disclosing Party as confidential; or
- (c) the Receiving Party knows or reasonably ought to know is confidential,

including (where TfNSW is the Disclosing Party) TfNSW IP to the extent that it has not already been publicly disclosed, but does not include information that:

- (d) is published or has otherwise entered the public domain without a breach of this Deed or other obligation of confidence;
- (e) is obtained from a third party who has no obligation of confidentiality to the Disclosing Party; or
- (f) is already known, rightfully received or independently developed, by the Receiving Party free of any obligation of confidence and without breach of this Deed.

**Consequential Loss** means [REDACTED]

**Contract Mobilisation Bond** means [REDACTED]

**Contractor Integrated Test Facility** has the meaning given in clause 13.8(a).

**Contractor Licensed IP** means:

- [REDACTED]
- [REDACTED]
- [REDACTED]

**Contractor Personnel** means all Personnel of the Contractor and the Subcontractors who are involved from time to time in the ETS Project.

**Contractor Project Materials** means items which are not otherwise available to the ETS Entities and which are in the reasonable opinion of TfNSW required in order to ensure the smooth Transfer of the ETS, including passwords, physical keys, IDs, badges, passes,

encryption codes, Software and security keys, IP addresses and similar or equivalent identifiers and contact details but excluding any Contractor Retained Assets.

**Contractor Retained Assets** means a tool, process, system, piece of Software or equipment (a **tool**) which is:

- (a) used by the Contractor in performing the ETS Project and meeting its obligations under the Deed; and
- (b) does not form part of the ETS;

and which is owned (directly or under licence by third party) by the Contractor or a Related Body Corporate of the Contractor and is:

- (c) required by the Contractor or that Related Body Corporate for use in the normal course of its business (including for other customers of the Contractor or that Related Body Corporate); or
- (d) a tool which a successor operator ought reasonably to be able to supply or procure from the open market.

**Contractor Test Phase** means the Test Activities conducted by the Contractor, as described in section 1.3 of Schedule 23.

**Contractor's Representative** means the person engaged in that role by the Contractor from time to time, as further described in clause 4.4. As at the Execution Date, the Contractor's Representative is the person named in Schedule 19.

**Contractor's Solution** means the Contractor's solution attached to this Deed at Parts B and C Appendices of the Scope of Works and Services.

**Controller** means, in relation to a Change in Control of the Contractor, the person to whom control (as defined in section 50AA of the Corporations Act) will pass.

**Core Systems** means the ETS excluding Smartcards, Device Infrastructure, Device Communications Infrastructure, Disaster Recovery Infrastructure and the Integrated Test Facilities.

**Corporations Act** means the *Corporations Act* 2001 (Cth).

**Corrective Action Plan** means a corrective action plan required by TfNSW under clause 19(a).

**CPI** or **Consumer Price Index** has the meaning given to it in Schedule 8.

**Critical Design Review** or **CDR** means the critical design review described in Appendix A8 of the Scope of Works and Services.

**Cutover** means the change from parallel operation of the ETS with an Operator's existing ticketing system, to ETS operation only for that Operator.

**Date for Completion** means, in respect of a:

- (a) Planned Value Category, the date (if any) by which Completion of the Planned Value Category is required; or
- (b) Stage, the date (if any) by which Completion of that Stage is required,

as set out in Schedule 3.

**Date of Certified Completion** means the date on which a Certificate of Completion is issued pursuant to clause 14.5(c).

**DDI** means a development and deployment increment, comprising the activities necessary to meet the criteria for a DDI Review set out in Appendix A8 of the Scope of Works and Services.

**DDI Deliverable** has the meaning given to it in clause 9.2(b).

**DDI Review** means any of the following development and deployment increment reviews as set out in Appendix A8 of the Scope of Works and Services:

- (a) System Requirements Review (**SRR**);
- (b) System Functional Review (**SFR**);
- (c) Preliminary Design Review (**PDR**);
- (d) Critical Design Review (**CDR**);
- (e) System Verification Review (**SVR**);
- (f) Field Trial Readiness Review (**FTR**);
- (g) Deployment Readiness Review (**DR**);
- (h) Physical Configuration Audit (**PCA**);
- (i) Operational Readiness Review (**ORR**); and
- (j) Deployment Milestone Review (**DM**).

**Deed** means this deed entitled "Project Deed" between TfNSW and the Contractor and includes:

- (a) the Schedules and other documents attached to, or included within, such Schedules; and
- (b) the Design Documentation.

**Deed of Appointment of Expert** means any deed referred to in clause 50.1(d).

**Defect** means any part of the ETS Project or the ETS which does not conform with this Deed (including through loss, damage or destruction, or where such non-conformance is not caused by the Contractor).

**Delay** has the meaning given in clause 14.7(a)(i).

**Delay Costs** means

[REDACTED]

[REDACTED]

**Deployment Readiness Review or DR** means the deployment readiness review described in Appendix A8 of the Scope of Works and Services.

- (a) detailed specifications describing the design, features, functionality and performance of the ETS and each aspect of the ETS Project; and
- (b) the integration specification.

**Device Communications Infrastructure** means the third party telecommunications infrastructure between the points of interconnection to the Device Infrastructure and the points of interconnection to the Core Systems.

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- (a) installed on stations, wharves, depots and vehicles, including the equipment and communications links up to the points of interconnection to the Device Communications Infrastructure;
- (b) intended to be carried by Personnel of an Operator, including Portable Readers; or
- (c) installed at retail outlets,

but does not include Smartcards.

**Direct Costs** means

[REDACTED]

**Direct Overhead**

[REDACTED]

**Direct Savings** means

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**Disaster Recovery Infrastructure** means the part of the ETS that is used to replace and replicate the functions and performance of the Core Systems when the Core Systems become unavailable for use.

**Disclosing Party** has the meaning given in the definition of “Confidential Information”.

**Disposable Smartcard** means a Smartcard which, once purchased, stored value cannot be added.

**Dispute** has the meaning given to it in clause 49.1(a).

**Dispute Resolution Procedures** means the procedures established under clause 49 to hear and resolve disputes between the Parties.

**Distributor** means any person that either distributes Smartcards to Cardholders or provides facilities to Cardholders to load value to Smartcards.

**Emergency** means:

- (a) a circumstance where there is a risk, or a potential and immediate threat, to:
  - (i) public interest or safety relating to the ETS Project; or
  - (ii) the structural integrity or safety of any site on which the ETS Project takes place or the ETS is located; or
- (b) a circumstance exists where it may be necessary for an ETS Entity to take immediate action to discharge its statutory duties or powers.

**Entitlement to Claim Criteria** means that, for:

- (a) a Planned Value Category that is Mobilisation, all requirements necessary for completion of that Planned Value Category under this Deed have been satisfied, including all of:
  - (i) the pre-conditions set out in Schedule 2; and
  - (ii) the pre-requisites set out in Schedule 3;
- (b) a Planned Value Category except Mobilisation or a Stability Period, all requirements necessary for claiming completion of part of that Planned Value Category under this Deed have been satisfied, including:
  - (i) all of the pre-conditions set out in Schedule 2;
  - (ii) all of the pre-requisites set out in Schedule 3; and
  - (iii) the specific entitlement to claim criteria set out in Schedule 3; and
- (c) a Planned Value Category that is a Stability Period, the Stability Requirements for that Planned Value Category have been met.

**Environmental Management Plan** means the plan of that name in the Scope of Works and Services.

**Escrow Agent** means Iron Mountain Intellectual Property Management, Inc., and if clause 38.5(b) applies, means any replacement escrow agent nominated by TfNSW under that clause.

**Escrow Agreement** means the three-party escrow service agreement between TfNSW, the Contractor and the Escrow Agent dated on or about the Execution Date substantially in the form of Schedule 33 and if clause 38.5(b) applies, means any escrow agreement contemplated by that clause.

**Escrow Material** has the meaning given in the Escrow Agreement.

**ETS** means the electronic ticketing system that the Contractor must develop, deploy, operate, support, repair and handback to TfNSW under this Deed and comprises the Core Systems, Device Infrastructure, Device Communications Infrastructure, Disaster Recovery Infrastructure, Smartcards and Integrated Test Facilities.

**ETS Accounts** has the meaning given in Schedule 38.

**ETS Components Delivered** means the parts or components of the ETS that are the subject of an Extent of Completion Certificate issued under clause 14.4.

**ETS Delivery** means all work, tasks and everything else required to be performed by the Contractor under this Deed to develop and deploy the ETS, including the planning, project management, design, development, building, integration, installation, testing, implementing and commissioning of the ETS.

**ETS Delivery Phase** means, in respect of a Stage, the period from the commencement date of that Stage to Completion of that Stage.

**ETS Delivery Phase Variation** means:

- (a) to alter, vary, modify, omit, increase or decrease the ETS Delivery;
- (b) to change the character or quality of any ETS Documentation or the ETS Project, including anything described in the Scope of Works and Services;
- (c) to amend the Subsidiary ETS Delivery Program, including by changing any of the dates specified therein (other than any changes made in accordance with clause 8); or
- (d) doing any of the things contemplated in paragraphs (a) to (c), so as to include an additional Operator contemplated in paragraph (f) of Schedule 15.

**ETS Delivery Price** means [REDACTED]

[REDACTED]

[REDACTED]

**ETS Delivery Program** means the Overall ETS Delivery Program and the Subsidiary ETS Delivery Program.

**ETS Delivery Security Bond** means [REDACTED]

[REDACTED]

**ETS Documentation** means any documentation, materials, Software, data or information (whether electronic or hard-copy) including:

- (a) reports, diagrams, drawings, plans, specifications, manuals, flowcharts, maps, and similar things; and

(b) data which is used, processed, generated, manipulated or stored by the ETS,

which are, or are required to be, prepared or used by or on behalf of the Contractor or provided to an ETS Entity under this Deed or in connection with the ETS Project, including the Design Documentation.

**ETS Entities** means the Operators, TfNSW and any other part of the NSW Government.

**ETS Entities' Works** has the meaning given in clause 7.7(b)(i).

**ETS Operational Services** means the provision of services (including as specified in the Scope of Works and Services) and the performance of obligations to operate, support and repair the ETS and otherwise as required by this Deed.

**ETS Owned Assets** means the ETS, other than the Smartcards, Device Communications Infrastructure and the Contractor Project Materials.

**ETS Project** means all of the Contractor's obligations to be performed in accordance with this Deed and includes the ETS Delivery and the ETS Operational Services.

**ETS Project Fees** means [REDACTED]

**ETS User** means a user of the ETS including Cardholders, ETS Entities and retail outlet personnel.

**Evaluation and Test Documentation** means the evaluation and test documentation described in Table 6 of Section 2 of Appendix A8 of Schedule 17.

**Evaluation and Test Strategy Plan** means the plan of that name in the Scope of Works and Services, which the Contractor is required to prepare based on the initial evaluation and test strategy plan set out in the Part C Appendices of the Scope of Works and Services.

**Event of Default** means an event of default set out in clause 53.1.

**Event of Insolvency** means, the occurrence of any one or more of the following events in relation to a company:

- (a) an application (not being an application withdrawn or dismissed within 5 Business Days) is made to a court for an order, or an order is made, that it be wound up, declared bankrupt or that a provisional liquidator or receiver and manager be appointed;
- (b) a liquidator or provisional liquidator is appointed;
- (c) an administrator is appointed to it under the Corporations Act ss 436A, 436B or 436C;
- (d) a controller (as defined in the Corporations Act s 9) is appointed to it or any of its assets;
- (e) a receiver is appointed to it or any of its assets;
- (f) it enters into an arrangement or composition (formal or informal) with one or more of its creditors, or an assignment for the benefit of one or more of its creditors or any similar proceeding or arrangement by which the assets of the company are



subjected conditionally or unconditionally to the control of the company's creditors is ordered, declared or agreed to, or is applied for and the application is not withdrawn or dismissed within 5 Business Days, in each case other than to carry out a reconstruction or amalgamation while solvent;

- (g) it proposes a winding-up, dissolution or reorganisation, moratorium, deed of company arrangement or other administration involving one or more of its creditors;
- (h) it is insolvent as disclosed in its accounts or otherwise, states that it is insolvent, is presumed to be insolvent under an applicable law (including under the Corporations Act ss 459C(2) or 585) or otherwise is, or states that it is, unable to pay all its debts as and when they become due and payable;
- (i) it is taken to have failed to comply with a statutory demand as a result of the Corporations Act s 459F(1);
- (j) a notice is issued under the Corporations Act ss 601AA or 601AB;
- (k) a writ of execution, garnishee order, Mareva injunction or similar order, attachment, distress or other process is made, levied or issued against it or in relation to any asset of the company;
- (l) it ceases to carry on business or threatens to do so, other than for reorganisation or restructuring in accordance with the terms of this Deed; or
- (m) anything occurs under the law of any jurisdiction which has a substantially similar effect to any of the events set out in the above paragraphs of this definition.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**Execution Date** means the date of execution of this Deed.

[REDACTED]

**Expert** means any person appointed from time to time to act as an expert for the purposes of and in accordance with clause 50.

**Extent of Completion** has the meaning given in clause 14.4(b).

**Extent of Completion Certificate** means a certificate issued by TfNSW in the form set out in part D of Schedule 36 certifying the extent to which Completion of a Planned Value Category has occurred in accordance with this Deed.

**Extent of Completion Claim** has the meaning given in clause 14.2(a).

**Ferries** means Sydney Ferries (ABN 46 202 040 027) of Level 9, 37 Pitt Street, Sydney, New South Wales.

**Field Trial Readiness Review** or **FTR** means the field trial readiness review described in Appendix A8 of the Scope of Works and Services.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**Fit for ETS Purposes** means that:

- (d) in relation to the ETS and for the duration of the Term, the ETS:
  - (i) will meet and continue to meet the requirements for the ETS referred to in this Deed;
  - (ii) is fit for the purposes of use as a multi-modal electronic ticketing system for public transport for Greater Sydney as contemplated in this Deed;
  - (iii) will comply with and operate in accordance with those policies of the ETS Entities referred to in clause 5.5;

- (iv) will meet the requirements in the Scope of Works and Services and is able to provide the ETS Operational Services in accordance with the Scope of Works and Services;
- (v) is compatible, interoperable, and capable of integration, with the Operators' Environments and is compatible with the Sites, in each case in accordance with this Deed;
- (vi) is maintainable, flexible, extensible and upgradeable in accordance with the Scope of Works and Services;
- (vii) is capable of supporting the requirements set out in clause 10.3;
- (viii) is capable of being modified to provide an Account-Based system as contemplated in the Scope of Works and Services; and
- (ix) will have scalable processing and communications capacity that is capable of efficiently and effectively meeting increased operational needs over time;
- (e) in relation to the ETS Operational Services and for the duration of each Operational Services Phase, the ETS Operational Services:
  - (i) will meet the requirements for the ETS Operational Services referred to in this Deed;
  - (ii) are of a suitable quality to operate and support a multi-modal electronic ticketing system for public transport for Greater Sydney as contemplated in this Deed;
  - (iii) will be provided in accordance with the Scope of Works and Services; and
  - (iv) are capable of supporting the requirements set out in clause 10.3; and
- (f) in relation to Project Plans, Manuals, ETS Components Delivered and Stages and for the duration of the Term, each of the Project Plans, Manuals, ETS Components Delivered and Stages will meet the requirements for those items set out in this Deed.

**Fixed Service Charge** means

[REDACTED]

**Force Majeure** means any event that causes a failure or delay in the performance of a Party's obligations under this Deed that:

- (a) is caused, directly or indirectly, without fault by such Party, by fire, flood, earthquake, hurricanes, elements of nature or acts of God, widespread power outage, industrial action or strikes (which are not specific to, or attributable to the actions of, the Contractor or any of its Subcontractors), acts of war (declared and undeclared), terrorism, riots, civil disorders, rebellions or revolutions, quarantines, embargoes and other similar governmental action, an order of a New South Wales or Commonwealth court where the Contractor (or any of its Related Bodies Corporate or Subcontractors) are not a named party, an intervening act, demand or requirement of the Government of New South Wales or the Commonwealth of Australia that the Contractor is not otherwise required to comply with under this Deed and that prevents performance of the Contractor's obligations under this Deed, and includes any of the preceding events that cause a failure or delay in the performance of:

- (i) in the case of the Contractor, a Subcontractor's obligations to the Contractor in respect of the ETS Project; and
  - (ii) in the case of TfNSW, an ETS Entity's performance of the ETS Entities' Works or other obligations to TfNSW in respect of the ETS Project, or the Independent Certifier's obligations under the Independent Certifier Deed; and
- (b) could not have been prevented by reasonable precautions and cannot reasonably be circumvented by the non-performing Party through the use of alternate sources, work around plans or other means (including, in the case of the Contractor compliance with the Contractor's obligations under this Deed with respect to the provision of any disaster recovery services).

[REDACTED]

**FX Protocol** means the protocol set out in Schedule 39.

**GAAP** means generally accepted accounting principles, standards and practices in Australia.

**Good Industry Practice** means that degree of skill, care, prudence, foresight, practice and timeliness which would reasonably and ordinarily be expected from time to time of a skilled and experienced person engaged in the same type of undertaking as that of the Contractor under the same or similar circumstances.

**Greater Sydney** means the area designated as such in the Scope of Works and Services.

**GST** has the meaning given to that expression in the GST Act.

**GST Act** means the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

**Guarantor** means Cubic Corporation of 9333 Balboa Avenue, San Diego, California 92123, United States of America.

**Handback Audit** has the meaning given in Schedule 12.

**Handback Condition** has the meaning given in Schedule 12.

**Handback Plan** means the plan of that name in the Scope of Works and Services which the Contractor is required to prepare based on the initial handback plan set out in the Part C Appendices to the Scope of Works and Services.

**Hazardous Materials** means any hazardous or other materials including any form of organic or chemical matter whether solid, liquid or gas, which have the capacity to cause personal injury or death, damage to property, create a nuisance or in any way pollute or contaminate the environment.

**IFRS** means the International Financial Reporting Standards adopted by the International Accounting Standards Board.

**Indemnified Entities** means:

[REDACTED]

■ [REDACTED]

■ [REDACTED]

[REDACTED]

**Independent Certifier** means Arup Pty Ltd ABN 18 000 966 165, and if clause 14.8 applies, means any replacement independent certifier appointed in accordance with that clause.

**Independent Certifier Deed** means the deed between TfNSW, the Contractor and the Independent Certifier, substantially in the form set out in Schedule 35 and if clause 14.8 applies, means any replacement independent certifier deed contemplated by that clause.

**Indexation Review Date** means the dates which are 3 and 8 years after the date of commencement of the Operational Services Term (referred to in paragraph (a) of the definition of "Operational Services Term").

**Indirect Overhead** [REDACTED]

**Information Documents** means the information documents referred to in Schedule 18.

**Initial Project Plans** means each of the initial plans prepared by the Contractor and attached to this Deed at Part C Appendices of the Scope of Works and Services.

**Insured Party** means the ETS Entities and any other party entitled to benefit under the insurance policies affected in accordance with clause 41.

**Integrated Test Facilities** means the integrated test facilities to be developed or provided by the Contractor in accordance with this Deed.

**Intellectual Property Rights** means any and all industrial and intellectual property rights of whatever nature, in Australia and throughout the world, whether registrable or not, and whether now known or devised in the future, including rights in respect of or in connection with:

- (a) patents, copyright, registered or unregistered trade marks or service marks, trade names, business names, brand names, indications of source or appellations of origin, designs and commercial names and designations, circuit layouts and database rights;
- (b) ideas, processes, methodologies, concepts, techniques, inventions, discoveries, trade secrets, know-how, confidential information and scientific, technical and product information; and
- (c) any rights to apply for or renew the registration of any such rights.

**Interface Plan** means the interface plan set out in Schedule 25, as updated from time to time in accordance with clause 6.

**KPI or Key Performance Indicator** means each key performance indicator specified in Schedule 9.

**KPI Relief Period** has the meaning given to it in clause 25(a).

**KPI Reports** means the reports to be provided by the Contractor in accordance with Schedule 9.

**Latent Conditions** are physical conditions on the Operators' Sites and their near surrounds, including artificial things but excluding weather conditions, which differ materially from the physical conditions described in the Information Documents or (where they are not described) the physical conditions which should have been reasonably anticipated by a competent contractor.

**Law** means:

- (a) those principles of law established by decisions of courts;
- (b) any constitution, charter, act, code, statute, regulation, proclamation, ordinance, rule, regulatory principle and requirement or by-law and other subordinate regulation of the Commonwealth, the State of New South Wales or any other jurisdiction in which the ETS Project is performed and writs, orders, injunctions and judgments;
- (c) binding requirements and mandatory approvals (including conditions) of the Commonwealth, the State of New South Wales or any other jurisdiction in which the ETS Project is performed, or of any Authority;
- (d) statutory rules of an industry body and industry-wide non-statutory rules or obligations in force or as applicable from time to time;
- (e) statutory and mandatory codes of conduct; and
- (f) GAAP and IFRS (as applicable).

**Licence Fee** has the meaning given in clause 55.3A(c).

**Licensed IP** means:

- (a) Contractor Licensed IP; and
- (b) Third Party Licensed IP.

**Liquidated Damages Cap** [REDACTED]

**Liquidated Damages Period** has the meaning given in clause 14.6(a).

**Loss** means any damage, loss, liability, cost, charge, expense, outgoing or payment.

**Major Modification** means:

- (a) in relation to any Licensed IP that is Software, any Modification that consists of a new release or a new version of such Software, a patch or update to such Software that is designed to overcome a serious fault, defect or problem, or customisation of such Software where such customisation provides additional functionality or otherwise overcomes a serious fault, defect or problem; and
- (b) in relation to any other materials and data, any Modification that a reasonable person would consider represents a significant and material change, or otherwise results in a material impact on TfNSW.

**Major Review** has the meaning given in clause 21.1(a).

**Management Accounts** has the meaning given in clause 47.3(a).

**Manuals** means each of the operations manuals and support manuals to be provided by the Contractor in accordance with the Deed.

**Margin** means

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

**Minor Modification** means any Modification that is not a Major Modification.

**Mobile Reader** means a Reader that is used on a vehicle.

**Mobilisation** means, in respect of a Planned Value Category or Stage, that all necessary people, materials and facilities are ready and available in order for the Contractor to commence the ETS Project for that Planned Value Category or Stage.

**Modification** means any change, amendment, correction, alteration, update, upgrade, new version, new release, or replacement of any Escrow Material which is, or is required to be, prepared or used by the Contractor or provided to TfNSW or an ETS Entity under this Deed or in connection with the ETS Project.

**Monthly Fixed Services Charge** means

[REDACTED]

**Monthly Interim Fixed Services Charge** means

[REDACTED]

**Monthly Invoice** means each of the monthly billing documents referred to in clause 34.7(a).

**Monthly Report** means the report referred to in clause 8.6.

**Moral Rights** means moral rights within the meaning of Part IX of the *Copyright Act 1968* (Cth) and any analogous rights arising under statute that exist, or may come to exist, anywhere in the world.

**NSW Government** means the Crown in right of New South Wales and includes a ministry, department or agency of the New South Wales Government and any statutory authority or state-owned corporation.



**Non-Contractor Defect** means, in respect of any part of the ETS for which risk has passed to TfNSW in accordance with clause 15.6, any Defect which:

- (a) does not arise from fair wear and tear;
- (b) has been caused by TfNSW or a third party (including an ETS Entity), including vandalism; and
- (c) has not been caused, or contributed to, by the Contractor (which includes Defects arising through electrical, environmental or physical conditions, such as physical impacts, that the ETS is required to be designed to withstand).

**OHS Act** means the *Occupational Health and Safety Act 2000* (NSW).

[REDACTED]

[REDACTED]

[REDACTED]

**Open Source Software** means any Software which, as a condition of its use, modification or distribution, requires that such Software, any modification to that Software or any other Software with which such Software is combined or distributed be:

- (a) disclosed or distributed in source code or object code form;
- (b) licensed for the purposes of making modifications; or
- (c) redistributable,

to any third parties.

**Operational Readiness Review** or **ORR** means the operational readiness review described in Appendix A8 of the Scope of Works and Services.

**Operational Services Phase** means in respect of:

- (a) all of the parts and components of the ETS provided under Stages 1 to 11 (as they existed immediately prior to the Re-baselining Date), the period commencing on the Re-baselining Date and ending on the expiry of the Operational Services Term; or
- (b) any ETS Components Delivered, the period:
  - (i) commencing on the date contemplated in clause 16.1(a)(ii) in respect of those ETS Components Delivered; and
  - (ii) ending on the expiry of the Operational Services Term.

**Operational Services Program** means the Overall Operational Services Program and the Subsidiary Operational Services Program.

**Operational Services Security Bond** means [REDACTED]

[REDACTED]



**Operational Services Term** means the period:

- (a) commencing on 1 October 2014; and
- (b) subject to earlier termination in accordance with this Deed, ending on 30 September 2024.

**Operational Services Variation** means to:

- (a) alter, vary, modify, omit, increase or decrease the ETS Operational Services;
- (b) alter, vary, modify, omit any part of the ETS;
- (c) change the character or quality of any ETS Documentation or the ETS Project, including anything described in the Scope of Works and Services;
- (d) provide additional, or less, equipment or Software as required in respect of an Operator;
- (e) amend the Subsidiary Operational Services Program, including by changing any of the dates specified therein other than in accordance with clause 8; or
- (f) doing any of the things contemplated in paragraphs (a) to (e) above so as to include an additional Operator as contemplated in paragraph (f) of Schedule 15.

**Operators** mean the persons described in Schedule 15.

**Operators' Environments** means the Operators' information technology environments, including infrastructure, hardware, Software and systems, but excluding the ETS.

**Operators' Sites** means those sites, vehicles and vessels specified as such in Schedule 14 or as otherwise notified by TfNSW to the Contractor from time to time whether or not owned by an Operator.

**Option** means each option set out in Schedule 37.

**Option Exercise Date** means the date by which each Option may be exercised by TfNSW, as set out in Schedule 37 or such later date as the Parties may agree.

**Overall ETS Delivery Program** has the meaning given in clause 8.1(a)(i).

**Overall Operational Services Program** has the meaning given in clause 8.1(a)(ii).

**Parent Company Guarantee** means the Deed of Guarantee and Indemnity between TfNSW and the Guarantor in the form set out in Schedule 32.

**Party** means either TfNSW or the Contractor, and **Parties** means both of them.

**PDR Security Bond** means

[REDACTED]

**Permitted Purpose** has the meaning given in clause 27.1(b).

**Personal Information** has the same meaning as in the *Privacy Act 1988* (Cth).

**Personnel** means officers, employees, secondees, consultants, agents and contractors.

**Physical Configuration Audit** or **PCA** means the physical configuration audit described in Appendix A8 in the Scope of Works and Services.

**Planned Value Category** means, for a Stage, the planned value categories for that Stage as set out in Schedule 3.

**Planned Value Category Requiring Certification** means a Planned Value Category which Schedule 3 indicates is to be reviewed by the Independent Certifier.

**Preliminary Design Review** or **PDR** means the preliminary design review described in Appendix A8 of the Scope of Works and Services.

**Privacy Legislation** means:

- (a) *Privacy Act 1988* (Cth);
- (b) *Privacy and Personal Information Protection Act 1998* (NSW);
- (c) any applicable Laws from time to time in force in the Commonwealth of Australia, the State of New South Wales or any other jurisdiction in which the ETS Project is performed that affects Privacy Obligations, Personal Information or the collection, handling, storage, processing, use or disclosure of data; and
- (d) any ancillary rules, guidelines, orders, directions, directives, codes of conduct or other instruments made or issued under them, as amended from time to time.

**Privacy Obligations** means:

- (a) the obligations imposed on public sector agencies under the *Privacy and Personal Information Protection Act 1998* (NSW);
- (b) TfNSW's Privacy Management Plan;
- (c) the privacy management plan of any ETS Entity, as notified to the Contractor by TfNSW from time to time;
- (d) the obligations imposed on private sector organisations not exempt from regulation by the *Privacy Act 1988* (Cth) (as amended by the *Privacy (Private Sector) Amendment Act 2000*);
- (e) any privacy obligations generally imposed on NSW Government entities notified to the Contractor by TfNSW from time to time;
- (f) any privacy obligations generally imposed on non-NSW Government entities by the State of New South Wales notified to the Contractor by TfNSW from time to time;
- (g) any privacy codes of practice or similar instrument in relation to privacy protection which are industry standards and applicable to the ETS or the ETS Operational Services notified to the Contractor by TfNSW from time to time; and
- (h) any other obligations arising under Privacy Legislation.

**Private Bus Operators** or **PBO** means the private companies contracted under:

- (a) the NSW Government's Metropolitan Bus System Contracts; or

(b) the NSW Government's Outer Metropolitan Bus System Contracts,

in each case to provide public bus services in Greater Sydney and includes associated operators to the lead operator.

**Product Terms and Conditions** means the terms and conditions between the Bank and the merchant or other receivable account holder for the merchant services and other receivable products.

**Profit** has the meaning given in the definition of "Margin".

**Programs** has the meaning given in clause 8.2.

**Project Agreements** means:

- (a) this Deed;
- (b) the Parent Company Guarantee as executed by the parties to it;
- (c) the Independent Certifier Deed as executed by the parties to it;
- (d) the Deed of Appointment of Expert as executed by the parties to it;
- (e) any Subcontractor Deed as executed by the parties to it; and
- (f) the Escrow Agreement as executed by the parties to it.

**Project Management Group** means the group referred to in clause 4.3.

**Project Party** means any party to any contract under or in relation to this Deed or in relation to the ETS.

**Project Plans** means each of the plans which the Contractor is required to prepare or, in the case of the Initial Project Plans, amend, in accordance with this Deed, but for clarification, does not include the Site Access Plan, Testing Plan, Business Continuity Plan, Interface Plan, Corrective Action Plan or Environmental Management Plan.

**Purse** means Smartcard memory where remaining monetary value is stored.

**Quality Management Plan** means the quality management plan governing the provision of the ETS Delivery and the ETS Operational Services the initial version of which is attached to this Deed at Part C Appendices of the Scope of Works and Services.

**Quarter** means a period of three months commencing on 1 January, 1 April, 1 July or 1 October in any year, provided that (except for the purposes of clause 34.4):

- (a) the first Quarter commences on the Commencement Date and ends on the first to occur of the 31 March, 30 June, 30 September and 31 December; and
- (b) the last Quarter ends on the last day of the Term.

**Quarterly Report** has the meaning given in clause 34.4(f)(i).

**RailCorp** means Rail Corporation of New South Wales (ABN 59 325 778 353) of 18 Lee Street, Chippendale, New South Wales.

**Reader** means a Device that is capable of interacting with a Smartcard.

**Re-baselining Date** means 15 September 2014, being the date on which amendments to this Deed were effected by the Re-Baselining Deed, Project Deed – Electronic Ticketing System for the Greater Sydney region dated on or around 12 September 2014 between the Parties.

**Receiving Party** has the meaning given in the definition of “Confidential Information”.

**Referred Matter** has the meaning given in clause 50.1(a).

**Regression Test** means selective retesting of a system or component to verify that modifications have not caused unintended effects and that the system or component still complies with its specified requirements.

**Release Event** has the meaning given in clause 38.3(a).

**Reloadable Smartcard** means a Smartcard that allows multiple automatic or ad hoc topping up of the stored value Purse.

**Retail Outlet Commission** means

[REDACTED]

**Revenue Management** means the subject matter of Appendix A4 of the Scope of Works and Services.

**Rotables Inventory** has the meaning given in clause 22(a).

**S&P** means Standard & Poor's (Australia) Pty Limited.

**Scope of Works and Services** means Schedule 17.

**Secured Equipment** has the meaning given in clause 15.7(b).

**Security Bonds** means

[REDACTED]

**Security Deed** means a deed in the form set out in Schedule 40.

[REDACTED]

[REDACTED]

**Site Access Plan** means the site access plan set out in Schedule 22, and which must reflect each place and time of Site access required for performing ETS Delivery in accordance with the ETS Delivery Program.

**Site Requirements** means the subject matter of Appendix A6 of the Scope of Works and Services.

**Sites** means the sites, vessels and vehicles where any aspect of the ETS Project is performed, including any Operators' Sites.

**Six Year Review** has the meaning given in clause 21.1(a).

**Smartcard** means an electronic contactless media used to interact with the ETS and any reference to a Smartcard includes a Reloadable Smartcard or Disposable Smartcard.

**Software** means software (including any firmware and device drivers), and for software programmed in a language where the distinction is relevant, includes both source and object code forms.

**Source Code** means each item of the Licensed IP that is software, expressed in human readable language which is reasonably necessary for understanding, maintaining, correcting and enhancing each such item.

**Spares Inventory** has the meaning given in clause 22(a)(ii).

**Specified Personnel** means the people listed in Schedule 19 and any replacement of such people approved by TfNSW under clause 4.6(c)(v).

**STA** means the State Transit Authority of New South Wales (ABN 51 750 635 629) of 219 - 241 Cleveland Street, Strawberry Hills, New South Wales.

**Stability Period** means [REDACTED]

**Stability Requirements** means [REDACTED]

[REDACTED]

[REDACTED]

**Stage** means any one of the stages specified in Schedule 1.

**Stage Bond** means [REDACTED]

**Standards** mean the standards set out in the Scope of Works and Services and, in respect of:

- (a) the ETS Delivery and the ETS, the applicable version of each standard will be the version which is current as at the Commencement Date; and
- (b) the ETS Operational Services, the applicable version of each standard will be the version which is current as at the time the relevant ETS Operational Services are to be performed.

**State Records** means any information recorded or stored in any manner whatsoever by the Contractor in respect of the ETS and/or the ETS Operational Services and which is also a "state record" for the purposes of the *State Records Act 1998* (NSW).

**Step-In Rights** has the meaning given in clause 52(a).

**Subcontract** means a contract between the Contractor and a Subcontractor, or between a Subcontractor and another Subcontractor, that relates to the performance of any part of the ETS Project.

**Subcontractor** means any subcontractor engaged by the Contractor to perform any part of the ETS Project and includes any subcontractor of such subcontractor and any third party in its capacity as a vendor of hardware, a licensor of Software incorporated in the ETS, or a provider of maintenance or support services in respect of such hardware or Software.

**Subcontractor Deed** means a deed in the form attached at Schedule 34.

**Subcontractor Legislation** means the requirements of section 175B of the *Workers Compensation Act 1987* (NSW), Schedule 2 Part 5 *Payroll Tax Act 2007* (NSW) and section 127 of the *Industrial Relations Act 1996* (NSW).

**Subsidiary ETS Delivery Program** has the meaning given in clause 8.2(a) and includes any updates or modifications to it agreed by the Parties in accordance with this Deed.

**Subsidiary Operational Services Program** has the meaning given in clause 8.2(b) and includes any updates or modifications to it agreed by the Parties in accordance with this Deed.

**System Functional Review** or **SFR** means the system functional review described in Appendix A8 of the Scope of Works and Services.

**System Requirements Review** or **SRR** means the system requirements review described in Appendix A8 of the Scope of Works and Services.

**System Verification Review** or **SVR** means the system verification review described in Appendix A8 of the Scope of Works and Services.

**Term** has the meaning given in clause 3.1.

**Termination for Convenience Fee** means the fee specified in paragraph (c) of Schedule 10.

**Test Activity** means an activity within a Test Phase. The Test Activities are described in section 1.3 of Schedule 23.

**Test Entry Criteria** means the criteria or requirements which must be met to enter a Test Type.

**Test Exit Criteria** means the criteria or requirements which must be met to complete a Test Type.

**Test Phase** means a Contractor Test Phase or a TfNSW and Operator Test Phase (as applicable).

**Test Types** means those tests described in section 4.1.9 of the Scope of Works and Services.

**Test Waiver** has the meaning given in clause 13.3(a).

**Tested Component** means that part or component of the ETS that is the subject of any particular test.

**Testing Plan** means the testing plan set out in Schedule 23.

**TfL IP** has the meaning given in clause 27.3(f).

**TfNSW** means Transport for NSW, a New South Wales statutory corporation constituted under the *Transport Administration Act 1988* (NSW) and its successors and assigns and includes for the purposes of issuing or receiving notices, giving directions and exercising discretion under this Deed, TfNSW's Representative.

**TfNSW and Operator Test Phase** means the Test Activities conducted by TfNSW and/or the Operators, as described in section 1.3 of Schedule 23.

**TfNSW Integrated Test Facility** has the meaning given in clause 13.8(a).

**TfNSW IP** means:

- (a) all documentation, materials, Software, data or information, Branding, whether created by or on behalf of an ETS Entity or licensed to an ETS Entity by a third party independently of this Deed, before or after the Execution Date, which are provided to the Contractor by or on behalf of an ETS Entity under this Deed, including modifications under clause 27.1(d); and
- (b) in respect of the definition of "Confidential Information" and in clauses 27.1(a) and (d) and 27.7(b) only, includes the Project Agreements, other than the Contractor's Solution,

and includes any Intellectual Property Rights in such things.

**TfNSW's Representative** means the person appointed in accordance with clause 4.5 and includes for the purposes of issuing or receiving notices, giving directions and exercising discretion under this Deed, TfNSW.

**Third Party Licensed IP** means:

- (a) the ETS Documentation which is specifically identified in Schedule 21 (as may be updated from time to time in accordance with clause 27.5) as "Third Party Licensed IP", and includes any Intellectual Property Rights in such ETS Documentation; and
- (b) any trade mark, trade name or brand in which a third party owns the Intellectual Property Rights and that is used by the Contractor in connection with the ETS or ETS Project (excluding the Branding) and includes any Intellectual Property Rights in such trade mark, trade name or brand,

(excluding the TfL IP), including all modifications made by, or on behalf of, the Contractor to any such items.

**Three Year Review** has the meaning given in clause 21.1(a).

**Transaction** means an event where monetary, or non-monetary, value is transferred.

**Transfer** means the transfer of:



- (a) the ETS; and
- (b) to the extent it is not part of the ETS, all Software and infrastructure used in the provision of the ETS Operational Services (other than the Contractor Retained Assets and the facilities of the Contractor or a Related Body Corporate) including the Contractor Project Materials,

to an ETS Entity or a third party (as the case may be) in a manner which includes enabling an ETS Entity or a third party to:

- (c) take over the operation of the ETS and the provision of the ETS Operational Services as a going concern; or
- (d) replace the ETS with another system.

**Transition** means the tasks and activities associated with the preparation of the ETS Entities and other ETS Users in their use of the ETS to the end of the last Stability Period.

**Transport Functions** means all functions (other than the ETS Operational Services) to be undertaken by or on behalf of each Operator in connection with the transport of passengers, including all activities and services that would reasonably be expected, as at the Execution Date, to be undertaken in connection with or which are incidental or ancillary to such functions and activities.

**Usage Service Charge** means:

[REDACTED]

[REDACTED]

**Variation** means an ETS Delivery Phase Variation or an Operational Services Variation as the case may be.

**Vested IP** means any ETS Documentation and Branding, and includes any Intellectual Property Rights in such things, but excluding the Licensed IP and TfNSW IP.

**Virus** means any:

- (a) virus, trojan horse, worm, spyware, backdoor, trapdoor, wabbit or rabbit, rootkit, logic bomb, bacteria, other malware; or
- (b) any other code which would or could have the effect of:
  - (i) disrupting, impairing, disabling or otherwise adversely affecting, shutting down or denying one or more ETS Entities or any of their respective customers access to all or any portion of the ETS; or
  - (ii) erasing or interfering with information in connection with the ETS.



## 1.2 Interpretation

- (a) The following rules apply in interpreting this Deed, except where the context makes it clear that a rule is not intended to apply.
- (b) A reference to:
  - (i) a Law includes a constitutional provision, treaty, decree, convention, statute, regulation, ordinance, by-law, judgment, rule of common law or equity and is a reference to that Law as amended, consolidated or replaced;
  - (ii) any legislation or to any section or provision of it includes any statutory modification or re-enactment or any statutory provision substituted for it and all ordinances, by-laws, regulations and other statutory instruments issued under it;
  - (iii) this Deed or any other deed, agreement, document or instrument (or a provision of the same) includes this Deed or such other deed, agreement, document or instrument as amended, novated, supplemented, varied or replaced from time to time;
  - (iv) a person includes an individual, partnership, joint venture, Authority, trust, corporation or any other entity or association whether or not it is incorporated or has a separate legal identity;
  - (v) any Party includes that Party's executors, administrators, successors, and permitted substitutes and assigns, including any person taking by way of novation;
  - (vi) the expressions "especially", "in particular", "including", "such as", "includes" and "include" and similar expressions are not intended to be words of limitation and have the meaning as if followed by "without limitation";
  - (vii) **dollars** or **\$** is to the lawful currency of Australia;
  - (viii) any document in an **agreed form** means the document which has been accepted and agreed by the Parties;
  - (ix) anything (including a right, obligation or concept) includes each part of it;
  - (x) a Schedule refers to Schedules to this Deed and a reference to a Project Agreement includes any Schedule or Annexure to that Project Agreement;
  - (xi) day or month means a reference to a calendar day or calendar month respectively;
  - (xii) a reference to a third party is a reference to a person other than a Party; and
  - (xiii) a clause or term is a reference to a clause or term of this Deed.
- (c) The singular word includes the plural, and vice versa.
- (d) A word which denotes a gender includes the other genders.
- (e) If a word is defined, any other part of speech or other grammatical form of that word has a corresponding meaning.

- (f) If an example is given of anything (including a right, obligation or concept), such as by saying it includes something else, the example does not limit the scope of that thing.
- (g) The words **subsidiary**, **holding company** and **Related Body Corporate** have the same meanings as in the Corporations Act.
- (h) Headings are for convenience only, and do not affect the interpretation of this Deed.
- (i) All obligations of the Contractor pursuant to this Deed will be performed at the cost of the Contractor, unless expressly provided otherwise in this Deed.
- (j) Those parts of this Deed that were not the subject of the “agreed variations” effected by the Re-Baselining Deed, Project Deed – Electronic Ticketing System for the Greater Sydney region dated on or around 12 September 2014 between the Parties (being Schedules 10 to 34 and 37 to 39) are to be read in a manner that is consistent with such “agreed amendments”. For example, this includes that:
  - (i) references to “the PTTC” or “PTTC” are amended to “TfNSW”;
  - (ii) references to “Full ETS Stability” or “Full ETS Stability Period” will be amended to refer to “Stability Period in respect of Stage 12”;
  - (iii) the first sentence in section 1.3 of Schedule 23, the reference to “Each of the Milestones in Stage 1 is associated with its own set of development DDIs as shown in Figure 2”, is amended to state “Each of the DDI Deliverables in each relevant Stage is associated with its own set of Entitlement to Claim Criteria in accordance with the DDI shown in Figure 2, to the extent applicable in accordance with Schedule 17, Appendix A8”; and
  - (iv) the next update of the Project Plans and Manuals provided by the Contractor under clause 6.3 after the Re-baselining Date must reflect such “agreed amendments”.

### **1.3 No joint venture**

Subject to clause 17.7, nothing in any Project Agreement constitutes a joint venture, partnership, agency or fiduciary relationship between the Parties.

### **1.4 Business Days**

If the day on or by which a person must do something under this Deed is not a Business Day the person must do it on or by the next Business Day.

### **1.5 Contra proferentum**

In the interpretation of this Deed, no rule of construction applies to the disadvantage of one Party on the basis that the Party put forward or drafted this Deed or any provision in it.

### **1.6 Discontinuance of TfNSW or any Operator**

Subject to any contrary legislative intention:

- (a) if TfNSW or any Operator is reconstituted, renamed or replaced, or if its powers or functions are transferred to another entity, this Deed is deemed to refer to that new entity;
- (b) if TfNSW or any Operator ceases to exist, this Deed is deemed to refer to that entity which serves substantially the same purpose or object as the former entity; and
- (c) notwithstanding any other provision of this Deed, TfNSW may transfer this Deed and any rights under this Deed to any new or substitute entity referred to in clauses 1.6(a) and 1.6(b).

#### **1.7 Exercise of functions**

- (a) This Deed will not in any way unlawfully restrict or affect the unfettered discretion of the ETS Entities to exercise any of their functions and powers under Laws.
- (b) Anything which an ETS Entity does, fails to do or purports to do pursuant to its functions and powers under legislation will be deemed not to be an act or omission by TfNSW under this Deed and will not entitle the Contractor to make any Claim against TfNSW under this Deed except as expressly stated in this Deed.

#### **1.8 Priority of interpretation**

- (a) The Project Agreements comprise various documents, which for the purposes of this Deed will, if there is any inconsistency, ambiguity or discrepancy between or within them, prevail according to the following order of priority with the first mentioned taking precedence to the extent of that inconsistency, ambiguity or discrepancy:
  - (i) clauses 1 to 58 of this Deed;
  - (ii) the Schedules (excluding the Scope of Works and Services);
  - (iii) the Scope of Works and Services (excluding the Contractor's Solution);
  - (iv) the Project Agreements (excluding clauses 1 to 58 of this Deed and the Schedules);
  - (v) the Contractor's Solution; and
  - (vi) any Design Documentation not included in any of the above.
- (b) If the Contractor becomes aware of any material inconsistency, ambiguity or discrepancy as contemplated under clause 1.8(a), the Contractor must notify TfNSW within 20 Business Days of becoming aware of any such material inconsistency, ambiguity or discrepancy. Within 20 Business Days of receipt by TfNSW of the Contractor's notice, the Parties will meet to discuss and agree in good faith:
  - (i) the resolution of the material inconsistency, ambiguity or discrepancy; and
  - (ii) an appropriate Variation where the resolution agreed by the Parties under clause 1.8(b)(i) results in a material change to the Contractor's obligations under this Deed,

provided that if the Parties are unable to resolve any material inconsistency, ambiguity or discrepancy within 30 Business Days of receipt by TfNSW of the Contractor's notice, either Party may have the matter resolved in accordance with the Dispute Resolution Procedures.

- (c) To the extent that any part or provision of the Project Agreements imposes higher standards, greater responsibilities or additional requirements on the Contractor than the other parts or provisions of Project Agreements, the Contractor must satisfy and meet those higher standards, greater responsibilities or additional requirements unless TfNSW otherwise directs in writing.
- (d) Without limiting clause 1.8(c), to the extent that the Contractor's Solution imposes higher standards, greater responsibilities or additional requirements on the Contractor than the other provisions of the Project Agreements, the Contractor must satisfy and meet those higher standards, greater responsibilities or additional requirements in the Contractor's Solution unless TfNSW otherwise directs in writing.
- (e) The Information Documents do not form part of this Deed other than for the purposes of clauses 1.10 and 1.11(a).

### **1.9 Omissions or misdescriptions of details**

Omission or misdescriptions of details relating to the ETS Project in the Project Agreements:

- (a) generally acknowledged to be customary and/or necessary to perform works and services in the nature of the ETS Project; or
- (b) which the Contractor knew or reasonably should have known and should have included in the Contractor's Solution,

will not relieve the Contractor from performing such omitted or misdescribed details relating to the ETS Project, and they must be performed as if fully and correctly set forth and described in the Project Agreements, without entitlement to a Variation.

### **1.10 Due diligence**

- (a) The Contractor acknowledges, represents, warrants and undertakes that:
    - (i) prior to the Execution Date it has had the opportunity and responsibility to conduct appropriate due diligence and that TfNSW has delivered or made available all documentation, materials and other information (including the Information Documents) the Contractor considers necessary, or which were requested by the Contractor with particularity in writing, to enable it to:
      - (A) form the decision to enter into this Deed;
      - (B) satisfy itself that it is able to perform its obligations under this Deed; and
      - (C) ascertain the risks associated with the ETS Project,
- (including, subject to clause 1.8, on the basis of any assumptions specified in the Contractor's Solution);

- (ii) no representation or warranty has been given or is given by or on behalf of the ETS Entities or any person on behalf of any of them as to:
    - (A) the potential use of the ETS;
    - (B) the suitability, completeness or efficacy of documentation, materials or other information supplied or made available by any of them, including the Scope of Works and Services and the Information Documents or any other documentation, materials or other information which relates to the ETS Project; or
    - (C) all relevant documentation, materials and other information in the possession or control of the ETS Entities relating to the ETS Entities or the ETS Project having been provided to the Contractor;
  - (iii) as between the Parties, it bears the risk that compliance with the Scope of Works and Services will not in itself fulfil the Contractor's obligations under this Deed and accordingly, the Contractor will undertake any further work required in order to fulfil its obligations under this Deed;
  - (iv) it has conducted its own review and evaluation of the suitability and accuracy of the documentation, materials and other information (including the Information Documents) supplied or made available without reliance on the ETS Entities or any person on behalf of any of them; and
  - (v) it has received the documentation in Schedule 18 in complying with this clause 1.10.
- (b) Notwithstanding clause 1.10(a)(ii), if the Contractor becomes aware of any material error in the Information Documents after the Execution Date, it may notify TfNSW accordingly. If the Contractor does so and such error directly results in a material increase in the Contractor's costs of performing its obligations under this Deed, the Parties agree to negotiate an appropriate Variation in respect of the Contractor's additional costs.

#### **1.11 Non-reliance**

The Contractor acknowledges, represents, warrants and undertakes to TfNSW that it:

- (a) did not rely upon any representation, ETS Documentation or other information made available, or provided to it, by the ETS Entities in entering this Deed, other than (for the purposes of clause 1.10(b)) the Information Documents; and
- (b) does not rely on any representation or warranty made by or on behalf of the ETS Entities which is not set out in this Deed.

#### **1.12 Acknowledgment**

The Contractor acknowledges that TfNSW, in entering into this Deed, is relying on the representations, warranties and undertakings given by the Contractor under this Deed.

#### **1.13 NSW Government**

- (a) An act or omission of an Operator or any other part of the NSW Government does not bind TfNSW, and any notice given to an Operator or any other part of the NSW Government is not a notice given to TfNSW.

- (b) Subject to clause 1.13(c), the Contractor must comply with directions, instructions or notices which are given by an ETS Entity, provided such directions, instructions or notices are given in accordance with this Deed.
- (c) If there is any conflict between a direction, instruction or notice given to the Contractor by TfNSW and that given by another ETS Entity, the Contractor must notify TfNSW of such conflict as soon as practicable of becoming aware of it. TfNSW will notify the Contractor of the resolution of the conflict as soon as practicable and the Contractor must comply with the directions, instructions or notices specified in TfNSW's notice.

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## 2 Conditions precedent

### 2.1 Conditions precedent to obligations of the Parties

- (a) The obligations of the Parties under this Deed (other than those under this clause 2 and clauses 1, 27, 29, 30, 44, 48, 58 and any other provisions which by their nature are intended to commence on the Execution Date) do not come into force until satisfaction, or waiver by TfNSW, of each of the following conditions precedent:
  - (i) execution by the Contractor and all relevant entities of each of the Parent Company Guarantee, the Independent Certifier Deed and the Escrow Agreement and satisfaction of any conditions precedent to such documents;
  - (ii) receipt by TfNSW of the ETS Delivery Security Bond and Contract Mobilisation Bond;
  - (iii) the insurance policies required by this Deed being effected in the form of the wording set out in Schedule 28 or as otherwise agreed by the Parties;
  - (iv) the Parties:
    - (A) performing their respective obligations set out in the FX Protocol; and
    - (B) updating Schedule 3 in accordance with the FX Protocol and producing a conformed version of Schedule 3 accordingly; and
  - (v) the execution by:
    - (A) the Contractor of a Subcontract with each of the Approved Subcontractors that are listed in Schedule 20 as at the Execution Date; and
    - (B) each of those Approved Subcontractors and the Parties of a Subcontractor Deed in the form set out in Schedule 34 in respect of each such Subcontract.
- (b) The Contractor must provide TfNSW with certified copies of the policies referred to in clause 2.1(a)(iii) within 10 Business Days of the Commencement Date.

### 2.2 Notification, waiver and satisfaction

- (a) The Contractor must notify TfNSW promptly following the satisfaction of each of the conditions precedent in clauses 2.1(a)(iii), 2.1(a)(iv) and 2.1(a)(v).

- (b) TfNSW must notify the Contractor promptly following the satisfaction of each of the conditions precedent in clause 2.1(a)(i) and 2.1(a)(ii).
- (c) TfNSW may agree in writing to waive any condition precedent in clause 2.1.
- (d) The Contractor must use reasonable endeavours to satisfy the conditions precedent in clause 2.1.
- (e) Upon receipt of notice from TfNSW of the satisfaction or waiver of all conditions precedent in clause 2.1, the Contractor must notify each of the other parties to the Project Agreements of the Commencement Date.
- (f) If any of the conditions precedent in clause 2.1 are not satisfied or waived by the date which is 4 months after the Execution Date, then TfNSW may terminate this Deed by at least 20 Business Days' notice to the Contractor and if TfNSW does so terminate, TfNSW must promptly return any Security Bonds to the Contractor.
- (g) If TfNSW terminates this Deed under clause 2.2(f), neither Party will have any liability for any Losses or Claims suffered or incurred by the other Party as a result of or in connection with such termination.

### 2.3 TfNSW may extend the time to comply

At any time prior to the expiration of the period referred to in clause 2.2(f), TfNSW may in its discretion extend the period by notice to the Contractor for any additional amount of time.

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## 3 Term

### 3.1 Term

This Deed commences on the Commencement Date and unless earlier terminated or extended in accordance with this Deed, expires on the expiry of the Operational Services Term (**Term**).

### 3.2 Option to extend

- (a) TfNSW may, in its discretion, elect to extend the Term for a period, not to exceed 24 months. If TfNSW elects to extend the Term, it must give notice of such election to the Contractor no later than 6 months prior to the expiry of the Term.
- (b) Prior to the expiry of the Term as extended in accordance with clause 3.2(a), TfNSW may, in its discretion, elect to extend the Term for a further period, not to exceed 24 months, by giving no less than 6 months' notice of such election to the Contractor prior to the expiry of the Term (as extended under clause 3.2(a)).
- (c) For clarification, if TfNSW elects to extend the Term in accordance with clause 3.2(a) or 3.2(b), the Parties agree to be bound by the terms and conditions of this Deed for the extended period, except that:
  - (i) the residual life for Device Infrastructure and gates at the location of the relevant Device Infrastructure will be the greater of:
    - (A) the residual life of such Device Infrastructure and gates as set out in the Handback Condition less the period of any extension of the Term under clauses 3.2(a) and 3.2(b); and



- (B) [REDACTED]; and
- (ii) where and to the extent that the Contractor is required to invest in new or upgraded Device Infrastructure or gates to enable it to comply with clause 3.2(c)(i), the Contractor must provide a proposal to TfNSW within 1 month of TfNSW's notice under clause 3.2(a) or 3.2(b), providing all necessary information:
  - (A) on an "open book" transparent basis; and
  - (B) evidencing the Contractor's costs of complying with clause 3.2(c)(i),and the Parties will meet within 10 Business Days of TfNSW's receipt of the Contractor's proposal to negotiate in good faith an appropriate variation to the ETS Project Fees to reflect the Contractor's actual costs of complying with clause 3.2(c)(i) plus the Margin. If the Parties have not reached agreement on such variation, TfNSW may withdraw its extension notice at any time prior to the date that is 2 months before the date on which the extension would otherwise take effect, in which case this Deed will not be extended.
- (d) Without limiting TfNSW's right to exercise its right to extend the Term under clauses 3.2(a) and 3.2(b), the Parties will meet no later than 9 months prior to the date on which TfNSW is required to give any notice under clauses 3.2(a) and 3.2(b), to discuss any such extensions of the Term.

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## 4A Options

- (a) Schedule 37 sets out a number of Options which relate to the ETS and ETS Project.
- (b) TfNSW may, at any time before the applicable Option Exercise Date, exercise an Option by notifying the Contractor accordingly.
- (c) If TfNSW exercises an Option in accordance with clause 4A(b), the Parties must amend this Deed to incorporate the Option as set out in the relevant Part of Schedule 37 and to reflect any additional, incidental or changed requirements relating to the Option as the Parties may agree.
- (d) If TfNSW does not exercise an Option by the applicable Option Exercise Date, the Option will lapse and be of no force or effect.

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## 4 Relationship between the Parties

### 4.1 Fundamental obligation

The Contractor must perform the ETS Project in accordance with this Deed.

### 4.2 Review by TfNSW

- (a) Notwithstanding any other provision of this Deed, any:
  - (i) review, comment upon or input into, any ETS Documentation which may be provided to or by any ETS Entity or any person on their behalf;



- (ii) inspection or testing by any ETS Entity or any person on its behalf; or
  - (iii) information set out in any Schedule or other document attached to, or included within a Schedule,
- will not:
- (iv) relieve the Contractor of its responsibility for such ETS Documentation or of its obligations or liabilities under this Deed;
  - (v) evidence or constitute an extension of time or a direction by TfNSW to accelerate, disrupt, prolong or vary any, or all, of the ETS Project; or
  - (vi) affect the rights or obligations of TfNSW or the Contractor under this Deed including the time for performance of TfNSW's or the Contractor's obligations under this Deed.
- (b) Notwithstanding any other provision of this Deed, a failure by the ETS Entities or any person on their behalf to inform the Contractor of any defect in or concern associated with any such ETS Documentation or following any such inspection or testing will not relieve the Contractor of its liabilities, or constitute a waiver of any of TfNSW's rights, under this Deed.

#### **4.3 Project Management Group**

- (a) Within 20 Business Days following the Commencement Date, the Parties will establish a Project Management Group which will consist of:
- (i) the Contractor's Representative;
  - (ii) TfNSW's Representative;
  - (iii) 2 persons from each Party holding positions more senior to the Contractor's Representative or TfNSW's Representative (as the case may be); and
  - (iv) such other members as the Parties may from time to time agree.
- (b) The representatives of the Parties referred to in clause 4.3(a) may appoint delegates to attend Project Management Group meetings in their absence and to otherwise discharge their responsibilities under this clause 4.3.
- (c) The objectives of the Project Management Group will be to monitor and review the progress of the ETS Project, including to:
- (i) assist in the resolution of:
    - (A) design interpretation; and
    - (B) any other specific matters referred to the Project Management Group by a Party;
  - (ii) monitor the progress of ETS Delivery;
  - (iii) monitor the provision of ETS Operational Services;
  - (iv) review all Monthly Reports provided under clause 8.6; and

- (v) review reports provided under clauses 16.5 and 23(g).
- (d) The Project Management Group will meet at least monthly (or at such other intervals agreed between the Parties in writing) and at such other times as requested by either Party.
- (e) TfNSW's Representative will convene and chair meetings of the Project Management Group and will take the minutes of all meetings and distribute, within 5 Business Days, the minutes of the meeting, to members of the Project Management Group. If any member disagrees with the content of the minutes, the member must provide its comments to TfNSW's Representative within 5 Business Days of receipt of the minutes. Any issue regarding the content of the minutes must be raised and determined at the next meeting.
- (f) TfNSW has the right, subject to the provision of reasonable advance notice to the Contractor, to:
  - (i) have representatives of other ETS Entities attend any meeting of the Project Management Group; and
  - (ii) require the Contractor to:
    - (A) use reasonable endeavours to procure the attendance of any Contractor Personnel residing outside of Australia; and
    - (B) procure the attendance of any Contractor Personnel residing within Australia,at any meeting of the Project Management Group.

#### **4.4 Contractor's Representative**

- (a) The Contractor's Representative will act as a representative of and be authorised to act on behalf of the Contractor in discharging its functions under this Deed.
- (b) The Parties acknowledge and agree that the Contractor's Representative and any appointee of the Contractor's Representative act at all times as agents of the Contractor.
- (c) The Contractor is bound by any act or omission of the Contractor's Representative, and any direction, notice or instruction given by TfNSW to the Contractor's Representative will be deemed to be a direction, notice or instruction to the Contractor.

#### **4.5 TfNSW's Representative**

- (a) TfNSW:
  - (i) must within 20 Business Days of the Commencement Date appoint a person to be TfNSW's Representative for the purposes of this Deed;
  - (ii) may at any time replace TfNSW's Representative, in which event TfNSW must appoint another person as TfNSW's Representative; and
  - (iii) must promptly give notice of all appointments under clauses 4.5(a)(i) and 4.5(a)(ii) to the Contractor.

- (b) TfNSW's Representative may:
  - (i) by notice to the Contractor appoint persons to exercise any of TfNSW's Representative's functions under this Deed;
  - (ii) not appoint more than one person to exercise the same function under this Deed; and
  - (iii) revoke any appointment under clause 4.5(b)(i) by notice to the Contractor.
- (c) TfNSW's Representative may continue to exercise a function under this Deed despite appointing another person to exercise the function under clause 4.5(b).
- (d) The Parties acknowledge and agree that TfNSW's Representative and any delegate of TfNSW's Representative appointed under clause 4.3(b) act at all times as agents of TfNSW.
- (e) The Contractor must comply with any direction by TfNSW's Representative given under a provision of this Deed. TfNSW is bound by any act or omission of TfNSW's Representative, and any notice given by the Contractor to TfNSW's Representative will be deemed to be a notice to TfNSW.
- (f) Where there is any inconsistency, ambiguity or uncertainty between:
  - (i) a direction of TfNSW's Representative and a direction of an appointee of TfNSW's Representative; or
  - (ii) directions of 2 appointees of TfNSW's Representative,the Contractor must give notice to TfNSW's Representative of such inconsistency, ambiguity or uncertainty promptly and in any event no later than 10 Business Days after the Contractor first becomes aware or reasonably ought to have become aware of the inconsistency, ambiguity or uncertainty. Within 10 Business Days of receiving notice of the inconsistency, ambiguity or uncertainty, TfNSW's Representative must notify the Contractor which direction to follow and the Contractor must comply with that notice.
- (g) The Contractor will have no Claim unless it notifies TfNSW within the time stipulated in clause 4.5(f).

#### **4.6 Specified Personnel**

- (a) The Contractor must:
  - (i) engage and deploy those people specified in Schedule 19, as replaced from time to time in accordance with clause 4.6(c), in the roles specified in Schedule 19 for the period specified in Schedule 19;
  - (ii) with respect to any roles specified in Schedule 19 which have not been allocated to a specific individual as at the Commencement Date, obtain TfNSW's approval in respect of the people to be allocated to such roles as if they were a proposed replacement under clause 4.6(c);
  - (iii) ensure that the Specified Personnel are throughout the duration of the relevant assignment located within Australia or any other location specified in the Scope of Works and Services or agreed under clause 43;

- (iv) properly manage the allocation of holidays or any other planned absence of any Specified Personnel to ensure that at all times the relevant role is adequately resourced in accordance with the requirements of the ETS Project;
  - (v) use its reasonable endeavours to minimise the turnover rate of Specified Personnel to a reasonable level;
  - (vi) not remove or replace the Specified Personnel without TfNSW's prior approval, except in accordance with clause 4.6(c), provided that the Contractor must, if required by TfNSW, promptly, and in any event within 20 Business Days, provide temporary substitute personnel approved by TfNSW to replace any Specified Personnel absent pursuant to clause 4.6(c), on such terms and conditions, including variation of rates, as the Parties may agree and, in the absence of agreement, as TfNSW reasonably requires; and
  - (vii) be responsible for the costs incurred by the Contractor in complying with this clause 4.6, including its costs of providing temporary substitute personnel in the absence of Specified Personnel.
- (b) If the Contractor fails to provide acceptable replacement personnel in accordance with the timeframe required under clause 4.6(a)(vi), TfNSW may treat the failure as an Event of Default for the purposes of clause 53.
- (c) The Contractor must not replace any of the Specified Personnel unless:
  - (i) they are no longer available to perform the ETS Project due to serious illness, death or resignation, or TfNSW otherwise approves such replacement in accordance with this clause 4.6(c);
  - (ii) the Contractor gives TfNSW notice of the reasons for the desired replacement and the details of the proposed replacement;
  - (iii) the replacement personnel are of:
    - (A) equal or superior ability and required experience to the original personnel; and
    - (B) meet the criteria set out in Schedule 19;
  - (iv) the Contractor notifies TfNSW of the proposed replacement, introduces the individual to the appropriate TfNSW representatives and/or personnel, provides TfNSW with a resume and other information about the individual reasonably requested by TfNSW and allows TfNSW an opportunity to interview the individual;
  - (v) TfNSW gives its approval to the replacement requested by the Contractor, provided that:
    - (A) if any replacement personnel proposed by the Contractor is not acceptable to TfNSW, the Contractor must make available alternative replacement personnel of equal or superior ability to the original personnel;

- (B) the process set out in this clause 4.6(c) will continue until such time as TfNSW gives its approval to the replacement requested by the Contractor; and
- (C) any such changeover is handled to ensure the continuity of the ETS Project and to avoid any delay or disruption to the ETS Project.
- (d) The Parties will meet annually to discuss and agree in good faith any changes to the Specified Personnel, with the aim of allowing the Contractor to rotate the Specified Personnel used to perform the ETS Project, while providing for the proper and adequate retention of skills, knowledge and experience of the Specified Personnel in relation to the ETS Project. Any such replacement must be performed in accordance with the processes contained in clause 4.6(c).
- (e) If TfNSW determines that any person employed by the Contractor or any Subcontractor is not performing his or her job in a professional and competent manner, the Contractor must, within 20 Business Days of receiving a direction from TfNSW to do so, procure the removal of that person from the job and must ensure that the person is not re-employed in any job which is part of the ETS Project without the prior approval of TfNSW.

#### **4.7 Subcontracting**

- (a) Subject to this clause 4.7, the Contractor may permit an Approved Subcontractor to perform part of the ETS Project after execution by the Parties and an Approved Subcontractor of the Subcontractor Deed in Schedule 34.
  - (b) The Contractor must not permit any part of the ETS Project to be performed by any person (other than itself or an entity in Schedule 20) where:
    - (i) the value of that part of the ETS Project to be performed exceeds [REDACTED]; or
    - (ii) that part of the ETS Project is to be performed on an Operators' Site, unless:
      - (iii) it has made prior application in writing to TfNSW:
        - (A) giving full particulars of the part of the ETS Project it wishes to subcontract, the proposed subcontract and the proposed subcontractor; and
        - (B) provided to TfNSW any other information which TfNSW reasonably requests, including the proposed subcontract documents and any relevant insurance;
    - (iv) TfNSW has approved the subcontractor; and
    - (v) the Subcontractor and the Parties have signed a Subcontractor Deed in the form set out in Schedule 34 in respect of that Subcontract,
- following which the Subcontractor will be deemed to become an Approved Subcontractor in respect of the relevant work.

- (c) Any approval given by TfNSW is conditional upon the Subcontract including:
  - (i) provisions that the Subcontractor will not assign or subcontract without the prior written consent of the Contractor; and
  - (ii) provisions which are reasonably necessary to enable the Contractor to fulfil its obligations to TfNSW.
- (d) The Contractor must ensure that each Subcontractor:
  - (i) has sufficient experience, expertise and ability to perform its obligations to the standards required by this Deed and has experience and expertise (to the extent relevant to the services the Subcontractor is to provide) in successfully performing works and services the same as or substantially similar to the relevant part of the ETS Project;
  - (ii) has in place arrangements for ensuring the availability of the appropriate skills and resources to perform its obligations to the standards required by this Deed;
  - (iii) is reputable and is of sufficiently sound financial and commercial standing to perform its obligations to the standards required by this Deed;
  - (iv) is engaged in connection with the execution of the relevant part of the ETS Project as an independent contractor to the Contractor;
  - (v) does not hold itself out as being, or otherwise purport to be, the agent of TfNSW in connection with the execution of any subcontract or any subcontract works; and
  - (vi) has no authority to contract or otherwise deal with any tenderer, or any Subcontractor, or any person, as agent for, or on behalf of, TfNSW and must not purport to have any such authority.
- (e) TfNSW may require the removal of any Subcontractor at any time if:
  - (i) TfNSW reasonably considers that the Subcontractor's performance has been deficient (including for reasons relating to lack of progress in the performance of the Subcontractor's obligations, poor quality in the standard of any of the deliverables, products or services (or any part thereof) provided by the Subcontractor, and/or where the Subcontractor conducts itself in a manner that brings or is likely to bring the ETS Entities, the Contractor or the ETS into disrepute);
  - (ii) TfNSW in good faith has concerns about the Subcontractor's ability to render future performance; or
  - (iii) there have been material misrepresentations by or concerning the Subcontractor.
- (f) Where TfNSW gives the Contractor notice that it requires the removal of a Subcontractor under clause 4.7(e), the Contractor must ensure that the Subcontractor ceases to perform all services relating to this Deed which it was performing as soon as reasonably practicable, but in any event (subject only to clause 4.7(g)) within 1 month after receipt of such notice (or such other period of time as the Parties may agree).

- (g) The Contractor must not terminate the appointment of any Subcontractor other than pursuant to clause 4.7(e) unless:
  - (i) the Contractor has obtained TfNSW's prior written approval; and
  - (ii) another person, in respect of which clause 4.6(c) has been complied with, is appointed to perform the obligations which were performed by that Subcontractor.
- (h) Notwithstanding the provisions of this clause 4.7 and notwithstanding any subcontract or approval to subcontract work, the Contractor remains bound by the Contractor's obligations under this Deed to perform the ETS Project in accordance with this Deed and will be liable for all acts, omissions and defaults of its Subcontractors, all Contractor Personnel and any other persons performing work relating to, or in any way connected with, the ETS Project, as if such acts, omissions or defaults were its own acts, omissions or defaults.
- (i) The Contractor must obtain and ensure TfNSW has the benefit of warranties and guarantees from Subcontractors with respect to each relevant part of the ETS Project.
- (j) The Contractor must submit a signed written statement in a form which complies with the Subcontractor Legislation confirming that it has paid all amounts payable to, or in connection with, its employees and Subcontractors for work undertaken in relation to this Deed with each:
  - (i) invoice submitted under clause 33.5;
  - (ii) invoice submitted in respect of the Monthly Interim Fixed Service Charge;
  - (iii) Monthly Invoice; and
  - (iv) invoice for any other amount payable under the Deed.
- (k) Each statement submitted by the Contractor under clause 4.7(j) must be in respect of all work which is the subject of the relevant invoice or Monthly Invoice. TfNSW is not obliged to make any payment to the Contractor under clause 33 unless the Contractor has complied with its obligations under clause 4.7(j) and this clause 4.7(k).
- (l) Where TfNSW is liable for any amount under the Subcontractor Legislation in respect of a Subcontractor or employee of the Contractor, the Contractor will be liable to pay the same amount as a debt due and payable to TfNSW within 5 Business Days of demand by TfNSW.

#### **4.8 Notification**

If, after performing any review, inspection or testing under this Deed, TfNSW has actual knowledge of any material failure or defect in the ETS Documentation or component of the ETS and which TfNSW (acting reasonably) considers the Contractor is not aware of, TfNSW will notify the Contractor accordingly within a reasonable period of time after becoming aware of it.



#### **4.9 Leadership teams**

- (a) If TfNSW so requires from time to time, each Party must make available senior members of their respective leadership teams to:
  - (i) attend Quarterly meetings to be held in Sydney to review key issues in relation to the ETS Project; and
  - (ii) meet in relation to Disputes in accordance with clause 49.
- (b) As at the Commencement Date, the Contractor agrees to appoint executives holding the position of CEO or Managing Director of the Contractor and of no more than 2 of its Approved Subcontractors to attend the meetings contemplated under clause 4.9(a).
- (c) TfNSW will prepare an agenda for the Quarterly leadership meeting.
- (d) The Contractor agrees not to appoint delegates to attend meetings referred to in clause 4.9(a) except with the consent of TfNSW.
- (e) TfNSW may invite such Personnel as it considers appropriate to attend the Quarterly leadership meetings.

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## **5 Compliance**

### **5.1 ETS Project Approvals**

- (a) The Contractor must expeditiously and (if appropriate) progressively:
  - (i) apply for and obtain from each relevant Authority, all Approvals;
  - (ii) comply with the lawful requirements of each such Authority to permit their proper consideration of the applications for Approvals; and
  - (iii) comply with all terms and conditions of the Approvals.
- (b) Approvals obtained by the Contractor must immediately be provided to TfNSW and if directed by TfNSW, to the Independent Certifier.
- (c) Subject to clause 5.1(d), TfNSW must provide the Contractor with reasonable assistance in obtaining the Approvals.
- (d) Notwithstanding the assistance to be provided by TfNSW pursuant to this clause 5.1, TfNSW is not liable under this Deed or otherwise in relation to any Approvals required for the ETS Project.
- (e) Subject to the provisions of this clause 5.1, if and to the extent TfNSW requires any Approvals in relation to the subject matter of clauses 17 or 18 or which can only be obtained by an ETS Entity, the Contractor must notify TfNSW within 10 Business Days of the Commencement Date of the Approvals required and in lieu of its obligation under clause 5.1(a)(i) in relation to those Approvals provide all assistance and co-operation that TfNSW reasonably requires to apply for and obtain those Approvals.
- (f) Notwithstanding any other provision of this Deed, the Contractor must comply with and discharge all regulatory requirements in relation to the ETS Project except for



those that can only be discharged by TfNSW, in which case the Contractor will notify TfNSW of all such requirements in a timely manner and prepare all documentation necessary in connection with those requirements. The Contractor must also comply with all directions of TfNSW in connection with such regulatory requirements.

## **5.2 Compliance with Laws and other requirements and standards**

Without limiting clause 5.1 and any other provision of this Deed, the Contractor must comply with:

- (a) the Laws including the requirements of the Work Cover Authority of New South Wales and the requirements of the New South Wales Fire Brigade; and
- (b) the Standards,

to the extent relevant to the ETS Project.

## **5.3 Change in Law**

- (a) Where there is a Change in Law, if either Party wishes clause 5.3(b) to apply, then that Party must within 20 Business Days of the Change in Law being passed, give a notice to the other stating that clause 5.3(b) applies and containing:
  - (i) details of the Change in Law; and
  - (ii) that Party's estimate of the increase or decrease (as the case may be) in the Contractor's costs of performing its obligations under this Deed in compliance with the Change in Law including sufficient information to support the estimate.
- (b) The Parties agree to meet within 20 Business Days of a notice being given under clause 5.3(a) and subject to clause 5.3(c), agree to negotiate and endeavour to agree to any increase or decrease (as the case may be) in the Contractor's costs of performing its obligations in order to comply with the Change in Law and where agreement is reached as to the amount of the increase or decrease in costs:
  - (i) for operating costs, the relevant component or components of the Charges payable by TfNSW to the Contractor under this Deed:
    - (A) in the case of a decrease in costs, will be decreased; and
    - (B) in the case of an increase in costs, will be increased; and
  - (ii) for the costs of capital expenditure, at the option of TfNSW:
    - (A) in the case of a decrease, the agreed amount will be either deducted from the relevant component or components of the ETS Delivery Price or the Charges, or will be a reduction in the ETS Project Fees payable by TfNSW;
    - (B) in the case of an increase, the agreed amount will be payable as a lump sum after completion of the work the subject of the capital expenditure or by increasing the ETS Delivery Price or the Charges (as relevant); and

- (c) where compliance with the Change in Law necessitates a Variation, the value of that Variation, and payment for it, will be dealt with under clauses 11 or 26 as appropriate.
- (c) The Contractor cannot claim compensation or adjustment under clause 5.3(b) unless and only to the extent that the aggregate net increase in the costs of performing its obligations in respect of one or more Changes in Law occurring in a year exceeds [REDACTED] (a year being each successive 12 month period calculated from the Commencement Date).
- (d) If no agreement is reached in relation to an increase or decrease in costs within 20 Business Days (or such other period that the Parties agree upon) of a notice being given under clause 5.3(a):
  - (i) in the case of a decrease in the Contractor's costs of performing its obligations in compliance with the Change in Law, TfNSW will determine and advise the Contractor of the amount of the decrease and that amount will be a reduction in the ETS Project Fees payable by TfNSW; and
  - (ii) in the case of an increase in the Contractor's costs of performing its obligations in compliance with the Change in Law, TfNSW will determine and advise the Contractor of the amount of the increased costs as they are actually incurred and, subject to the Contractor having taken all reasonable steps to mitigate those increased costs, the relevant component or components of the amounts payable by TfNSW to the Contractor under this Deed will be increased by that amount or otherwise payable in the manner described in clause 5.3(b).
- (e) Notwithstanding any provision of the Deed, the Contractor must comply with each Change in Law, or any other change in Law.

#### **5.4 Independent Pricing and Regulatory Tribunal**

The Contractor must co-operate with and provide all reasonable assistance (including providing any documentation, materials or other information) to the relevant ETS Entity in respect of any investigation conducted, and comply with any determination made, pursuant to the *Independent Pricing and Regulatory Tribunal Act 1992* (NSW) relating to or concerning the ETS or any fees, charges or fines payable in respect of Smartcards. To the extent such co-operation and assistance is in addition to obligations that the Contractor is otherwise required to perform under this Deed, the Parties agree to negotiate an appropriate Variation in relation to that co-operation and assistance.

#### **5.5 Policies of the ETS Entities**

The Contractor must comply with those policies and procedures of the ETS Entities which have been made available to the Contractor prior to the Execution Date or are subsequently notified by TfNSW to the Contractor from time to time. If after the Execution Date TfNSW notifies the Contractor of any new policies and procedures (or changes to existing policies and procedures) which impose materially different obligations on the Contractor when compared to:

- (a) the Contractor's existing obligations under this Deed; and
- (b) the policies and procedures that a prudent, competent and experienced contractor should have anticipated for a project of the nature of the ETS Project,

the Parties agree to negotiate an appropriate Variation in respect of the costs of the Contractor complying with the new or changed policies and procedures of the ETS Entities.

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## 6 Project Plans and Manuals

### 6.1 Development of Project Plans and Manuals

- (a) The Contractor must develop the Project Plans and Manuals in accordance with the relevant requirements and timeframes set out in this Deed.
- (b) The Contractor acknowledges and agrees that the intended purposes of the Project Plans and Manuals include:
  - (i) to demonstrate to TfNSW that the Contractor has the understanding, capacity and capability at all times to perform the ETS Project in accordance with this Deed;
  - (ii) to ensure that the ETS Project and the ETS comply with the requirements of this Deed; and
  - (iii) to allow TfNSW to understand how the Contractor will achieve the performance outcomes specified in this Deed and otherwise fulfil its obligations under this Deed.
- (c) The Contractor must comply with each Project Plan and Manual which has been submitted to TfNSW and in respect of which TfNSW has not given notice under clause 6.4(a)(ii), unless it is necessary to depart from a Project Plan or Manual to ensure compliance with this Deed, in which case the Contractor must promptly, and in any event within 10 Business Days, notify TfNSW of any such departure.

### 6.2 Project Plans and Manuals warranty

- (a) The Contractor represents, warrants and undertakes that the Project Plans and Manuals will be and will remain:
  - (i) Fit for ETS Purposes; and
  - (ii) in accordance with this Deed.
- (b) The Contractor must monitor and regularly report to TfNSW regarding its progress in relation to development of the Project Plans and Manuals.

### 6.3 Updated Project Plans and Manuals

In addition to any other provision of this Deed, the Contractor must:

- (a) develop, continually review and, if necessary, update the Project Plans and Manuals:
  - (i) to take into account events or circumstances which will, or may reasonably be expected to, affect the manner in which the Contractor carries out the ETS Project, including:
    - (A) Changes in Law;

- (B) Approvals (including the conditions of Approvals); and
- (C) any breach or potential breach of the warranty in clause 6.2; and
- (ii) as otherwise specified in this Deed; and
- (b) promptly submit each updated Project Plan and Manual to TfNSW.

#### **6.4 Review by TfNSW**

- (a) TfNSW may:
  - (i) review any Project Plans and Manuals submitted under this clause 6; and
  - (ii) if any of the Project Plans or Manuals do not comply with the requirements of this Deed, notify the Contractor of that non-compliance within 15 Business Days of their submission to TfNSW.
- (b) If the Contractor receives a notice under clause 6.4(a)(ii), it must, taking into account TfNSW's comments, promptly submit to TfNSW an amended Project Plan or Manual, as the case may be, which complies with this Deed. In such case, TfNSW must review the amended Project Plan or Manual within 15 Business Days of submittal and notify the Contractor as to the compliance of the amended Project Plan or Manual.

#### **6.5 TfNSW may request updates**

If:

- (a) any Project Plans or Manuals do not comply with this Deed; or
- (b) the Contractor has not updated any Project Plans or Manuals in accordance with clause 6.3,

TfNSW may by notice request that the Contractor update the Project Plans or Manuals specifying:

- (c) the reasons why such updating is required; and
- (d) the time within which such updating must occur (which must be reasonable),

and the Contractor must:

- (e) amend or update the Project Plans or Manuals as requested by TfNSW; and
- (f) submit the amended or updated Project Plans or Manuals to TfNSW within the time specified under clause 6.5(d).

#### **6.6 Manuals**

The Contractor must comply with the obligations set out in the Manuals and must ensure that any amendments to the Manuals are consistent with the previously approved Manuals.

## **6.7 Environment**

- (a) Without limiting the Contractor's obligations under other provisions of this Deed, the Contractor:
  - (i) must:
    - (A) comply with the Environmental Management Plan and all requirements of the Law for protection of the environment insofar as they relate to the ETS Project, including the disposal of Hazardous Materials; and
    - (B) whenever required by TfNSW, demonstrate to TfNSW that the Environmental Management Plan and all requirements of the Law for protection of the environment insofar as they relate to the ETS Project, including the disposal of Hazardous Materials, have been met;
  - (ii) must develop, implement and maintain an environmental management system which is in accordance with AS/NZS ISO 14000;
  - (iii) must not, in performing the ETS Project, pollute, contaminate or otherwise damage the environment; and
  - (iv) is responsible for and must make good any pollution, contamination or damage to the environment caused by the performance by the Contractor of its obligations under this Deed.
- (b) If the Contractor is in default of its obligations under this clause 6.7 and does not remedy such default within 20 Business Days of receiving notice from TfNSW to do so (or such lesser period of time notified by TfNSW which is reasonable in the circumstances), TfNSW may take whatever action it considers reasonably necessary (at the Contractor's cost) to remedy such default and any costs incurred by TfNSW in taking such action will be a reduction in the ETS Project Fees payable by TfNSW.

## **6.8 Industrial relations**

- (a) The Contractor must perform its obligations under this Deed so as to minimise industrial relations disputes and ensure that a good industrial climate is maintained.
- (b) The Contractor must ensure that at all times it complies with any and all employment and industrial relations obligations to the Contractor Personnel, including ensuring that:
  - (i) all relevant awards and formal industrial agreements are adhered to;
  - (ii) good safety practices in accordance with relevant legislation, awards and procedures contained in the relevant industry agreements are maintained; and
  - (iii) industrial relations are professionally managed.
- (c) Except as expressly provided in this Deed, no additional fees will be paid by TfNSW and no extensions of time will be granted to the Contractor by TfNSW as a result of costs incurred by the Contractor, or delays resulting from, industrial action involving Contractor Personnel, including go slows, black bans and rolling strikes.

- (d) The Contractor indemnifies and agrees to hold harmless the Indemnified Entities against any Loss or Claim suffered or incurred as a result of or in connection with any industrial relations dispute which arises as a result of an act or omission of the Contractor.

## **6.9 Occupational Health and Safety**

- (a) In this clause 6.9, the terms 'Principal Contractor' and 'place of work' have the same meanings assigned to those terms under the OHS Act and the *Occupational Health and Safety Regulation 2001* (NSW) (in this clause 6.9, the 'Regulation').
- (b) Without limiting the Contractor's obligations under any provision of this Deed, to the extent that any ETS Entity owns any place of work at which any part of the ETS Project is being undertaken by the Contractor and to which clause 210(1) of the Regulation applies, TfNSW:
  - (i) appoints the Contractor as the Principal Contractor under clause 210 of the Regulation in respect of the ETS Project; and
  - (ii) authorises the Contractor to exercise such authority of TfNSW as is necessary to enable the Contractor to discharge the responsibilities imposed on a Principal Contractor by the Regulation.
- (c) Where clause 6.9(b) does not apply, or TfNSW is not otherwise able to validly appoint the Contractor as the Principal Contractor under clause 210 of the Regulation at any place of work at which any part of the ETS Project is being undertaken by the Contractor, the Contractor must exercise and fulfil the functions and obligations of the Principal Contractor under the Regulation as if the Contractor had been validly appointed as the Principal Contractor under clause 210 of the Regulation so as to ensure that the responsibilities imposed on a Principal Contractor by the Regulation are discharged and for this purpose TfNSW authorises the Contractor to exercise such authority of TfNSW as is necessary to enable the Contractor to ensure that the responsibilities imposed on a Principal Contractor by the Regulation are discharged.
- (d) The Contractor must:
  - (i) perform the ETS Project in a safe manner and so as to avoid causing damage to any person or property;
  - (ii) perform the ETS Project in accordance with applicable occupational health and safety obligations, including under the Regulation;
  - (iii) incorporate occupational health, safety and rehabilitation in all aspects of the ETS Project, including Project Plans and Manuals;
  - (iv) maintain for the duration of the Term a corporate occupational health, safety and rehabilitation management system that complies with AS/NZS 4801 and the NSW Government OHS&R Management Systems Guidelines;
  - (v) provide a suitably qualified site safety representative who has authority and responsibility for issues relating to occupational health, safety and rehabilitation in respect of the ETS Project; and
  - (vi) notify TfNSW of any person, property, land or improvements which may be affected in relation to the ETS Project.

- (e) If the Contractor is in default of its obligations under clause 6.9(b) and does not remedy such default within 20 Business Days of receiving notice from TfNSW to do so (or such lesser period of time notified by TfNSW which is reasonable in the circumstances), TfNSW may take whatever action it considers reasonably necessary (at the Contractor's cost) to protect any person or property, including any part of the ETS, which the Contractor fails to take. Any costs incurred by TfNSW in taking such action will be a reduction in the ETS Project Fees payable by TfNSW.
- (f) The Contractor will ensure that each Subcontract contains applicable provisions corresponding to clauses 6.9(d)(i) to (vi).

#### **6.10 Site Access Plan and Interface Plan**

The Contractor must:

- (a) comply with any obligations on it in the Site Access Plan and Interface Plan; and
- (b) review and update the Site Access Plan and Interface Plan in accordance with clauses 6.2(b), 6.3, 6.4 and 6.5 as if a reference in those clauses to the Project Plans includes the Site Access Plan and Interface Plan.

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## **7 Access**

### **7.1 Access by TfNSW**

- (a) TfNSW and any person authorised by TfNSW may at any time during the Term after reasonable notice to the Contractor have access to any part of the Sites for any purpose related to the ETS Project, subject to:
  - (i) normal safety and security constraints as notified by the Contractor to TfNSW; and
  - (ii) in the case of TfNSW's access to the Operators' Sites, TfNSW acknowledges that such access is subject to compliance with any requirement of the relevant Operator.
- (b) TfNSW must ensure that the Contractor is not impeded in performing the ETS Project while exercising its right of access under this clause 7.1.

### **7.2 Access by the Contractor**

- (a) The Contractor acknowledges, represents, warrants and undertakes that prior to entering into this Deed, it performed all investigations and examinations allowed by TfNSW, in respect of the adequacy or sufficiency of the Site Access Plan, the Site Requirements and the Operators' Sites and it is satisfied that the Site Access Plan, the Site Requirements and each of the Operators' Sites are adequate and sufficient for the ETS Project and for it to satisfy its obligations under this Deed.
- (b) Clause 7.2(a) does not apply to any Latent Conditions. If the Contractor is required to undertake any additional work as a result of any Latent Conditions, it will be entitled to payment for such work in accordance with Table 6 of Schedule 7. The Contractor's rights in respect of any Latent Conditions are limited to the payment referred to in this clause 7.2(b).



- (c) Subject to the Contractor's compliance with clause 7.2(e), TfNSW will procure for the Contractor access to each of the Operators' Sites at such locations and at such times specified in the Site Access Plan for the Contractor to perform ETS Delivery in accordance with this Deed.
- (d) Notwithstanding any other provision of this Deed:
  - (i) in the case of ETS Delivery, the Contractor is only entitled to such access to an Operators' Site as is reflected in a Site Access Plan approved by TfNSW, approval of which is at the discretion of TfNSW; and
  - (ii) during each Operational Services Phase, TfNSW will grant the Contractor reasonable access to each Operators' Site for the purpose of performing the ETS Operational Services subject always to the Site Requirements and this Deed.
- (e) At least 20 Business Days prior to commencing work on an Operators' Site (or such other period of time as TfNSW may agree), the Contractor must notify TfNSW of the date the Contractor proposes to commence such work and the expected duration of the work on that Operators' Site.

### **7.3 Access to Operators' Sites**

- (a) The Contractor must perform all aspects of the ETS Project to be performed on an Operators' Site in accordance with this Deed.
- (b) Without limiting the generality of clause 7.3(a), the Contractor must:
  - (i) obtain and comply with all necessary Approvals and consents prior to performing work on an Operators' Site, including any Approvals specific to a particular Operator;
  - (ii) comply with the Site Access Plan;
  - (iii) comply with any workplace, health and safety rules or requirements of an Authority;
  - (iv) comply with all reasonable requirements of the relevant Operator;
  - (v) control access to, and ensure public safety on, all or such part (as the case may be) of an Operators' Site;
  - (vi) manage the ETS Project to ensure that any interference or inconvenience to the business of the Operators and Transport Functions are kept to an absolute minimum, and must comply with any direction of TfNSW in respect of such management;
  - (vii) ensure the ETS Project is performed so that there is no legal nuisance and minimal disturbance is caused to owners, users or occupiers of land adjoining the Operators' Sites or use by the public of the land adjoining the Operators' Sites;
  - (viii) not contact any of the Operators without prior approval from TfNSW; and
  - (ix) ensure the ETS Delivery is performed safely so as to protect persons and property and to avoid causing destruction or damage to property or harm to persons.



- (c) The Contractor acknowledges and agrees that:
  - (i) it may not be given exclusive access to the Operators' Sites;
  - (ii) an ETS Entity may engage other contractors or consultants to perform other work on the Operators' Sites;
  - (iii) TfNSW or an Operator may remove any unauthorised person from a Site at any time; and
  - (iv) the Operators' Sites are areas where the Operators carry on their business and, subject to clauses 12.5 and 12.6, the Contractor is not entitled to make a Claim for any delay or disruption to the Contractor caused by an Operator carrying on business on that Operators' Site.

#### **7.4 No interference with operations or assets**

- (a) The Contractor must ensure that:
  - (i) the performance of the ETS Project; and
  - (ii) any other acts or omissions of the Contractor or the Contractor Personnel,do not adversely affect or otherwise interfere with the operations or assets of the ETS Entities, other than as may be expressly contemplated in this Deed.
- (b) The Contractor indemnifies and agrees to hold harmless the Indemnified Entities against any Loss or Claim suffered or incurred as a result of or in connection with any adverse effect or interference referred to in clause 7.4(a) caused by any act or omission of the Contractor or the Contractor Personnel. The Contractor must promptly notify TfNSW of any such adverse effect or interference.

#### **7.5 Disposal of materials**

- (a) The Contractor must, as agreed with TfNSW in consultation with the relevant Operators, dispose of all materials removed during the course of performing the ETS Project at each Operators' Site daily at the Contractor's cost, unless TfNSW indicates that some of these materials are to be retained by TfNSW or the relevant Operator.
- (b) If it is not practical to remove materials from each Operators' Site each day, then the materials not so removed must be stored within an area prescribed by TfNSW on the Operators' Site, on a daily basis.

#### **7.6 Working areas on Operators' Sites**

- (a) The Contractor acknowledges and agrees that working areas and areas for the stacking of materials and equipment may be nominated by TfNSW from time to time. The Contractor must not perform work or permit materials or equipment to be stacked outside of the areas nominated.
- (b) The Contractor must arrange and place all plant, sheds and other equipment and materials of the Contractor on an Operators' Site in positions approved by TfNSW.
- (c) Neither TfNSW nor the Operators will be responsible for the safe-keeping of any of the Contractor's plant, equipment, tools or materials. The Contractor may provide,

at the Contractor's own cost, any security measures it considers necessary, subject to TfNSW's approval.

- (d) TfNSW and the Operators will have the right to check the contents of vehicles and vessels entering or leaving an Operators' Site.
- (e) The Contractor must not perform any part of the ETS Project on the Operators' Site at times and locations other than as notified by TfNSW in consultation with the Operator and the Contractor.
- (f) The Contractor must keep all working areas and areas for the stacking of materials and equipment at an Operators' Site clean and tidy as it proceeds and must clean up no less often than at the end of each day.

## 7.7 ETS Entities' Works

- (a) TfNSW will perform or ensure that the ETS Entities' Works are performed in accordance with and subject to this Deed.
- (b) The Contractor acknowledges, represents, warrants and undertakes that:
  - (i) Schedule 26 contains an accurate and complete list of:
    - (A) all tasks that the Contractor requires to be performed; and
    - (B) all resources that the Contractor requires to be provided,by or on behalf of each ETS Entity in relation to the ETS Project (**ETS Entities' Works**); and
  - (ii) TfNSW is not required to provide or perform, or to procure any other ETS Entity or any persons who are not parties to this Deed to provide any goods or perform any services in relation to the ETS Project other than the ETS Entities' Works.

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## 8 Programs

### 8.1 Overall ETS Delivery Program and Overall Operational Services Program obligations

- (a) The Contractor warrants that:
  - (i) Schedule 29 sets out a program which describes the timing for the activities of the ETS Delivery showing, for each Stage, the detailed program of works, the sequences of activities constituting the critical path and the inter-dependencies between activities (**Overall ETS Delivery Program**); and
  - (ii) Schedule 30 sets out a program which describes the details of, and timing for, the performance of the ETS Operational Services (**Overall Operational Services Program**).
- (b) Subject to the development of the Subsidiary ETS Delivery Program and the Subsidiary Operational Services Program pursuant to clause 8.2, the Contractor must comply with the Overall ETS Delivery Program and Overall Operational Services Program.

## 8.2 ETS Delivery Program and Operational Services Program obligations

Throughout the Term, the Contractor must update:

- (a) the Overall ETS Delivery Program to ensure that it accurately describes the timing for the activities for ETS Delivery, for each Stage and the detailed program of works, the sequences of activities constituting the critical path and the inter-dependencies between activities (**Subsidiary ETS Delivery Program**); and
- (b) the Overall Operational Services Program to ensure that it accurately describes the details of, and timing for, the ETS Operational Services (**Subsidiary Operational Services Program**),

(the **Programs**).

## 8.3 Contractor's obligation to update Programs

- (a) The Contractor must update the Programs monthly to reflect the current status of the work under the ETS Project and to take into account any changes to the relevant Program in the prior month made in accordance with this Deed.
- (b) The Contractor must submit the updated Programs to TfNSW, at the latest 5 Business Days prior to the end of each month.
- (c) The Contractor must make due allowance in the Subsidiary ETS Delivery Program for:
  - (i) the processes set out in clauses 9.2, 9.3 and 14 to be completed so as not to delay the progress of the ETS Delivery or Completion;
  - (ii) TfNSW and (where applicable) the Independent Certifier to have a reasonable time to comment upon and review the DDI Deliverables submitted to it under clause 9.2(b) and each Extent of Completion Claim;
  - (iii) any resubmission of the DDI Deliverables which may be required; and
  - (iv) any other review of Design Documentation contemplated under this Deed.
- (d) The Contractor must not make any alteration, addition or modification to the ETS Delivery Program or the Operational Services Program other than in accordance with this Deed.
- (e) The Contractor must produce an updated Site Access Plan for approval by TfNSW at the same time and in the same manner as the ETS Delivery Program is updated in accordance with this Deed. The updated Site Access Plan must reflect each place and time of site access required for ETS Delivery shown in the approved ETS Delivery Program.
- (f) TfNSW may at any time change any Site Access Plan by notice to the Contractor. The Contractor will have no Claim including in relation to extensions of time or Delay Costs to the extent that the changes to the Site Access Plan do not adversely affect the Contractor's previously planned work or ability to complete ETS Delivery of the relevant Stages by the relevant Dates for Completion.
- (g) Within 90 days after the Commencement Date, the Parties agree to develop a protocol that will facilitate an effective and efficient way to amend the Site Access Plan in relation to individual Operators' Sites during each ETS Delivery Phase.

#### **8.4 TfNSW's right to require amendments to updated Programs**

Without limiting the rights TfNSW may have and subject to clause 12.6, if TfNSW reasonably considers that:

- (a) the Programs are not in accordance with this Deed; or
- (b) any aspect of the ETS Project undertaken in compliance with the updated portion of the Programs may cause a delay or disruption to Transport Functions or change or hinder the obligations of TfNSW,

TfNSW may within 5 Business Days of receipt of the updated Programs referred to in clause 8.3(a), by notice, direct the Contractor to amend (or further amend) the updated portions of the Programs as the case may be, specifying:

- (c) the reasons why such amendments are required; and
- (d) such reasonable time within which such amendment must occur,

and the Contractor must:

- (e) further amend the Programs as directed by TfNSW; and
- (f) submit the further developed, updated or amended Programs to TfNSW for review in accordance with this clause 8.4 within the time specified in TfNSW's notice.

#### **8.5 TfNSW discretion**

- (a) Notwithstanding the provisions of this clause 8, TfNSW may:
  - (i) at any time during the Term, direct rescheduling of any part of the ETS Project set out in the Programs; or
  - (ii) at any time during each ETS Delivery Phase, direct rescheduling of any of the site access dates set out in the Site Access Plan,
- (b) in each case, where TfNSW determines that performing any part of the ETS Project, including the ETS Delivery, in accordance with the Programs or Site Access Plan (as the case may be) will or may disrupt the Transport Functions or the ETS Entities, in which case, unless clause 8.5(c) applies, the Contractor will not be entitled to an extension of time under clause 12.5, Delay Costs under clause 12.6 or any other form of relief or compensation.
- (c) If a direction (or series of directions) by TfNSW under clause 8.5(a) materially impacts on the Contractor's ability to perform the ETS Project in accordance with the Programs or Site Access Plan (as applicable) which cannot be circumvented through the use of work around plans or other means:
  - (i) the Parties agree to negotiate, in good faith, an appropriate Variation in respect of the timing for the performance of the Contractor's obligations under this Deed; and
  - (ii) the Contractor may seek Delay Costs under clause 12.6.

## 8.6 Monthly Report

During ETS Delivery, the Contractor must provide to TfNSW by the 5th Business Day of each month 10 copies of a report in such format as is required by TfNSW containing or setting out such information as required by this Deed (**Monthly Report**).

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# 9 Development

## 9.1 Design Documentation

The Contractor must ensure that the Design Documentation complies with this Deed.

## 9.2 Design Documentation process

- (a) The Contractor must do all things necessary to satisfy the requirements for each DDI, in accordance with the Subsidiary ETS Delivery Program and this Deed.
- (b) Once the Contractor considers it has satisfied sufficient of the requirements for a DDI to satisfy the DDI components of the Entitlement to Claim Criteria for a Planned Value Category, the Contractor must deliver to TfNSW and (for a Planned Value Category Requiring Certification) the Independent Certifier all necessary documentation and other deliverables for the DDI to enable TfNSW and (for a Planned Value Category Requiring Certification) the Independent Certifier to undertake a DDI Review of such documentation and other deliverables (together, the **DDI Deliverables**), within a period of time so as to not affect the Subsidiary ETS Delivery Program.
- (c) The Contractor acknowledges that:
  - (i) the DDI Deliverables are also subject to those provisions of this Deed dealing with Extent of Completion Claims, including clause 14; and
  - (ii) its obligations under this clause 9 do not limit the Contractor's obligations in other provisions of this Deed.
- (d) In addition to the obligations in this clause 9.2 the Contractor must ensure that each DDI Deliverable also complies with any provisions of this Deed relating to the Planned Value Category and Stage it forms part of.
- (e) Notwithstanding any other part of this clause 9, if the Contractor proposes to submit DDI Deliverables in respect of more than one Planned Value Category in any particular 20 day period, the Contractor must notify TfNSW at least 20 days before submitting the DDI Deliverables, and in that notice specify the manner and order in which the Contractor proposes to provide those DDI Deliverables. If requested by TfNSW, TfNSW's Representative and the Contractor's Representative will meet within 5 Business Days of TfNSW's receipt of the Contractor's notice to discuss and negotiate in good faith any changes to the Contractor's submission of those DDI Deliverables and/or the timeframes referred to in clause 9.3 for TfNSW to notify the Contractor of any comments.

## 9.3 DDI Reviews

- (a) Within 20 Business Days following submission by the Contractor of a DDI Deliverable, TfNSW will notify the Contractor of any comments on the DDI Deliverable, including (where that DDI Deliverable forms part of a Planned Value Category Requiring Certification), subject to clause 9.3(b), comments from the

Independent Certifier. For clarification, whilst TfNSW does not propose to review every DDI Deliverable, TfNSW reserves the right to reject any DDI Deliverable that is not in accordance with this Deed.

- (b) For the avoidance of doubt, the Independent Certifier will notify TfNSW of its comments on a DDI Deliverable that forms part of a Planned Value Category Requiring Certification, and TfNSW may in its discretion accept or reject the Independent Certifier's comments and may in its discretion notify the Contractor of the Independent Certifier's comments.
- (c) The Contractor must, within 10 Business Days or such longer period of time specified in writing by TfNSW after receipt of a notice from the PTTC:
  - (i) under clause 9.3(a), amend the relevant DDI Deliverables having regard to comments provided; and
  - (ii) under clause 9.3(a) rejecting the DDI Deliverables, amend the relevant DDI Deliverables so that they are in accordance with the Deed.
- (d) If the Contractor disagrees with any notice issued by the PTTC under clause 9.3(a) it must promptly and in any event no later than 10 Business Days of receipt of such a notice, give notice of such disagreement to the PTTC.
- (e) Notwithstanding any other provision of this clause 9, the Contractor will not be entitled to any extension of time under clause 12.5 if the Contractor submits the DDI Deliverables in a manner (including in a quantity) or at a time which prevents TfNSW from reviewing it in the time allowed under this clause 9.
- (f) If, at any time, TfNSW reasonably considers:
  - (i) the Contractor is not undertaking the design of the ETS or design and development of the ETS Operational Services in accordance with the Subsidiary ETS Delivery Program; and/or
  - (ii) a DDI Deliverable is incomplete or does not comply with this Deed,then TfNSW may give notice to the Contractor requiring the Contractor to:
  - (iii) submit to TfNSW within 10 Business Days of such notice a plan and program for corrective action to correct the matter the subject of the notice under this clause 9.3(f); and/or
  - (iv) amend the DDI Deliverable to correct such incompleteness or non-compliance.
- (g) Any notice issued under this clause 9.3 will not entitle the Contractor to any extension of time to any Date for Completion.
- (h) If the Contractor is required to amend any DDI Deliverable pursuant to clauses 9.3(c) or 9.3(f), it must continue to resubmit the DDI Deliverable under those clauses until all comments notified by TfNSW to the Contractor within 20 Business Days of TfNSW's receipt of the revised DDI Deliverable have been addressed.

#### **9.4 Design warranties and undertakings**

The Contractor acknowledges, represents, warrants and undertakes that following the completion of its obligations in respect of any DDI Deliverable comprising Design Documentation under this clause 9:

- (a) the relevant Design Documentation will be and will remain:
  - (i) substantially without material defects or omissions in design having regard to the requirements under this Deed; and
  - (ii) capable of supporting the ETS Project in such a manner that the ETS will be Fit for ETS Purposes and in compliance with this Deed; and
- (b) the Contractor will perform the ETS Project in accordance with such Design Documentation.

#### **9.5 Retention of Design Documentation**

The Contractor must:

- (a) provide TfNSW on a monthly basis with an updated schedule of the Design Documentation showing current issues and the status of requested updates or amendments;
- (b) submit to TfNSW one copy of the Design Documentation and all amended versions of them, on such secure and encrypted physical electronic media as TfNSW reasonably requests from time to time, within 5 Business Days of being completed;
- (c) ensure that a complete backup copy of the Design Documentation, as updated from time to time, is kept at all times; and
- (d) make the requested Design Documentation available to TfNSW (either in hard copy or in electronic media form, as required by TfNSW) during the hours of 9.00 am to 5.00 pm on any Business Day, within 48 hours of a request from TfNSW to do so.

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## **10 Deployment**

### **10.1 Deployment of the ETS**

The Contractor must perform the ETS Delivery in accordance with this Deed.

### **10.2 ETS warranties**

The Contractor acknowledges, represents, warrants and undertakes that:

- (a) following the Re-baselining Date, any parts and components of the ETS provided under Stages 1 to 11 (as they existed immediately prior to the Re-Baselining Date); and
- (b) following the issue of an Extent of Completion Certificate, any ETS Components Delivered for the Extent of Completion Certificate,

will:



- (c) be Fit for ETS Purposes;
- (d) comply with all requirements of this Deed including the Design Documentation; and
- (e) without limiting clauses 10.2(c) or 10.2(d), enable the Contractor to provide the ETS Operational Services for the ETS in accordance with this Deed.

### 10.3 Capability of the ETS

The Contractor must ensure that ETS Delivery is performed in a manner that ensures that the ETS is capable of being upgraded to be used as a payment system for the range of purposes contemplated in this Deed.

### 10.4 Open Source Software

Where any component of the ETS including any Software provided by the Contractor in relation to this Deed incorporates any Open Source Software, the Contractor must ensure that the use of that Open Source Software:

- (a) does not result in an obligation to disclose, license or otherwise make available any part of the Operators' Environments, the Vested IP, TfNSW IP or any of TfNSW's Confidential Information; and
- (b) will not in any way diminish the Contractor's obligations under the Deed, including in relation to any warranties, indemnities or any provisions dealing with the licensing or assignment of Intellectual Property Rights.

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## 11 ETS Delivery Phase Variations

### 11.1 ETS Delivery Phase Variations required by TfNSW

- (a) TfNSW may, at any time during an ETS Delivery Phase by notice expressly under this clause 11.1, request the Contractor to provide a proposal to perform an ETS Delivery Phase Variation.
- (b) If:
  - (i) TfNSW requests the Contractor to provide a proposal under clause 11.1(a); or
  - (ii) this Deed otherwise requires the Parties to agree an ETS Delivery Phase Variation,

the Contractor must provide to TfNSW such a proposal within 20 Business Days of receiving TfNSW's request under clause 11.1(a) or of the event giving rise to the requirement to agree an ETS Delivery Phase Variation (as applicable), and include in it full particulars of the proposed ETS Delivery Phase Variation.

- (c) The Contractor must not vary the ETS Project except:
  - (i) as directed by TfNSW under clause 11.2; or
  - (ii) as approved under clause 11.4; or
  - (iii) otherwise in accordance with this Deed.



- (d) The Contractor's proposal referred to in clause 11.1(b) must contain the following:
  - (i) the Contractor's proposed total price of such ETS Delivery Phase Variation calculated in accordance with clause 11.3, supported by measurements and/or other itemised evidence of that, and any other information requested by TfNSW;
  - (ii) where the Contractor considers that the ETS Delivery Phase Variation may result in a delay, details (including substantiation) of the period of the delay together with any notices required by clause 12; and
  - (iii) where possible, the date by which the Contractor requires TfNSW's decision on whether or not to proceed, such that the Contractor will not be delayed in the progress of the ETS Project (other than by the execution of the ETS Delivery Phase Variation itself, if at all).
- (e) TfNSW agrees to respond to the Contractor's proposal as soon as reasonably practicable after its receipt and will have regard to clause 11.1(d)(iii).
- (f) If TfNSW notifies the Contractor in relation to a variation under paragraph (d) of the definition of ETS Delivery Phase Variation, the Contractor's proposal referred to in clause 11.1(b) must:
  - (i) be valued under clause 11.3 and the Contractor's proposal must have particular regard to the size of the variation; and
  - (ii) include appropriate amendments to the KPIs to include any such additional Operator, with the KPIs in respect of that additional Operator being no less favourable to that Operator than the KPIs applicable to the Operators at the time the Contractor provides its proposal under clause 11.1(d) to TfNSW.

## **11.2 Commencement of ETS Delivery Phase Variation**

- (a) The Contractor must not commence an ETS Delivery Phase Variation unless:
  - (i) the Contractor's proposal provided pursuant to clause 11.1(b) has been approved by TfNSW; or
  - (ii) TfNSW has directed the Contractor to so commence the ETS Delivery Phase Variation, in accordance with clause 11.2(b).
- (b) TfNSW may by notice expressly under this clause 11.2(b) direct the Contractor to commence performing the ETS Delivery Phase Variation at any time before the Contractor's proposal provided under clause 11.1(b) has been approved by TfNSW in which case the ETS Delivery Phase Variation will be valued in accordance with clause 11.3, or in the case of a proposal contemplated under clause 11.1(f), will be valued having regard to clause 11.1(f).
- (c) If the Contractor is directed by TfNSW under this clause 11.2 to proceed with an ETS Delivery Phase Variation, the Contractor must without delay commence and perform the ETS Delivery Phase Variation in accordance with its terms and this Deed.

### 11.3 Valuation of ETS Delivery Phase Variation

- (a) An ETS Delivery Phase Variation must be valued on the basis of the cost of the ETS Delivery Phase Variation using the rates and prices set out in Schedule 7 or to the extent these are not applicable:
  - (i) the Direct Costs; and
  - (ii) the Direct Savings,of the ETS Delivery Phase Variation.
- (b) For clarity, if any of the amounts ascertained in accordance with clause 11.3(a) represent amounts for performance of obligations in respect of the ETS Project which are no longer required, such amounts will be deducted for the purposes of aggregating the amounts in clause 11.3(a). Where any rates and prices set out in Schedule 7 are used for valuing an ETS Delivery Phase Variation under this clause 11.3, the rates and prices will be deemed to cover all labour, materials, on and off-site overheads and profit, required to perform all work the subject of the ETS Delivery Phase Variation and comply with the Contractor's obligations under this Deed.

### 11.4 ETS Delivery Phase Variations proposed by the Contractor

- (a) The Contractor may, at any time during each ETS Delivery Phase, propose an ETS Delivery Phase Variation which will give rise to a reduction in the ETS Delivery Price by giving notice to TfNSW with details of the proposed ETS Delivery Phase Variation. The notice under this clause must contain at least the information referred to in clause 11.1(d).
- (b) Within 10 Business Days of receiving a notice under clause 11.4(a), TfNSW may give notice to the Contractor requiring it to give TfNSW:
  - (i) details of:
    - (A) the proposed ETS Delivery Phase Variation in addition to those details provided in accordance with clause 11.4(a);
    - (B) the reason for the proposed ETS Delivery Phase Variation;
    - (C) the effect the proposed ETS Delivery Phase Variation would have on the ETS Delivery and the Subsidiary ETS Delivery Program;
    - (D) the effect the proposed ETS Delivery Phase Variation would have on any Date for Completion;
    - (E) the effect (if any) the proposed ETS Delivery Phase Variation would have on the Contractor's obligations under this Deed;
    - (F) the proposal for any Direct Savings arising from the ETS Delivery Phase Variation and the timeframes when such Direct Savings will be realised; and
    - (G) the proposed reduction to the ETS Delivery Price arising from the ETS Delivery Phase Variation;
  - (ii) a notice stating that the proposed ETS Delivery Phase Variation:

- (A) will not adversely affect the functional integrity of any of the elements of the ETS; and
  - (B) will not adversely affect the quality standards required under this Deed; and
- (iii) any other information or supporting documentation TfNSW requires.
- (c) TfNSW:
  - (i) may give a direction to the Contractor approving or rejecting an ETS Delivery Phase Variation the Contractor proposes; and
  - (ii) will be under no obligation to approve any such ETS Delivery Phase Variation.
- (d) If TfNSW gives a direction approving the ETS Delivery Phase Variation under clause 11.4(c), the Contractor must perform its obligations under this Deed in accordance with the approved ETS Delivery Phase Variation.
- (e) With respect to any ETS Delivery Phase Variation the subject of a direction approving it under clause 11.4(c)(i), the Parties will share equally any Direct Savings notified by the Contractor under clause 11.4(b)(i)(F). TfNSW's share of those Direct Savings will be a reduction in the ETS Project Fees payable by TfNSW in accordance with the timeframes referred to in clause 11.4(b)(i)(F), or at such later time as the Parties agree.
- (f) The Contractor must:
  - (i) bear all costs:
    - (A) associated with proposing an ETS Delivery Phase Variation under clause 11.4(a);
    - (B) associated with providing details under clause 11.4(b); and
    - (C) reasonably incurred by TfNSW in assessing the proposed ETS Delivery Phase Variation (such costs to be a reduction in the ETS Project Fees payable by TfNSW); and
  - (ii) unless otherwise agreed, not make any Claim against TfNSW arising out of or in connection with the ETS Delivery Phase Variation.

## **11.5 Decision by TfNSW not to proceed**

If at any time prior to approval of the ETS Delivery Phase Variation by TfNSW under clause 11.2(a)(i) TfNSW elects not to proceed with the ETS Delivery Phase Variation, TfNSW will so notify the Contractor, whereupon the provisions of this clause 11 will no longer apply in respect of the relevant request.

## **11.6 Contractor's costs**

- (a) Except where clause 11.6(b) applies, TfNSW is under no obligation to pay the Contractor's costs of investigating and preparing a proposal to perform an ETS Delivery Phase Variation.

- (b) If the Contractor demonstrates to the reasonable satisfaction of TfNSW that significant additional resources are required to investigate and prepare a proposal to perform an ETS Delivery Phase Variation requested by TfNSW, the Parties will negotiate in good faith a reasonable amount payable by TfNSW to the Contractor in respect of the Contractor's investigation and preparation of the proposal. TfNSW acknowledges that the Contractor may require additional resources to investigate and prepare an ETS Delivery Phase Variation if its then current Personnel are fully committed to meeting the Contractor's existing obligations under this Deed.

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## 12 Time

### 12.1 Completion

The Contractor must:

- (a) promptly commence the ETS Project and ETS Delivery; and
- (b) achieve Completion of each Stage and (for those Planned Value Categories to which a Date for Completion applies as indicated in Schedule 3) Planned Value Category on or before the Date for Completion for that Stage or Planned Value Category.

### 12.2 Risks of delays

Except as otherwise expressly provided in this Deed (including under clauses 12.5, 12.6 and 51.3), the Contractor will:

- (a) bear the risk of all delays to ETS Delivery and its provision of the ETS Operational Services and all Losses or Claims to the extent arising as a result of or in connection with such delays; and
- (b) not be entitled to any extension of time to any Date for Completion or to any other Claim.

### 12.3 Delay

- (a) When the Contractor becomes aware of any matter which will, or is likely to, give rise to a delay in ETS Delivery of any Stage or (for those Planned Value Categories to which a Date for Completion applies as indicated in Schedule 3) Planned Value Category, the Contractor must immediately and in any event not more than 10 Business Days after the Contractor first became aware or ought reasonably to have become aware of the cause of the possible delay, give TfNSW notice setting out:
  - (i) sufficient detailed particulars of the delay for TfNSW to understand the cause of the delay;
  - (ii) the corrective action which the Contractor proposes to take to overcome the effects of the delay; and
  - (iii) the period of the possible delay to be claimed.
- (b) Notwithstanding any other provisions in this Deed:
  - (i) the rights and remedies of the Contractor expressly set out in this clause 12 are the Contractor's only rights and remedies in respect of any delay to ETS

Delivery and the Contractor's provision of the ETS Operational Services (or any part of them); and

- (ii) if the Contractor fails to give notice under clause 12.3(a) within the period of 10 Business Days referred to in clause 12.3(a), then:
  - (A) TfNSW will have no liability that it otherwise had or but for this clause may have had for any Loss or Claim suffered or incurred by the Contractor as a result of or in connection with the delay; and
  - (B) for clarity and without limiting clause 12.3(b)(ii)(A), TfNSW will have no obligation to take the delay or its causes into account in exercising any of TfNSW's rights or discretions under this Deed.

#### **12.4 Consequences of delay**

If the Contractor does not achieve Completion of a Stage or (for those Planned Value Categories to which a Date for Completion applies as indicated in Schedule 3) Planned Value Category by the Date for Completion of that Stage or Planned Value Category (and the Contractor is not entitled to relief for such failure in accordance with this Deed, including under clauses 12.5, 12.6 and 51.3), then without limiting any other rights or remedies available to TfNSW:

- (a) TfNSW may exercise its Step-In Rights under clause 52;
- (b) TfNSW may exercise its rights to temporarily stop or suspend the ETS Project under clause 52;
- (c) such failure will constitute an Event of Default for the purposes of clause 53.1; and
- (d) the Contractor must pay liquidated damages in accordance with clause 14.6.

#### **12.5 Extension of time**

- (a) Subject to clause 12.5(b), the Contractor may claim an extension of time to a Date for Completion if Completion of that Stage or (for those Planned Value Categories to which a Date for Completion applies as indicated in Schedule 3) Planned Value Category by the relevant Date for Completion is or is likely to be delayed in the manner described in clause 12.5(b)(v) as a direct result of:
  - (i) Force Majeure;
  - (ii) an ETS Delivery Phase Variation issued by TfNSW in accordance with clause 11;
  - (iii) a breach by TfNSW of its obligations under this Deed in circumstances where the timing of Completion of the relevant Stage by the Contractor is dependent on performance of such obligation of TfNSW;
  - (iv) a step-in or stoppage or suspension by TfNSW under clause 52 where clause 52(h)(i)(B) applies;
  - (v) a delay or disruption caused by TfNSW failing to comply with clause 7.7; or
  - (vi) a failure by TfNSW to comply with the provisions for access in clause 7.2(c).

- (b) The following are conditions precedent to the Contractor's right to an extension of time:
  - (i) the Contractor must submit the notice to TfNSW referred to in clause 12.3 within the time prescribed by clause 12.3;
  - (ii) the Contractor must submit a claim for extension of time under this clause 12.5 in writing which gives detailed particulars of the delay and the effect this will have on Completion of the Stage and (if possible) states the number of Business Days' extension of time claimed;
  - (iii) the Contractor must have strictly complied with all and any of its obligations under this Deed which touch on or concern the cause of the delay;
  - (iv) the Contractor must not have caused or contributed to the cause of the delay and must have taken all steps reasonably necessary both to preclude the cause of the delay and to avoid or minimise the delay and the consequences of the delay; and
  - (v) the Contractor must have actually been delayed by one of the matters described in clause 12.5(a) in a manner which will prevent it from achieving Completion of a Stage or (for those Planned Value Categories to which a Date for Completion applies as indicated in Schedule 3) Planned Value Category by the relevant Date for Completion.
- (c) Where TfNSW is satisfied that the conditions precedent in clause 12.5(b) have been met, the relevant Date for Completion for the relevant Stage or (for those Planned Value Categories to which a Date for Completion applies as indicated in Schedule 3) Planned Value Category will be extended by a period determined by TfNSW and notified to the Contractor within 15 Business Days of receipt by TfNSW of the notice referred to in clause 12.5(b)(i).
- (d) TfNSW may, whether or not the Contractor is otherwise entitled to, or has made an application for, an extension of time, unilaterally extend a Date for Completion by any period specified in a notice which it gives to the Contractor. The ability of TfNSW to extend time under this clause 12.5(d) is to be exercised for the benefit of TfNSW only.
- (e) Any delay or failure by TfNSW to grant an extension of time in accordance with clause 12.5(c) will not cause any Date for Completion to be set at large.
- (f) The Contractor must use its best endeavours (including by making reasonable expenditure of funds) to mitigate any delay, disruption or Loss or Claim arising due to the occurrence of a delay caused by any of the events referred to in clause 12.5(a), having regard to the Contractor's ability to mitigate the cause of the delay, disruption or Loss or Claim.

## **12.6 Delay Costs**

- (a) Where:
  - (i) the Contractor has been granted an extension of time under clause 12.5(c) for a delay caused by the events referred to in clauses 12.5(a)(iv), 12.5(a)(v) or 12.5(a)(vi);

- (ii) TfNSW has directed an amendment to any updated Programs under clause 8.4(b) such that the Contractor will be delayed in performing its obligations under this Deed; or
  - (iii) the Contractor is entitled to seek Delay Costs under clause 8.5(c),
- TfNSW must pay to the Contractor any Delay Costs.
- (b) TfNSW will have no liability to pay any Delay Costs whatsoever in relation to any other extensions of time to the Date for Completion of a Stage or (for those Planned Value Categories to which a Date for Completion applies as indicated in Schedule 3) Planned Value Category.

## 12.7 Performance of ETS Delivery

TfNSW may from time to time notify the Contractor that it requires the Contractor to commence work with respect to one or more Planned Value Category or a Stage, prior to the date specified in the ETS Delivery Program in respect of that Planned Value Category or Stage, and if it does so notify the Contractor, the Parties agree to negotiate in good faith an appropriate ETS Delivery Phase Variation in respect of the relevant Planned Value Category or Stage and/or the ETS Delivery Price.

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# 13 Testing and inspection

## 13.1 General inspection, testing and evaluation obligations

- (a) The Contractor must undertake comprehensive inspection, testing and evaluation of all parts of the ETS in accordance with the DDIs and the Test Activities, in a controlled and transparent manner, to demonstrate that the ETS complies with each requirement of this Deed.
- (b) The Contractor must ensure its inspection and testing approach aligns with the phased and incremental development approach described in section 1.3 of the Testing Plan.
- (c) The Contractor must establish and maintain a formal inspection and testing methodology that ensures tests are conducted to provide appropriate coverage for each DDI. The formal inspection and testing methodology must be included in the Evaluation and Test Strategy Plan and where appropriate in the Evaluation and Test Documentation.

## 13.2 Testing Plan

- (a) The Contractor acknowledges, represents, warrants and undertakes that the Testing Plan includes sufficient tests to test and demonstrate that each Planned Value Category and Stage of the ETS Delivery and the ETS Operational Services comply with this Deed.
- (b) Without limiting its rights under this Deed, TfNSW may require the Contractor to conduct any part of the testing and inspection at the TfNSW Integrated Test Facility or, at any time following completion of the System Verification Review exit criteria, at an Operators' Site.
- (c) From time to time throughout the Term, the Contractor must review and if necessary, update the Testing Plan so it complies with this Deed. Any update of the Testing Plan will only apply if it is approved by TfNSW in its discretion.



- (d) The Contractor must, if TfNSW so requires, ensure that any Independent Certifier recommendations in relation to the Contractor's testing methodology are incorporated into the Contractor's testing activities (including the Evaluation and Test Strategy Plan and the Evaluation and Test Documentation, where appropriate).
- (e) The Contractor must produce and review test scripts to ensure the ETS meets all requirements and specifications nominated in the Design Documentation. Test scripts must be included in the Evaluation and Test Documentation.

### 13.3 Testing generally

- (a) The Contractor may seek a test waiver for a particular Test Activity from TfNSW for Contractor furnished modules or devices and third party commercial off the shelf devices (either hardware or Software) that can be otherwise demonstrated to comply with the requirements by submittal of either, or both, previous test or field performance data (**Test Waiver**). The Test Waiver will not be unreasonably withheld by TfNSW.
- (b) Prior to the commencement of any Test Type by the Contractor, the Contractor must:
  - (i) ensure that the Tested Components are ready for the Test Type to be performed and that any applicable Test Entry Criteria have been met; and
  - (ii) deliver to TfNSW a notice stating the deliverable is ready for the Test Type to be performed and that it believes the Test Entry Criteria have been met.
- (c) The Contractor must perform each Test Activity forming part of the Contractor Testing Phase in accordance with this Deed, including in accordance with the Testing Plan, the Evaluation and Test Strategy Plan and the Evaluation and Test Documentation.
- (d) Production cryptographic keys must not be made available in test environments.
- (e) The Contractor must submit all test results for testing it conducts to TfNSW within 10 Business Days after the relevant testing is completed.

### 13.4 Testing by the ETS Entities

- (a) At any time during the Term, any ETS Entity may itself conduct, or engage a third party to conduct, such testing as forms a part of TfNSW and Operator Test Phase or as it otherwise determines is necessary to verify that either or both of the ETS Delivery and the ETS Operational Services comply with this Deed. While TfNSW has the right to perform the Test Activities that form a part of TfNSW and Operator Test Phase, TfNSW is under no obligation to do so.
- (b) The Contractor must, at no charge, render such assistance to the ETS Entities as TfNSW requires in order to perform any testing conducted under clause 13.4(a), provided that where such assistance relates to testing that falls:
  - (i) within the testing forming part of TfNSW and Operator Test Phase, such assistance must be provided at no additional cost to TfNSW; or
  - (ii) outside the testing forming part of TfNSW and Operator Test Phase, TfNSW will be liable to pay for such assistance in accordance with the applicable rates set out in Schedule 7 (provided that nothing in this clause 13.4(b) limits



the obligations of the Contractor to perform any obligations under clauses 13.4(c) or 13.5 at its own expense).

- (c) Without limiting TfNSW's other rights and remedies, if any such testing shows that either or both of the ETS Delivery and ETS Operational Services are not in accordance with this Deed, TfNSW may require the Contractor to perform:
  - (i) such rework as TfNSW notifies the Contractor it requires so that either or both of the ETS Delivery and ETS Operational Services (as applicable) are in accordance with this Deed; and
  - (ii) such testing as TfNSW notifies the Contractor it requires to demonstrate those matters to the reasonable satisfaction of TfNSW.

### **13.5 Non-compliance discovered as a result of testing**

- (a) The Contractor must establish and maintain a non-compliance management regime ensuring non-compliances are tracked, managed, analysed and reported to TfNSW.
- (b) If, as a result of any testing, any:
  - (i) part or component of the ETS Delivery; or
  - (ii) any aspect of the ETS Operational Services,does not or will not comply with any of the requirements of this Deed, the Contractor must reconduct the test as soon as practicable after submitting the test results under clause 13.3. In the case of testing performed by an ETS Entity, the Contractor is only required to do so after TfNSW has provided the Contractor with a notice specifying the nature of the non-compliance.
- (c) TfNSW must, within 20 Business Days of receipt of the test results, give a notice to the Contractor which specifies the extent of non-compliance, and:
  - (i) specifies some or all of the modifications, changes, additions or corrections the Contractor must make or any other action (including testing procedure changes) the Contractor must take to ensure compliance;
  - (ii) specifies the extent of non-compliance that TfNSW accepts and requires the Contractor to take all action that is necessary to ensure compliance other than to the extent of the non-compliance that is accepted by TfNSW. TfNSW may, at its discretion, specify some or all of the modifications, changes, additions or corrections the Contractor must make or any other action the Contractor must take; or
  - (iii) states that TfNSW accepts the non-compliance.
- (d) If TfNSW gives a notice under clauses 13.5(c)(i) or 13.5(c)(ii), the Contractor must commence undertaking the action specified by TfNSW within 20 Business Days after receipt of a notice from TfNSW. Once that action is taken all relevant testing must again be conducted in accordance with this Deed including performing Regression Testing in the Contractor Integrated Test Facility before promoting changes to the TfNSW Integrated Test Facility.
- (e) Without limiting TfNSW's other rights and remedies, the Contractor must reimburse TfNSW for any reasonable overtime and associated costs and any reasonable third

party costs or disbursements which any ETS Entity incurs in connection with the repetition of all or any part of the testing.

- (f) If TfNSW gives a notice under clauses 13.5(c)(i) or 13.5(c)(ii), TfNSW may at its discretion, and acting reasonably, either:
  - (i) make a determination as to the extent to which the value of the ETS Delivery or the ETS Operational Services as required by this Deed will be reduced as a result of the non-compliance accepted by TfNSW in the notice, on the basis of any aspect of the ETS Delivery or ETS Operational Services added or omitted as a result of the non-compliance using the rates and prices set out in Schedule 5, Schedule 6 or Schedule 7 (as the case may be); or
  - (ii) require the Expert to make the determination and after such determination is made, the amount so determined by the Expert will be a reduction in the ETS Project Fees payable by TfNSW.
- (g) The Contractor is responsible for any delays caused as a result of any steps taken under this clause 13.5.
- (h) If, as a result of any testing, any material part or component (or a combination of parts or components that together are material) of the ETS Delivery or ETS Operational Services do not materially comply with any of the requirements of this Deed, then after three months following the commencement of such testing in accordance with this clause 13, TfNSW may terminate this Deed (in whole or in part) on notice to the Contractor with immediate effect and without liability and any amounts paid to the Contractor in connection with this Deed will be a reduction in the ETS Project Fees payable by TfNSW.

### 13.6 No limitation

Without limiting the generality of any other provision of this Deed, any exercise by TfNSW of any rights under this clause 13, will not relieve the Contractor of its obligations or liabilities, or constitute a waiver of any of TfNSW's rights, under this Deed. For clarification, the fact that a Tested Component has passed any Test Type, met any Test Entry Criteria or Test Exit Criteria, or has received a Test Waiver does not limit the Contractor's obligations in relation to any non-compliance that may be discovered in subsequent tests.

### 13.7 Acknowledgement

The Contractor acknowledges that the ETS Entities owe no duty to the Contractor to perform any testing under clause 13.4 or otherwise, to inspect any of the testing or review any of the tests or test results for errors, omissions or compliance with this Deed.

### 13.8 Integrated Test Facilities

- (a) The Contractor must, at its cost, establish and develop 2 Integrated Test Facilities, one for the use of TfNSW (**TfNSW Integrated Test Facility**) and one for the use of the Contractor (**Contractor Integrated Test Facility**).
- (b) The Contractor must commence the installation of both Integrated Test Facilities within three (3) months of the Commencement Date. The Integrated Test Facilities must be at the locations specified in section 3.10 of the Scope of Works and Services and be available in sufficient time to enable testing to commence in accordance with this Deed.

- (c) The Contractor must use the Contractor Integrated Test Facility to perform testing under this Deed including:
  - (i) all subsystem testing, system integration testing and if required by TfNSW, user acceptance testing; and
  - (ii) to test any Variations and other changes or modifications to the ETS or the ETS Operational Services, prior to their release.
- (d) The Contractor must, at its cost:
  - (i) throughout the Term, maintain both of the Integrated Test Facilities, including all equipment and documentation required to operate the test facilities in accordance with this Deed; and
  - (ii) ensure that at all times throughout the Term there are sufficient available Personnel with adequate training and experience in the operation of the Integrated Test Facilities and testing generally to conduct the testing required under this Deed.

### 13.9 Inspection

Any ETS Entity or the Independent Certifier, may at any time:

- (a) witness a test conducted by the Contractor;
- (b) inspect the performance of any part of the testing being performed by or on behalf of the Contractor; or
- (c) inspect the Contractor Integrated Test Facility and any other test facility set up by the Contractor,

in each case, after giving the Contractor reasonable prior notice, being at least 24 hours.

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## 14 Completion

### 14.1 Commencement of Planned Value Categories

Schedule 3 specifies certain pre-requisites to the commencement of Planned Value Categories and Stages with which the Contractor must comply.

### 14.2 Extent of Completion Claims

- (a) No more than once every two calendar months, if the Contractor considers it has achieved any of the Entitlement to Claim Criteria for one or more Planned Value Categories, the Contractor may deliver to TfNSW and (where any such Planned Value Category is a Planned Value Category Requiring Certification) the Independent Certifier a notice in the form set out in part C of Schedule 36 (an **Extent of Completion Claim**).
- (b) The Contractor may submit an Extent of Completion Claim at the same time that it submits DDI Deliverables relating to that Extent of Completion Claim for a DDI Review under clause 9.2. However the Contractor acknowledges that if it does so, because the 20 Business Day time period referred to in clauses 9.3(a) and 14.4 would run concurrently, if TfNSW notifies the Contractor of comments on those DDI Deliverables under clause 9.3(a) the Contractor may not be able to satisfy the

Extent of Completion Criteria relating to those DDI Deliverables and therefore the Contractor may have to wait until the next Extent of Completion Claim before satisfying such Extent of Completion Criteria.

- (c) Upon delivering the Extent of Completion Claim, the Contractor must:
  - (i) if the Extent of Completion Claim includes a Planned Value Category Requiring Certification, consult with the Independent Certifier about the tasks necessary to meet the Entitlement to Claim Criteria for that Planned Value Category;
  - (ii) allow TfNSW and (for a Planned Value Category Requiring Certification) the Independent Certifier to attend any relevant Site and take input from appropriately qualified persons regarding specialist activities necessary to meet the Entitlement to Claim Criteria;
  - (iii) provide sufficient information to TfNSW and (for a Planned Value Category Requiring Certification) the Independent Certifier to enable them to determine the extent to which the Entitlement to Claim Criteria have been met in accordance with the requirements of this Deed;
  - (iv) provide copies of any tests derived from the testing and copies of test certificates to TfNSW and (for a Planned Value Category Requiring Certification) the Independent Certifier;
  - (v) provide TfNSW and the Operators with entry onto any relevant Sites required for Transport Functions and to support aspects of the assessment of the extent to which the Entitlement to Claim Criteria have been met;
  - (vi) permit entry onto the relevant Sites and co-ordinate with specialist contractors and persons appointed by TfNSW to undertake the performance of any ETS Entities' Works where applicable;
  - (vii) in respect of the "Operational Establishment" Planned Value Category only, verify that all training, education and support components of the Entitlement to Claim Criteria have been completed; and
  - (viii) facilitate achievement of any necessary accreditation in respect of a Planned Value Category.
- (d) If, at any time, TfNSW considers the Contractor has achieved any Entitlement to Claim Criteria for a Planned Value Category, TfNSW may direct the Contractor to serve on TfNSW and (if the Planned Value Category is a Planned Value Category Requiring Certification) the Independent Certifier an Extent of Completion Claim pursuant to clause 14.2(a). The power under this clause 14.2(d) to issue a direction to the Contractor is to be exercised solely for the benefit of TfNSW.

### **14.3 Independent Certifier**

- (a) The Parties must not impede or hinder the Independent Certifier in the performance of its obligations under this Deed or the Independent Certifier Deed.
- (b) The Parties must provide all information and do all things necessary to enable the Independent Certifier to provide any certification that the Independent Certifier is required to provide under this Deed including the certificates under this clause 14.

- (c) Under no circumstance will TfNSW be liable to the Contractor in respect of any Claim relating to an act or omission of the Independent Certifier under this Deed or under the Independent Certifier Deed.

#### 14.4 Extent of Completion Certificate

- (a) Within 20 Business Days of receipt of an Extent of Completion Claim, TfNSW must issue an Extent of Completion Certificate to the Contractor in respect of that Extent of Completion Claim.
- (b) Each Extent of Completion Certificate must identify, for each Planned Value Category included in the Extent of Completion Claim, the extent to which TfNSW believes the Contractor has met the Entitlement to Claim Criteria for that Planned Value Category (where this has not previously been included in a previous Extent of Completion Certificate i.e. the incremental extent completed) (being the **Extent of Completion**).
- (c) The issue of an Extent of Completion Certificate to the Contractor will not relieve the Contractor of its obligations or liabilities, or constitute a waiver of any of TfNSW's rights, under this Deed.
- (d) If TfNSW is not satisfied that the Entitlement to Claim Criteria have been met as claimed by the Contractor in the Extent of Completion Claim, it will notify the Contractor of deficiencies which require rectification and the reasonable timeframes for rectification and the Contractor must:
  - (i) rectify those deficiencies in accordance with the timeframes specified in TfNSW's notice and notify TfNSW when it has done so, following which the Contractor may include such Planned Value Category in any subsequent Extent of Completion Claim; and
  - (ii) within 20 Business Days of TfNSW's notice, amend the Subsidiary ETS Delivery Program in order to reflect the work required to rectify those deficiencies and the timeframes specified in TfNSW's notice.

#### 14.5 Completion

- (a) Once the Contractor considers it has achieved all of the criteria necessary for Completion of a Planned Value Category or Stage, the Contractor must deliver to TfNSW a notice of Completion in the form set out in part A of Schedule 36, provided that, for the avoidance of doubt, the Date of Certified Completion in respect of the relevant Planned Value Category or Stage will not occur until the date TfNSW issues a Certificate of Completion in accordance with clause 14.5(c). For clarification, the Contractor can deliver such notice of Completion at the same time as its final Extent of Completion Claim for such Planned Value Category or Stage.
- (b) If, at any time, TfNSW considers the Contractor has achieved all of the criteria necessary for Completion of a Planned Value Category or Stage, TfNSW may direct the Contractor to serve on TfNSW a notice of Completion pursuant to clause 14.5(a). The power under this clause 14.5(b) to issue a direction to the Contractor is to be exercised solely for the benefit of TfNSW.
- (c) If TfNSW is satisfied Completion has been achieved for a Planned Value Category or Stage, it will, within 10 Business Days of receiving a notice of Completion pursuant to clause 14.5(a) in relation to that Planned Value Category or Stage,

issue a Certificate of Completion to the Contractor in respect of the relevant Planned Value Category or Stage.

- (d) The issue of a Certificate of Completion to the Contractor will not relieve the Contractor of its obligations or liabilities, or constitute a waiver of any of TfNSW's rights, under this Deed.
- (e) Without limiting any other provision of this Deed, if TfNSW issues a Certificate of Completion under clause 14.5(c) notwithstanding the existence of minor Defects in the ETS Components Delivered, the Contractor must rectify such minor Defects within the reasonable timeframes notified to the Contractor by TfNSW and otherwise in accordance with this Deed.

#### **14.6 Failure to meet Date for Completion**

[Commercial-in-confidence]

#### **14.7 Liquidated damages**

[Commercial-in-confidence]

#### **14.8 Replacement of Independent Certifier**

- (a) If the Independent Certifier Deed is terminated before its scheduled expiry, or if any incumbent Independent Certifier ceases to act as Independent Certifier for the purposes of this Deed, the Parties must, within 10 Business Days after the termination of the Independent Certifier Deed or cessation, agree to appoint another person to act as Independent Certifier.
- (b) The replacement Independent Certifier must:
  - (i) have the appropriate qualifications and experience to act as the Independent Certifier;
  - (ii) have no interest or duty which conflicts with its role as Independent Certifier under this Deed; and
  - (iii) be able and prepared to act in accordance with the terms of the Independent Certifier Deed.
- (c) If the Parties cannot so agree within 20 Business Days of either Party notifying the other Party of such anticipated or actual cessation, either Party may request that the Institute of Arbitrators & Mediators Australia nominate an Independent Certifier who meets the requirements set out in clause 14.8(b), and such Independent Certifier must be appointed as soon as practicable in accordance with the Independent Certifier Deed.
- (d) Following the appointment of a replacement Independent Certifier under clauses 14.8(a) or 14.8(c), the Parties and the replacement Independent Certifier must promptly enter into a replacement independent certifier deed substantially in the form of Schedule 35.
- (e) If for any reason there is no Independent Certifier for any particular period of time, TfNSW will request that the CEO of the Institute of Arbitrators & Mediators Australia appoint an interim Independent Certifier until such time as the Parties agree on a replacement Independent Certifier.

## 15 Ownership

### 15.1 Ownership of ETS

Subject to clause 27, ownership of that part of the ETS Owned Assets which:

- (a) was provided under Stages 1 to 11 (as they existed immediately prior to the Re-Baselining Date) prior to the Re-baselining Date and which is not already vested in TfNSW as at the Re-baselining Date, vests in TfNSW free of encumbrances and third party rights upon the Re-baselining Date; or
- (b) is not referred to in clause 15.1(a), vests in TfNSW free of encumbrances and third party rights upon payment by TfNSW of the relevant component of the ETS Delivery Price for the relevant Extent of Completion that these ETS Components Delivered form a part of.

### 15.2 Ownership of Smartcards

TfNSW will own all Smartcards provided by the Contractor free of encumbrances and third party rights upon delivery.

### 15.3 No retention of ownership

The Contractor must ensure that no Subcontracts include any retention of title clauses or any clauses under which the Subcontractor retains any security or other interest in any item which will become part of the ETS, which would prevent ownership or Transfer of those items passing to TfNSW in accordance with this Deed.

### 15.4 Indemnity

The Contractor indemnifies and agrees to hold harmless the Indemnified Entities against any Loss or Claim suffered or incurred as a result of or in connection with a failure by the Contractor to ensure that TfNSW has unencumbered ownership as required by this Deed.

### 15.5 Ownership in added or replaced components

If the Contractor adds to or replaces any component of the ETS Owned Assets when performing its obligations under this Deed (including by using any Spares Inventory), ownership of the added or replacement items will vest in TfNSW free of encumbrances and third party rights upon delivery or (where applicable) installation.

### 15.6 Risk

Risk of loss or damage to any part of the ETS does not pass to TfNSW unless and until:

- (a) completion of installation of that part at the Sites; or
- (b) for any parts which are not required to be installed at the Sites but are to be delivered to TfNSW, upon receipted delivery into the custody of TfNSW's Representative or a person authorised by TfNSW's Representative to provide such receipted delivery,

provided that:



- (c) any parts of the ETS which are not installed or delivered in accordance with this clause 15.6 will remain at the risk of the Contractor until Transfer in accordance with clause 55.2; and
- (d) nothing in this clause 15.6 limits the Contractor's obligation to remedy Defects in accordance with this Deed.

## 15.7 PPSA

- (a) In this clause 15.7, **PPSA** means the *Personal Property Securities Act 2009* (Cth). If a term which is used in this clause 15.7 has a particular meaning in the PPSA, it has the same meaning in this clause 15.7.
- (b) The Contractor agrees to grant TfNSW a security interest in and over any rights it has in each item of Device Infrastructure that forms a part of the ETS Components Delivered but which has not yet been delivered or installed (as applicable), from the time TfNSW pays the relevant component of the ETS Delivery Price for that Device Infrastructure until such time as that Device Infrastructure is delivered or installed (as applicable), on the terms of the Security Deed (the **Secured Equipment**). For clarification, in accordance with clause 1.8 of this Deed, if there is any inconsistency, ambiguity or discrepancy between the Security Deed and this clause 15.7, this clause 15.7 takes precedence.
- (c) TfNSW is not obliged to make any payment to the Contractor under clause 33 in relation to the Secured Equipment unless the Contractor has complied with its obligations under clause 15.7(b).
- (d) Without limiting any of the Contractor's other obligations under this Deed, the Contractor must:
  - (i) keep the Secured Equipment in its possession and control at all times;
  - (ii) store the Secured Equipment in a manner that clearly shows it is the property of TfNSW (separate from any of the Contractor's other goods at the same location), and not do or omit to do anything to the Secured Equipment to suggest it is the property of the Contractor or any third party;
  - (iii) secure the Secured Equipment from risk, damage and theft, and ensure that the Secured Equipment is kept in a good and serviceable condition; and
  - (iv) provide TfNSW at any time with the right to access, inspect and take possession of the Secured Equipment for any reason.
- (e) TfNSW and the Contractor agree not to disclose information of the kind mentioned in s 275(1) of the PPSA, except in circumstances required by sections 275(7)(b) to (e) of the PPSA.
- (f) The Contractor acknowledges that clause 41.1(a)(i)(A) applies to the Secured Equipment such that the Contractor must effect and maintain an insurance policy or policies providing cover for physical loss, destruction or damage to such Secured Equipment for a sum of not less than the full reinstatement value of such Secured Equipment.



## 16 ETS Operational Services

### 16.1 ETS Operational Services

- (a) Subject to clause 16.1(b), the Contractor must commence providing the ETS Operational Services in respect of:
  - (i) all of the ETS provided under Stages 1 to 11 (as they existed immediately prior to the Re-Baselining Date), on the Re-baselining Date; and
  - (ii) the ETS Components Delivered under each Extent of Completion Certificate, on the day after the date TfNSW issues such Extent of Completion Certificate.
- (b) TfNSW may from time to time notify the Contractor that it requires the ETS Operational Services (or certain of them) with respect to one or more parts or components of the ETS to commence prior to the date contemplated in clause 16.1(a), and if it does so notify the Contractor, the notification will be regarded as a request under clause 26.1(a).

### 16.2 Warranties

The Contractor acknowledges, represents, warrants and undertakes that:

- (a) the Contractor has established quality assurance arrangements for the provision of the ETS Operational Services and will comply with and maintain those quality assurance arrangements during the Term;
- (b) the ETS Operational Services will:
  - (i) be performed in accordance with Good Industry Practice;
  - (ii) be performed so as to ensure that the ETS is and remains Fit for the ETS Purposes; and
  - (iii) comply with all other requirements of this Deed; and
- (c) the Contractor must not enter into any arrangement that materially or clearly impedes its provision of the ETS Operational Services in accordance with this Deed.

### 16.3 Quality Management Plan for ETS Delivery and ETS Operational Services

- (a) The Contractor must provide the ETS Operational Services and the ETS Delivery in accordance with the Quality Management Plan.
- (b) The Contractor must ensure that the Quality Management Plan is and will remain in accordance with applicable Standards and that certification of compliance with such Standards is obtained:
  - (i) within 6 months from the Commencement Date, with respect to the ETS Delivery; and
  - (ii) prior to Completion of Stage 12, with respect to the ETS Operational Services.

(c) The Contractor must:

- (i) at its reasonable cost, have its compliance with the Quality Management Plan both for the ETS Delivery and ETS Operational Services audited by a third party approved by TfNSW during:
    - (A) the first 6 months of the first ETS Delivery Phase, and then at intervals not exceeding 12 months from such initial audit until Completion of Stage 12; and
    - (B) the first 6 months of the Operational Services Term, and then at intervals not exceeding 12 months,unless TfNSW has reason to suspect that the Contractor is not complying with its obligations in relation to the Quality Management Plan, in which case TfNSW may require one additional audit to be performed during any 12 monthly interval referred to in clauses 16.3(c)(i)(A) or 16.3(c)(i)(B);
  - (ii) permit representatives of TfNSW nominated by it to be present during such audit; and
  - (iii) deliver 2 copies of the auditor's report to TfNSW within 5 Business Days of its completion.
- (d) TfNSW has the right at any time to audit, at its own cost, the Contractor's compliance with the Quality Management Plan.
- (e) If the audit performed by TfNSW referred to in clause 16.3(d) reveals that the Contractor is not materially complying with the Quality Management Plan:
- (i) the Contractor must reimburse TfNSW for its reasonable costs of performing such an audit; and
  - (ii) TfNSW will notify the Contractor of the areas of non-compliance with the Quality Management Plan identified through the audit.

#### **16.4 Records**

The Contractor must:

- (a) keep detailed records and reports of the ETS Operational Services; and
- (b) permit TfNSW to inspect and copy such records and reports during normal business hours on reasonable notice.

#### **16.5 Reports**

In addition to the Monthly Reports contemplated under clause 8.6, the Contractor must provide the reports required by this Deed at the times and in such form and content as is required by the Deed.

#### **16.6 Capacity and scale**

The Contractor must provide such additional goods and services as are necessary to ensure that the ETS has sufficient capacity and scale at all times during each Operational Services Phase to comply with this Deed, including the KPIs. The only amounts payable by TfNSW for the provision of any such additional capacity and scale are the Charges.

## 17 Revenue Management

### 17.1 Funds pool

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### 17.2 Contractual relationships

The Contractor must ensure that all contractual relationships in relation to Revenue Management reflect this clause 17 and the Scope of Works and Services.

### 17.3 Compliance with Laws

(a) The Contractor agrees:

- (i) to ensure that the ETS and the ETS Operational Services comply with the *Payment Systems (Regulation) Act 1998* (Cth) and the *Banking Act 1959* (Cth);
- (ii) to comply with the terms of the *Payment Systems (Regulation) Act 1998* (Cth) and the *Banking Act 1959* (Cth) as they apply to the Contractor, TfNSW, the Operators and the ETS and the ETS Operational Services;
- (iii) to provide all reasonable assistance to enable TfNSW and the Operators to comply with the *Payment Systems (Regulation) Act 1998* (Cth) and the *Banking Act 1959* (Cth); and
- (iv) to ensure that the ETS and the ETS Operational Services comply and continue to comply during the Term, with all relevant Laws including:
  - (A) the *Financial Services Reform Act 2001* (Cth) and Corporations Act, Chapter 7;
  - (B) the *Financial Transaction Reports Act 1988* (Cth);
  - (C) the Electronic Funds Transfer Code of Practice;
  - (D) the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth);
  - (E) *A New Tax System (Goods and Services Tax) Act 1999* (Cth);
  - (F) the *Unclaimed Money Act 1995* (NSW);
  - (G) the *Consumer Credit (New South Wales) Act 1995*;
  - (H) Privacy Obligations; and
  - (I) the *Transport Administration Amendment (Public Transport Ticketing Corporation) Act 2005* (NSW).

(b) Without derogating from clauses 17.3(a)(i), (ii) and (iii), the Parties agree and acknowledge that:

- (i) to the extent that the ETS is a purchased payment facility for the purposes of the *Payment Systems (Regulations) Act 1998* (Cth), TfNSW is the holder of Balance on the Smartcard; and
- (ii) if the Australian Prudential Regulation Authority or the Reserve Bank of Australia considers that, to the extent that the ETS is a purchased payment facility for the purposes of the *Payment Systems (Regulation) Act 1998* (Cth) and the Contractor is the holder of the Balance on a Smartcard, that will constitute a Change in Law.
- (c) If the means of payment for a top-up transaction is a credit or charge card purchase transaction, then any refund to the Cardholder that includes the amount of that top-up must be paid to the credit or charge card, unless the Cardholder's credit or charge card account has previously been closed

#### **17.4 Unclaimed moneys**

- (a) The Parties acknowledge and agree that in certain circumstances the Balance on a Smartcard could become subject to the *Unclaimed Money Act 1995* (NSW), including as a consequence of a Smartcard being unutilised for a period of time or lost.
- (b) If the Balance on a Smartcard is subject to the *Unclaimed Money Act 1995* (NSW), the Contractor agrees to comply with that Act and any regulations made pursuant to it, including by:
  - (i) lodging any necessary returns in the prescribed form with the Chief Commissioner of State Revenue; and
  - (ii) administering the payment of any unclaimed money to the Chief Commissioner of State Revenue as required under the *Unclaimed Money Act 1995* (NSW).

#### **17.5 Audit trail**

The Contractor must implement and maintain appropriate system capabilities to log and preserve an audit trail for all material events occurring as part of transactions involving Cardholders. The Contractor will provide a record of those audit events during the Term to TfNSW in a mutually agreed format on a monthly basis.

#### **17.6 Acknowledgement**

The Contractor acknowledges that its liability to make any payment associated with the collection of funds from retail outlets to TfNSW is not in any way dependent on the Contractor having received any payment from any retail outlet or other person.

#### **17.7 Merchant services**

The Parties acknowledge that in relation to the merchant services and other receivables products described in section 5.5(b) of the Scope of Works and Services, including BPoint, EFTPOS and Direct Debit User:

- (a) the Contractor will apply for those merchant services and other receivable products as agent for TfNSW, subject to TfNSW's prior written approval of the associated Product Terms and Conditions;

- (b) the Bank will treat TfNSW as the merchant or receivables owner/biller (e.g. for the purposes of processing transactions throughout Australian Payment Schemes);
- (c) as between TfNSW and the Bank, TfNSW will be liable to the Bank for the performance of the customer's obligations under the relevant Product Terms and Conditions (e.g. TfNSW will be liable for chargebacks); and
- (d) the settlement account for the purposes of those merchant services and other receivable products will be a nominated ETS Account and the Bank is entitled to debit that account for any chargebacks or other amounts owing under the relevant Product Terms and Conditions, notwithstanding that the account may be established as a trust account.

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## 18 Legal relationship with Cardholder

The Parties acknowledge and agree that TfNSW will enter into a contract with each Cardholder in respect of the terms and conditions of use of the Smartcard held by the Cardholder. Such terms and conditions will be determined by TfNSW in its discretion.

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## 19 Corrective action

- (a) If TfNSW, acting reasonably, considers that the Contractor is not performing the ETS Project in accordance with this Deed then, without limiting any provisions of this Deed or the rights or remedies of TfNSW, TfNSW may notify the Contractor of such non-performance and the Contractor must within 10 Business Days of receiving TfNSW's notice provide to TfNSW for its approval a written corrective action plan providing details of how it intends to rectify such non-performance.
- (b) If TfNSW notifies the Contractor that the Corrective Action Plan:
  - (i) does not satisfactorily address the non-performance, TfNSW may require the Contractor to provide a further Corrective Action Plan and this process will continue until TfNSW approves the Corrective Action Plan; or
  - (ii) is approved, the Contractor must immediately implement such Corrective Action Plan.
- (c) TfNSW agrees to notify the Contractor if TfNSW becomes aware that the Contractor is not materially performing the ETS Project in accordance with this Deed.

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## 20 Parallel operation

### 20.1 Parallel operation with existing ticketing systems

- (a) The Contractor acknowledges that:
  - (i) during the Term, the Operators may continue to operate existing ticketing systems; and
  - (ii) at any time during the Term, one or more of the Operators may cease to operate such existing ticketing systems.

- (b) TfNSW agrees to notify the Contractor within a reasonable period after it is notified by an Operator that the Operator proposes to cease operating its existing ticketing systems. If such a notice is given, the Parties agree:
  - (i) to consult in relation to that cessation; and
  - (ii) if TfNSW so directs, the Contractor must comply with the provisions relating to Cutover and Transition in the Scope of Works and Services.
- (c) The Contractor must not do anything to preclude, hinder, interfere with or damage an Operator's existing ticketing system and will provide all reasonable co-operation requested by any of the ETS Entities in relation to such existing systems.

## **20.2 Arrangements are non-exclusive**

- (a) The Contractor acknowledges that no commitments have been made by the ETS Entities:
  - (i) that the ETS will be the sole or preferred ticketing system used by the Operators; or
  - (ii) in relation to:
    - (A) the volume of customers or revenue that the ETS may generate;
    - (B) the take-up rate of Smartcards; or
    - (C) the extent or nature of any marketing or promotional activities by or on behalf of any ETS Entity.
- (b) None of the ETS Entities are under any obligation to use, market or promote the use of the ETS.
- (c) The arrangements under this Deed are non-exclusive, and other than as expressly set out in this Deed the ETS Entities may themselves provide, or engage a third party to provide, the whole or any part of the ETS Project or any other similar goods or services, including by:
  - (i) engaging any third party to provide the whole or part of new or replacement ticketing systems; or
  - (ii) engaging any third party to extend or provide additional functionality related to the ETS.
- (d) If an ETS Entity engages a third party under clause 20.2(c) to provide the whole or any part of the ETS Project and such engagement directly results in a material increase in the Contractor's costs of performing, or time to perform, its obligations under this Deed, the Parties agree to negotiate an appropriate Variation in respect of the Contractor's additional costs. Further, the Contractor will have no responsibility or liability regarding any changes to the schedule or performance of the ETS that directly result from the acts or omissions of such third parties.

## 21 Reviews

### 21.1 Major Reviews

- (a) TfNSW may conduct a review of the Contractor's performance under this Deed following the expiry of three years following the commencement of the Operational Services Term (**Three Year Review**) and/or following the sixth anniversary of the commencement of the Operational Services Term (**Six Year Review**) (each a **Major Review**).
- (b) Where TfNSW determines in its discretion in the course of a Major Review that the Contractor's performance against the requirements under review as set out in clause 21.2 is unsatisfactory, TfNSW may convene a meeting of the leadership teams referred to in clause 4.9 to consider how the results of the Major Review should be addressed.

### 21.2 Conduct of Major Reviews

- (a) As part of the Major Reviews TfNSW will review all or any of the following:
  - (i) the ETS Operational Services provided by the Contractor in relation to all or any of the following areas:
    - (A) the quality and performance of the ETS Operational Services;
    - (B) the Key Performance Indicators;
    - (C) the Charges payable under this Deed together with any other prices or rates set out in Schedule 7; and
  - (ii) the extent to which the ETS is meeting the objectives set out within the Scope of Works and Services;
  - (iii) the Contractor's compliance with its obligations under this Deed in relation to the quality and performance of the ETS Operational Services that are required to be provided under this Deed; and
  - (iv) the Contractor's compliance with its obligations under this Deed in relation to meeting the required Key Performance Indicators.
- (b) Subject to clause 21.2(c), the Contractor must at its own cost promptly provide all information and assistance reasonably required by TfNSW for the purposes of enabling TfNSW to conduct a Major Review, including all ETS Documentation and other information relating to the performance of the ETS Project, such as:
  - (i) all monitoring data and other information;
  - (ii) all details, to a reasonable level under the circumstances of the review, relating to ETS transactions; and
  - (iii) information concerning the extent of the Contractor's compliance with the Key Performance Indicators, including performance metrics and associated data.
- (c) Where the information and assistance to be provided by the Contractor under clause 21.2(b) is in addition to the performance of obligations that the Contractor is

otherwise required to perform under this Deed (such as the Contractor's reporting obligations) and directly results in a material increase in the Contractor's costs of performing its obligations under this Deed, the Parties agree to negotiate an appropriate Variation in respect of the Contractor's additional costs.

- (d) TfNSW is entitled to conduct any part of a Major Review on its own account, independently of the Contractor, provided that TfNSW must:
  - (i) deliver to the Contractor a draft copy of the report prepared in connection with a Major Review before such report is issued in final form;
  - (ii) provide the Contractor with a period of 15 Business Days to review the draft report and respond in writing in relation to any issues arising under the review; and
  - (iii) following consideration of any issues raised under clause 21.2(d)(ii), provide notice to the Contractor of its final determination in relation to the Major Review under clause 21.1.

### 21.3 Minor reviews

The Contractor must:

- (a) continually monitor the ETS to ensure compliance with the performance requirements and Standards set out in the Scope of Works and Services; and
- (b) on an annual basis during the Operational Services Term, provide a report to TfNSW demonstrating the compliance of the ETS with the performance requirements and Standards set out in the Scope of Works and Services.

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## 22 Spares and rotables

- (a) During each Operational Services Phase, the Contractor must establish and maintain in accordance with this Deed:
  - (i) an inventory of rotables and capital spares as specified in the Scope of Works and Services (**Rotables Inventory**); and
  - (ii) an inventory of other spare parts sufficient to meet its obligations under this Deed (**Spares Inventory**),at locations in Greater Sydney approved by TfNSW.
- (b) TfNSW will own the Rotables Inventory and (subject to clause 15.5) the Contractor will own the Spares Inventory.
- (c) Subject to clause 22(d), if at any time either of the Spares Inventory or Rotables Inventory are not at the levels required by this Deed, the Contractor must notify TfNSW and (except for loss due to theft from an Operator's Site that is not caused or contributed to by the Contractor) the Contractor must, at TfNSW's option either:
  - (i) restock such inventory to the levels required at no expense to TfNSW; or
  - (ii) pay to TfNSW an amount equal to the cost of restocking such inventory to the levels required, such amount to be a reduction in the ETS Project Fees payable by TfNSW,



within 10 Business Days (or such other period of time as the Parties may agree) after receiving TfNSW's notice.

- (d) All units in the Rotables Inventory must be new or reconditioned to be equivalent to new.

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## 23 Defects

- (a) The Contractor must monitor the ETS for Defects in accordance with this Deed. ETS Entities may, from time to time, notify the Contractor of Defects.
- (b) The Contractor must report all Defects in accordance with the Scope of Works and Services.
- (c) The Contractor must remedy all Defects of which it becomes aware or which are notified to it by an ETS Entity.
- (d) Where a Defect exists, the Contractor must:

- (i) remedy the Defect:

- (A) as soon as practicable (and in accordance with any applicable KPIs);
    - (B) in accordance with the requirements set out in Schedule 13; and
    - (C) otherwise in accordance with the requirements set out in this clause 23,

regardless of whether the Defect:

- (D) arises in relation to, or is caused by, any component of the ETS; or
    - (E) arises in relation to the overall integration of components across the ETS;

- (ii) take such other measures as are appropriate and reasonable in all the circumstances to enable the uninterrupted operation of the ETS and the continuing performance of the ETS Operational Services in accordance with this Deed, including any applicable KPIs; and

- (iii) comply with clause 40.2 where applicable,

provided that (for clarification) the Contractor will have no liability for any non-compliance with the obligations set out in this clause 23(d) where and to the extent such non-compliance is caused by a defect in the legacy equipment owned by the ETS Entities.

- (e) If it is necessary for the Contractor to perform rectification work, the Contractor must do so at times and in a manner which causes as little inconvenience as is reasonably possible to the ETS Entities, Cardholders and any others who may be affected.
  - (f) If any Defect is not rectified within the required timeframes in accordance with this Deed then, without limiting any other rights that TfNSW may have, TfNSW may itself rectify or have a third party rectify the Defect and any costs incurred by

TfNSW in taking such action will be a reduction in the ETS Project Fees payable by TfNSW.

- (g) The Contractor must provide reports to TfNSW in relation to Defects in accordance with the Scope of Works and Services.
- (h) Without limiting the Contractor's obligations in this clause 23 and this Deed, if and to the extent there is a Defect which:
  - (i) results in the ETS posing a risk of harm or injury to any person;
  - (ii) has a material impact on the performance of the ETS; or
  - (iii) affects 10% or more of a particular component of the ETS in any 6 month period, or the design of the ETS,

TfNSW may, by notice to the Contractor, require the Contractor to remedy that Defect, which may include redesigning and resupplying any component of the ETS where that is necessary to remedy the Defect. If the Contractor becomes aware of the Defect before receiving TfNSW's notice, it must promptly notify TfNSW. The Contractor must remedy the Defect as soon as reasonably practicable after receiving notice from TfNSW, or earlier if the Contractor is aware of the Defect otherwise than as a result of the notice from TfNSW.

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## 24 Non-Contractor Defects

- (a) All of the Contractor's obligations under this Deed in relation to Defects apply in relation to Non-Contractor Defects, except that the Contractor will be relieved from compliance with those KPIs that measure availability to the extent that it is prevented from doing so as a result of a Non-Contractor Defect (but such exception does not limit the application of any other KPIs such as those relating to the timeframes for response or rectification of Non-Contractor Defects). However:
  - (i) the Contractor's cost of attending the location of each Non-Contractor Defect in order to inspect the Non-Contractor Defect and the labour component of any inspection or on-site repair work will be:
    - (A) borne by the Contractor for the first 20 occurrences of Non-Contractor Defects during each month; and
    - (B) otherwise paid for by TfNSW at the applicable rates and prices pursuant to Schedule 7, in accordance with this Deed; and
  - (ii) the Contractor must proceed as if each Non-Contractor Defect is the subject of a notice expressly issued under clause 26.1(a) requesting the Contractor to provide a proposal to perform an Operational Services Variation in respect of the Non-Contractor Defect, provided that the Contractor will not be entitled to any of the following costs in connection therewith:
    - (A) attendance at the location of the Non-Contractor Defect in order to inspect the relevant part or component of the ETS and the labour component of any inspection or on-site repair work (which is only payable in accordance with clause 24(a)(i)); or

- (B) work which the Contractor is otherwise required to provide as part of the ETS Operational Services or under this Deed, other than under clause 23.
- (b) Where the Contractor attends a Site to remedy a Defect, and after inspection it is correctly determined by the Contractor that no Defect exists (i.e. “no fault found”), then:
  - (i) if the Defect was reported by an ETS Entity, and the report was not based on a notification provided by the ETS (e.g. a component showing a Defect status), the Contractor's cost of Site attendance and inspection will (except where clause 24(a)(i)(A) applies) be paid for by TfNSW at the applicable rates and prices pursuant to Schedule 7; and
  - (ii) in all other cases, no additional amounts will be payable by TfNSW.

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## 25 Key Performance Indicators

[Commercial-in-confidence]

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## 26 Operational Services Variations

### 26.1 Operational Services Variations required by TfNSW

- (a) TfNSW may, at any time during an Operational Services Phase by notice expressly under this clause 26.1, request the Contractor to provide a proposal to perform an Operational Services Variation.
- (b) If:
  - (i) TfNSW requests the Contractor to provide a proposal under clause 26.1(a); or
  - (ii) this Deed otherwise requires the Parties to agree an Operational Services Variation,

the Contractor must, subject to clause 26.6, provide to TfNSW a proposal within 20 Business Days of receiving TfNSW's request under clause 26.1(a) or of the event giving rise to the requirement to agree an Operational Services Variation (as applicable), and include in it full particulars of the proposed Operational Services Variation.
- (c) The Contractor must not vary the ETS or the ETS Project during the performance of the Operational Services except:
  - (i) as directed by TfNSW under clause 26.2; or
  - (ii) otherwise in accordance with this Deed.
- (d) The Contractor's proposal referred to in clause 26.1(b) must contain the following:
  - (i) details of the work and activities it proposes to perform the Operational Services Variation together with details of the time frame within which such work and other activities will be performed;

- (ii) the consequential changes (if any) to the Scope of Works and Services;
  - (iii) the proposed prices and payment schedule in respect of performing the Operational Services Variation calculated in accordance with clause 26.3; and
  - (iv) any proposed decrease or increase to the Fixed Service Charge or the Usage Service Charge in respect of changes to the ETS Operational Services as a consequence of the Operational Services Variation calculated in accordance with clause 26.3 and the timeframes when such decreases or increases will take effect.
- (e) TfNSW agrees to respond to the Contractor's proposal as soon as reasonably practicable after its receipt.
- (f) If TfNSW notifies the Contractor in relation to a variation under paragraph (f) of the definition of Operational Services Variation, the Contractor's proposal referred to in clause 26.1(b) must:
  - (i) be valued under clause 26.3 and must have particular regard to the size of the variation; and
  - (ii) include appropriate amendments to the KPIs to include any such additional Operator, with the KPIs in respect of that additional Operator being no less favourable to that Operator than the KPIs applicable to the Operators at the time the Contractor provides its proposal under clause 26.1(d) to TfNSW.

## **26.2 Commencement of Operational Services Variation**

- (a) The Contractor must not commence an Operational Services Variation unless:
  - (i) the Contractor's proposal provided pursuant to clause 26.1(b) has been approved by TfNSW; or
  - (ii) TfNSW has directed the Contractor to so commence the Operational Services Variation, in accordance with clause 26.2(b).
- (b) TfNSW may by notice expressly under this clause 26.2(b) direct the Contractor to commence performing the Operational Services Variation at any time, including before the Contractor's proposal provided under clause 26.1(b) has been approved by TfNSW, in which case, the Operational Services Variation will be valued in accordance with clause 26.3 or in the case of a proposal contemplated under clause 26.1(f), will be valued having regard to clause 26.1(f)(i).
- (c) If the Contractor is directed by TfNSW under clauses 26.2(b) to proceed with an Operational Services Variation, the Contractor must without delay commence and perform the Operational Services Variation in accordance with its terms and this Deed.

## **26.3 Valuation of Operational Services Variation**

- (a) Subject to clauses 26.3(c) and (d), the Contractor must ensure that any proposed increase or decrease of the Fixed Service Charge or Usage Service Charge under clause 26.1(d)(iv) is reasonable having regard to the then current amount of the Fixed Service Charge and Usage Service Charge and the amount charged by the Contractor or third parties for providing similar services.

- (b) The Contractor must attach evidence of amounts charged by third parties or the Contractor for similar services to its proposal under clause 26.1(d)(iv).
- (c) The Parties agree that the value of any additional work, Software or equipment to be provided by the Contractor as part of a Operational Services Variation will be determined on the basis of the rates and prices set out in Schedule 7 (adjusted as appropriate in accordance with Schedule 8) to the extent that they are applicable or it is reasonable to use them for valuing the work and activities proposed to be undertaken in accordance with this clause 26.3(c).
- (d) If the rates and prices set out in Schedule 7 are not appropriate for the work and activities proposed to be undertaken by this clause, the Operational Phase Variation must be valued on the basis of:
  - (i) the Direct Costs; and
  - (ii) the Direct Savings,of the Operational Services Variation.

#### **26.4 Decision by TfNSW not to proceed**

If at any time prior to approval of the Operational Services Variation by TfNSW under clause 26.2(a)(i) TfNSW elects not to proceed with the Operational Services Variation referred to in clause 26.1(a), TfNSW will so notify the Contractor, whereupon the provisions of this clause 26 will no longer apply in respect of the relevant request.

#### **26.5 Contractor's costs**

- (a) Except where clause 26.5(b) applies, TfNSW is under no obligation to pay the Contractor's costs of investigating and preparing a proposal to perform an Operational Services Variation.
- (b) If the Contractor demonstrates to the reasonable satisfaction of TfNSW that significant additional resources are required to investigate and prepare a proposal to perform an Operational Services Variation, the Parties will negotiate in good faith a reasonable amount payable by TfNSW to the Contractor in respect of the Contractor's investigation and preparation of the proposal. TfNSW acknowledges that the Contractor may require additional resources to investigate and prepare an Operational Services Variation if its then current Personnel are fully committed to meeting the Contractor's existing obligations under this Deed.

#### **26.6 Reduction in scope**

- (a) If the Contractor believes it is not commercially viable for it to continue performing its obligations under this Deed if an Operational Services Variation requested by TfNSW under clause 26.1(a) would, if implemented, significantly reduce the scope of those obligations (**Scope Reduction Variation Request**), the Contractor must (in lieu of its other obligations under this clause 26, except where clause 26.6(b)(ii) applies):
  - (i) notify TfNSW accordingly within 20 Business Days of receiving the Scope Reduction Variation Request; and
  - (ii) provide all applicable information and source documentation to TfNSW:
    - (A) on an "open book" transparent basis;

- (B) evidencing the Contractor's costs of performing its obligations under this Deed; and
  - (C) evidencing the proportionate increase in those costs as a percentage of the Contractor's revenue from the ETS Project due to the Scope Reduction Variation Request (**Proportionate Increase**).
- (b) If the Contractor gives TfNSW a notice under clause 26.6(a) TfNSW may elect to:
  - (i) withdraw the Scope Reduction Variation Request; or
  - (ii) direct the Contractor to comply with the remainder of this clause 26 in relation to the Scope Reduction Variation Request and the Contractor must comply with such direction without delay, provided that:
    - (A) the Contractor will be entitled to the amounts determined in accordance with Schedule 10 as if the Scope Reduction Variation Request were a partial termination for the convenience of TfNSW;
    - (B) the Parties will meet to discuss the impacts of the Contractor proceeding with the Scope Reduction Variation Request and will negotiate in good faith an appropriate variation to the ETS Project Fees to reflect the Proportionate Increase arising directly from the Scope Reduction Variation Request; and
    - (C) the Contractor will not be entitled to any other form of relief or compensation in respect of its compliance with the Scope Reduction Variation Request.
- (c) If the Parties are unable to agree a variation to the ETS Project Fees under clause 26.6(b)(ii)(B) within 30 Business Days of the Contractor's notice provided under clause 26.6(a), either Party may have the matter resolved in accordance with the Dispute Resolution Procedures.

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## 27 Intellectual Property

[Commercial-in-confidence]

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## 28 Commercial rights

- (a) Without limiting any other provisions of this Deed, but subject to clause 27.3(c) and any inconsistent terms of use for Third Party Licensed IP approved by TfNSW in accordance with clause 27.4, the Contractor acknowledges that TfNSW has, or is granted under this Deed, all rights and benefits it requires in order to exploit the ETS for commercial purposes.
- (b) The Contractor agrees and acknowledges that, in the absence of any express agreement with TfNSW to the contrary, it has no rights to exploit the ETS for commercial purposes.
- (c) For the purposes of this clause 28, commercial purposes includes:
  - (i) any use, modification or extension or proposed use, modification or extension of the ETS, for purposes other than in respect of the ETS Project;

- (ii) use of Smartcards issued in accordance with this Deed for purposes other than in respect of the ETS Project;
- (iii) branding or proposed branding of the ETS or Smartcards;
- (iv) advertising or proposed advertising on the ETS or on Smartcards;
- (v) the involvement or proposed involvement of Smartcards in a loyalty or marketing scheme;
- (vi) use of information, including trend and Personal Information, derived from the ETS; and
- (vii) any other use or exploitation of any part of the ETS that TfNSW owns.

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## **29 Confidentiality and publicity**

### **29.1 Obligations of confidence**

- (a) Each Party agrees to keep confidential, and not to use or disclose, other than as permitted by this Deed, any Confidential Information of the other Party.
- (b) These obligations of confidence extend to Confidential Information provided to or obtained by a Party prior to entry into this Deed.

### **29.2 Permitted disclosures**

- (a) Each Party may use and disclose Confidential Information of the other only on a “need-to-know” and confidential basis:
  - (i) with the prior written consent of the other Party;
  - (ii) to its officers, agents, professional advisers (including lawyers), employees, contractors, subcontractors and insurers;
  - (iii) to its Related Bodies Corporate and their officers, agents, professional advisers, employees, contractors, and subcontractors;
  - (iv) to any auditor appointed under this Deed;
  - (v) (in the case of TfNSW) to any sublicensee of the Licensed IP; and
  - (vi) to the Independent Certifier, any Expert appointed under this Deed and to any Escrow Agent,for the exercise of rights or the performance of obligations under this Deed, and (in the case of TfNSW) to any third party in connection with any Transfer referred to in clause 55.2.
- (b) Each Party who discloses Confidential Information of the other pursuant to clause 29.2(a) must ensure that such information is kept confidential by the Party to whom it is disclosed.
- (c) Either Party may at any time require a Party who discloses Confidential Information pursuant to clause 29.2(a) to provide the other Party with a confidentiality deed in favour of the Disclosing Party and executed by the Party to whom it is disclosed, as



appropriate, containing terms and conditions similar in all material respects to those in this clause 29.

- (d) Notwithstanding anything to the contrary in this Deed, either Party may disclose Confidential Information of the other Party where such Confidential Information:
  - (i) is required to be disclosed by applicable Law, or by a court or Authority, provided that, prior to disclosing any such Confidential Information, the Party making the disclosure has promptly notified the other Party to allow that Party to take all reasonable steps to maintain such Confidential Information in confidence; or
  - (ii) is required to be disclosed in accordance with the rules of any stock exchange upon which the securities of the Party making the disclosure are listed, provided that prior to making such statement, the Party consults with the other Party about the form and content of the statement.
- (e) Following reasonable notice to the Contractor, TfNSW may publish on a NSW Government internet web site the contents of any Project Agreement to which TfNSW is a party, provided that TfNSW:
  - (i) acts in accordance with applicable Laws and Government policies and guidelines from time to time, including the *Freedom of Information Act 1989* (NSW) and the NSW Premier's Memorandum M2007-01 Public Disclosure of Information arising from NSW Government Tenders and Contracts, when determining what contents of any such Project Agreement are to be so published; and
  - (ii) consults with the Contractor in relation to the non-disclosure of the Contractor's commercial-in-confidence information to the extent permitted under applicable Laws, Government policies and guidelines. As at the Execution Date, section 15A of the *Freedom of Information Act 1989* (NSW) provides that the following commercial-in-confidence information is not required to be disclosed under that Act:
    - (A) the Contractor's financing arrangements;
    - (B) the Contractor's cost structure or profit margins;
    - (C) the Contractor's full base case financial model;
    - (D) any intellectual property in which the Contractor has an interest; or
    - (E) any matter whose disclosure would place the Contractor at a substantial commercial disadvantage in relation to other contractors or potential contractors, whether at present or in the future.
- (f) Nothing in this clause 29 will prevent TfNSW from disclosing any information obtained from the Contractor to any other ETS Entity or to any person engaged by an ETS Entity in connection with this Deed provided that in disclosing the information the ETS Entity has required that the information is treated as confidential.



### **29.3 Publicity**

- (a) The Contractor may not make any public statement about any part of the Project Agreements, or anything related to the subject matter of any part of the Project Agreements, without the prior written consent of TfNSW.
- (b) Clause 29.3(a) will not apply where the Contractor is required to make a public statement in order to comply with the rules of any stock exchange upon which the securities of the Contractor or Related Body Corporate are listed and the Contractor complies with clause 29.2(d)(ii), provided that, prior to making such statement, the Contractor consults with TfNSW regarding the form and content of the statement.

### **29.4 Right to injunctive relief**

The Receiving Party acknowledges that monetary damages may not be a sufficient remedy for a breach of its obligations under this clause 29, and that the Disclosing Party will be entitled, without limiting any of its other rights or remedies, to such injunctive or equitable relief as may be deemed proper by a court of competent jurisdiction if any such breach occurs.

### **29.5 Actions on termination, expiry or TfNSW request**

- (a) Subject to any ongoing right to use Confidential Information or Licensed IP under this Deed, immediately upon termination or expiration of this Deed or on request by TfNSW, the Receiving Party must immediately return to the Disclosing Party, destroy or, in the case of machine readable records, delete all Confidential Information of the Disclosing Party in the Receiving Party's possession or control.
- (b) When the Receiving Party has complied with its obligations under clause 29.5(a), it must certify to the Disclosing Party that all such Confidential Information has been returned, destroyed or deleted.

### **29.6 Information**

The Contractor must as soon as reasonably practicable notify TfNSW of the following:

- (a) any smartcard ticketing projects or related projects which the Contractor or any Related Body Corporate has been awarded either in Australia or overseas, except (and only for so long as) the Contractor is prohibited from doing so as a result of any applicable confidentiality obligations on it or the relevant Related Body Corporate;
- (b) any Event of Default;
- (c) any litigation, arbitration or administrative proceedings taking place, pending or threatened, affecting the Contractor or a Related Body Corporate which could materially impact on the ETS Project or the performance by the Contractor of its obligations under this Deed;
- (d) any substantial dispute between the Contractor and any Subcontractor or third party the outcome of which may impact on the ETS Project or the performance by the Contractor of its obligations under this Deed; and
- (e) any change in the financial position or prospects of the Contractor or a Related Body Corporate which may impact on the ETS Project or the performance by the Contractor of its obligations under this Deed.

## 30 Record keeping and reporting

### 30.1 State Records

The Contractor must:

- (a) keep all State Records in respect of the ETS Project in safe custody and preserve all such State Records;
- (b) provide each ETS Entity with any State Record it requires for the purpose of any legislation pertaining to the creation, management and protection of the records of public offices of the State and the provision of public access to those records, including the *State Records Act 1998* (NSW);
- (c) ensure that all State Records are in a format reasonably accessible to, and able to be read and interpreted by, the ETS Entities;
- (d) co-operate with and assist the ETS Entities, including by providing access to State Records, in respect of any request received by the ETS Entities from the State Records Authority pursuant to the *State Records Act 1998* (NSW) and comply with all reasonable requests and directions made by the ETS Entities to enable the ETS Entities to comply with their obligations pursuant to the *State Records Act 1998* (NSW) and the *State Records Regulation 2005* (NSW); and
- (e) comply with the guidelines for administrative practice set out in Schedule 1 of the *State Records Regulation 2005* (NSW) in respect of State Records.

### 30.2 Freedom of information

- (a) The Contractor agrees to assist and co-operate with the ETS Entities in respect of any request made by a third party pursuant to the *Freedom of Information Act 1989* (NSW).
- (b) The Contractor releases and indemnifies and agrees to hold harmless the Indemnified Entities against any Loss or Claim suffered or incurred as a result of or in connection with an Indemnified Entity performing its obligations, or what in its reasonable opinion formed on the basis of legal advice, are its obligations, pursuant to the *Freedom of Information Act 1989* (NSW) in respect of information relating to the ETS or the ETS Project.

### 30.3 Public Finance and Audit

- (a) The Contractor acknowledges that it is an "Accounting Officer" (as that expression is defined in the *Public Finance and Audit Act 1983* (NSW)) (**PFA Act**) in respect of certain money and property (**Public Property**) which forms part of or is collected, received or held in respect of the ETS.
- (b) The Contractor must:
  - (i) all times during the Term and without limiting the Contractor's obligations under any other provision of this Deed, comply with the PFA Act and any regulations made pursuant to it in respect of any Public Property;
  - (ii) prior to Completion of Stage 2 (as it existed immediately prior to the Re-baselining Date), seek and obtain the approval of the New South Wales Treasurer to the opening of the ETS Accounts;

- (iii) deposit any Public Property received, collected or held by the Contractor into the ETS Accounts;
- (iv) account for any money (including Public Money (as defined in the PFA Act)) held for or on behalf of ETS Entities held in any account with a bank, building society or credit union and upon request by the Auditor General (or a person authorised by the Auditor General) made pursuant to the PFA Act provide a statement of account or certificate as to the balance of the account or any other book, account, record or document;
- (v) co-operate with and provide all reasonable assistance to each ETS Entity necessary in relation to any special audit or other audit or inspection conducted or to be conducted by the Auditor General pursuant to the PFA Act;
- (vi) keep and maintain all proper books of account and other records in respect of the ETS in such form as is reasonably required by each of the ETS Entities and which comply with the PFA Act, including providing such information to the relevant ETS Entities within 4 weeks of the end of each financial year to ensure that they are able to comply with sections 41A and 41B of the PFA Act in respect of the ETS; and
- (vii) to keep and maintain books of account and other records as required of the "Accounting Officer" by and in accordance with the PFA Act.

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## 31 Updated Design Documentation

### 31.1 Provision of updated Design Documentation

- (a) The Contractor must update and provide to TfNSW all finalised Design Documentation produced pursuant to clauses 9 and 32.1:
  - (i) on a continuing basis throughout the Term, to ensure that at all times, the Design Documentation:
    - (A) contains sufficient information to enable the ETS Entities to continue using the ETS and use and receive the benefit of the ETS Operational Services in accordance with this Deed; and
    - (B) accurately and consistently reflects any material changes made to the ETS and the ETS Operational Services from time to time (including any operational or configuration changes); and
  - (ii) at intervals not exceeding 6 months, to ensure that the Design Documentation accurately and consistently reflects all changes made to the ETS and ETS Operational Services from time to time, including any non-material changes.
- (b) The Contractor must, as soon as reasonably practicable, supply the updated Design Documentation to TfNSW if in any other circumstances during the Term:
  - (i) the performance of any part of the ETS Project necessitates an update to the Design Documentation; or
  - (ii) the Design Documentation is inaccurate or out of date.

### 31.2 Warranties

The Contractor acknowledges, represents, warrants and undertakes that the Design Documentation prepared and made available by the Contractor from time to time throughout the Term in accordance with clause 31.1:

- (a) accurately and consistently reflects any changes made to the ETS and the ETS Operational Services from time to time;
- (b) comprises all of the documentation that is reasonably required by the ETS Entities for the use of the ETS and the ETS Operational Services at the relevant time in accordance with the terms of this Deed;
- (c) will be reasonably sufficient, adequate and accurate so as to enable TfNSW or an appropriately trained, skilled and experienced third party to operate and maintain the ETS;
- (d) will be reasonably sufficient to ensure that if the ETS is developed, integrated, installed, implemented, operated and maintained in accordance with the Design Documentation by appropriately trained, skilled and experienced Personnel, the ETS will be Fit for ETS Purposes; and
- (e) otherwise meets the warranties set out in clauses 9.4(a) and (b).

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## 32 Documentation, training and services

### 32.1 Documentation

- (a) Throughout the Term, the Contractor must provide comprehensive documentation and services to the extent required:
  - (i) to enable the ETS Entities to use the ETS and receive the ETS Operational Services in accordance with the terms of this Deed; and
  - (ii) to enable TfNSW (or its nominee) to take over all or any of the obligations, roles and responsibilities of the Contractor, or to direct any other person to assume any of those obligations, roles and responsibilities:
    - (A) pursuant to the exercise of its Step-In Rights; and
    - (B) following the termination or expiry of this Deed.
- (b) The services under clause 32.1(a) include the ongoing provision of updated Design Documentation and all other documentation required to transfer knowledge from the Contractor to TfNSW in relation to the methods and skills used by the Contractor to develop and operate the ETS, to interface the ETS with the Operators' Environments, and to provide the ETS Operational Services in accordance with this Deed.

### 32.2 Provision of training

- (a) The Contractor must provide training in accordance with this Deed.
- (b) TfNSW may require the Contractor to provide training in addition to that required in this Deed and if it does so, TfNSW may request the Contractor to provide a

proposal to perform an ETS Delivery Phase Variation or an Operational Services Variation.

- (c) Unless the Parties agree otherwise, the training referred to in this clause 32.2 will be provided at the nominated premises of the relevant Operators.

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## 33 ETS Delivery Payment

[Commercial-in-confidence]

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## 34 Charges for ETS Operational Services

[Commercial-in-confidence]

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## 35 Stability

### 35.1 Stability Period

- (a) During any applicable Stability Period for a Stage, the Contractor must ensure that the Stage meets the relevant Stability Requirements.
- (b) A failure to meet the relevant KPIs during a Stability Period will, subject to clause 25(a), entitle TfNSW to Abatements in accordance with Schedule 9.

### 35.2 Consequences of failure to achieve the Stability Requirements

In addition to TfNSW's other rights under this clause 35, if the Stability Requirements are not met in respect of any Stage within 12 months of the commencement of the Stability Period for that Stage then:

- (a) TfNSW may reject that Stage (or in the case of Stage 12, all of the ETS provided under Stages 1 to 11 (as they existed immediately prior to the Re-baselining Date) in addition to Stage 12) and all payments made by TfNSW to the Contractor in connection with that Stage (or in the case of Stage 12, all of the ETS provided under Stages 1 to 11 (as they existed immediately prior to the Re-baselining Date) in addition to Stage 12) will be a reduction in the ETS Project Fees payable by TfNSW; and
- (b) notwithstanding any other provision of this Deed to the contrary, this constitutes an Event of Default.

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## 36 Security Bonds

### 36.1 Replacement of bonds

- (a) Subject to the release of the Security Bonds under clause 36.4, the Contractor must, at least 1 month prior to the anniversary of the Commencement Date each year, provide TfNSW:
  - (i) with respect to the ETS Delivery Security Bond either:

- (A) an extension certificate for the current ETS Delivery Security Bond for a further period of no less than 3 years from the relevant anniversary; or
  - (B) a replacement ETS Delivery Security Bond in the same form and substance to that set out in Schedule 27, or in a form and substance which is otherwise satisfactory to TfNSW acting reasonably, for the total amount of the ETS Delivery Security Bond, less any proceeds of the ETS Delivery Security Bond demanded and received by TfNSW prior to that time, with an expiry date no earlier than 3 years from the relevant anniversary;
- (ii) on and from the date on which the Operational Services Security Bond is provided by the Contractor under clause 34.1(b), with respect to the Operational Services Security Bond, either:
  - (A) an extension certificate for the current Operational Services Security Bond for a further period of no less than 3 years from the relevant anniversary; or
  - (B) a replacement Operational Services Security Bond in the same form and substance to that set out in Schedule 27, or in a form and substance which is otherwise satisfactory to TfNSW acting reasonably, for the total amount of the Operational Services Security Bond, less any proceeds of the Operational Services Security Bond demanded and received by TfNSW prior to that time, with an expiry date no earlier than 3 years from the relevant anniversary; and
- (iii) with respect to:
  - (A) the Contract Mobilisation Bond;
  - (B) the PDR Security Bond; and
  - (C) on and from the date on which each Stage Bond is provided by the Contractor under clause 33.3, the relevant Stage Bond,

(together, **Mobilisation, Stage and PDR Bonds**) either:

  - (D) an extension certificate for each current Mobilisation, Stage and PDR Bond for a further period of no less than 1 year from the relevant anniversary; or
  - (E) a replacement Mobilisation, Stage and PDR Bond in the same form and substance to that set out in Schedule 27 for the applicable type of Mobilisation, Stage and PDR Bond, or in a form and substance which is otherwise satisfactory to TfNSW acting reasonably, for the total amount of the relevant Mobilisation, Stage and PDR Bond, less any proceeds of such Mobilisation, Stage and PDR Bond demanded and received by TfNSW prior to that time, with an expiry date no earlier than 1 year from the relevant anniversary.
- (b) If TfNSW does not receive the extension certificates or replacement Security Bonds required under clause 36.1(a) at least 1 month prior to the anniversary of the Commencement Date each year, TfNSW is entitled to demand and receive the proceeds of the current Security Bonds and deposit those proceeds in a bond

security account with an Australian financial institution with a credit rating of no less than A- (S&P) maintained by TfNSW.

- (c) If the Contractor provides TfNSW with a replacement bond in accordance with clause 36.1(a)(i)(B) or 36.1(a)(ii)(B), the Parties must exchange the relevant existing bond held by TfNSW for the replacement bond.

### **36.2 Access of TfNSW to Security Bonds**

- (a) Without in any way limiting TfNSW's rights to demand, receive or use the proceeds of the Security Bonds, TfNSW is entitled to demand, receive and use the proceeds of the Security Bonds whenever it asserts a right to the payment of moneys by the Contractor under this Deed for an amount greater [REDACTED]  
[REDACTED]
- (b) In the event TfNSW receives the proceeds of a Security Bond in excess of an amount that the Contractor is ultimately determined to owe TfNSW under the Dispute Resolution Procedure, the excess funds will be returned to the Contractor, with such interest as may be determined pursuant to such Dispute Resolution Procedure.

### **36.3 Contractor not to injunct TfNSW**

The Contractor must not take any steps to injunct or otherwise restrain:

- (a) any issuer of a Security Bond from paying TfNSW pursuant to the Security Bond;
- (b) TfNSW from taking any steps which may be a precondition to obtaining payment under the Security Bonds; or
- (c) TfNSW using the money received under the Security Bonds.

### **36.4 Return of Security Bonds**

TfNSW will reduce the Security Bonds as follows:

- (a) upon the expiration of the Stability Period for Stage 12, TfNSW must return to the Contractor the balance of the ETS Delivery Security Bond then held;
- (b) within 5 Business Days after the Re-Baselining Date, TfNSW must return to the Contractor the Contract Mobilisation Bond and the PDR Security Bonds;
- (c) within 20 Business Days after the Date of Certified Completion of the Stage(s) or Planned Value Category(ies) to which it relates, or as otherwise specified in Schedule 3, TfNSW must return to the Contractor the Stage Bond; and
- (d) at the expiration of the Term or termination of this Deed and due compliance by the Contractor of all of its obligations to TfNSW, TfNSW must return to the Contractor the balance of the Security Bonds then held.

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## **37 Expenses, stamp duties and GST**

### **37.1 Expenses**

Each Party must bear:



- (a) its own costs, including professional costs and disbursements, associated with the preparation and execution of the Project Agreements and any subsequent consent, agreement, approval or waiver hereunder or amendment thereto; and
- (b) unless this Deed expressly provides otherwise, the costs associated with performing its obligations under any Project Agreement.

### 37.2 Stamp duties

As between the Parties, the Contractor must pay all stamp, registration and similar taxes including fines and penalties 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 (other than the stamp duty referred to in clause 58.23, which must be paid by TfNSW).

### 37.3 GST

- (a) All capitalised terms used in this clause 37.3 (unless defined elsewhere in this Deed) have the meanings ascribed to those terms by the GST Act.
- (b) If, under the terms of this Deed, the Contractor is entitled to be reimbursed by TfNSW for an amount paid by the Contractor to any third party in consideration for any Supply made by the third party, including any amount paid under clause 12, then the amount payable by TfNSW for the purposes of clause 37.3(c) will be the amount paid by the Contractor less any amounts in respect of GST included in the consideration provided by the Contractor to such third party (whether or not such amounts of GST are separately identified by the third party supplier to the Contractor). This clause is subject to clause 37.3(c) below.
- (c) Subject to clause 37.3(da), all amounts payable by TfNSW under the terms of this Deed (including clause 37.3(b)) are calculated to be exclusive of GST. If GST becomes payable in respect of any Supply made by the Contractor to TfNSW under or in connection with this Deed (**Contractor's GST liability**), the amount otherwise payable to the Contractor under this Deed will be increased by the amount of the Contractor's GST liability. Subject to the receipt of a valid Tax Invoice, the increased amount will be payable by TfNSW in the same manner and at the same time as required by the other relevant terms of this Deed.
- (da) Clause 37.3(c) does not apply in relation to the Retail Outlet Commission. The Retail Outlet Commission is calculated to be inclusive of GST. The Contractor must provide TfNSW with a valid Tax Invoice for the GST payable in relation to any Retail Outlet Commission that has been deducted during a calendar month in accordance with clause 17.1(e), within 5 Business Days of the end of that calendar month.
- (d) If GST becomes payable in respect of any Supply (if any) TfNSW makes to the Contractor under or in connection with this Deed, including any Supply made in relation to any guarantee, indemnity or Security Bond given under or in connection with this Deed (**TfNSW's GST Liability**), TfNSW may recover from the Contractor an amount equal to TfNSW's GST Liability in addition to any other amount or consideration payable under this Deed. Any additional amount on account of GST recoverable from the Contractor under this clause 37.3(d) will be calculated without any deduction or set-off of any other amount and is payable by the Contractor upon demand by TfNSW whether such demand is by means of an invoice or otherwise.



- (e) If any of the taxes, duties, excises or other imposts paid or payable by the Contractor in accordance with its obligations under this Deed are abolished or reduced the Contractor must, within 2 months of each such abolition or reduction, calculate the extent to which the Contractor's costs in performing its obligations under this Deed have been reduced. The Contractor must pass the benefit of all such reductions in its costs to TfNSW by reducing amounts otherwise payable by TfNSW under this Deed.
- (f) Upon 5 Business Days of completion of the calculations required under clause 37.3(e), the Contractor must notify TfNSW of the reduction in amounts payable by TfNSW and the Contractor's basis of calculation. If TfNSW is for any reason dissatisfied with the basis of the Contractor's calculation or the extent to which the Contractor's reductions in cost (whether or not such reductions in cost are acknowledged by the Contractor) have been included in lower amounts payable under this Deed, then upon TfNSW providing a notice to the Contractor under this clause 37.3(f), the matters to be determined under this clause 37.3 will be referred for determination by an Expert in accordance with clause 50.

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## 38 Escrow of Escrow Materials

### 38.1 Deposit of Escrow Materials

The Contractor must deposit and maintain the Escrow Materials (irrespective of whether or not the Escrow Materials have been especially customised or developed for the purposes of this Deed or developed by the Contractor), in escrow with the Escrow Agent, and must comply with all other aspects of the Escrow Agreement. To the extent any Escrow Materials have not been deposited in escrow with the Escrow Agent at the Re-baselining Date (including any new Escrow Materials for any new Stage as part of a Variation), the Contractor must initially deposit the Escrow Materials with the Escrow Agent for each part of the ETS as it is delivered in accordance with the timeframe for such deposit described in Appendix A8 of the Scope of Works and Services, and thereafter must update such Escrow Materials in accordance with clause 38.2.

### 38.2 Updating of Escrow Materials

- (a) Whenever any Modification is made, the Contractor must deliver to and deposit with the Escrow Agent whatever additional material is required to make the Escrow Material equivalent to the then current version of the Software, documentation or other material being used in relation to the ETS Project. Clauses 38.2(b) and 38.2(c) set out the required timeframes within which such delivery and deposit must take place.
- (b) The Contractor must ensure that where there is any Major Modification, the Contractor has deposited with the Escrow Agent a copy of the relevant updated item of the Escrow Materials within 5 Business Days of the date on which the Major Modification was accepted by or provided to TfNSW or otherwise installed in the ETS (as the case may be). TfNSW may, acting reasonably, inform the Contractor that a particular Modification is to be treated as a Major Modification.
- (c) The Contractor must ensure that where there is any Minor Modification, the Contractor may aggregate all such Minor Modifications and provide a copy of the relevant updated items of the Escrow Materials on a quarterly basis where there were any Minor Modifications made in the previous quarter.

### 38.3 Release of Escrow Materials

- (a) Subject to clause 38.3(d), TfNSW will be entitled, at no additional cost to TfNSW to be provided with the Escrow Materials at any time if any of the following events occur:
  - (i) the Contractor becomes or threatens to become or is in jeopardy of becoming subject to an Event of Insolvency or ceases or threatens to cease conducting business in the normal manner;
  - (ii) the Escrow Agent becomes or threatens to become or is in jeopardy of becoming subject to an Event of Insolvency;
  - (iii) TfNSW, acting on independent professional advice, is reasonably of the view that an Event of Insolvency will or is likely to occur in relation to the Contractor or the Escrow Agent or any of their respective Related Bodies Corporate acting as a guarantor under the Project Deed or the Escrow Agreement within a 12 month period;
  - (iv) an Event of Default occurs;
  - (v) TfNSW terminates this Deed for any reason;
  - (vi) upon the expiration of this Deed;
  - (vii) the Contractor is in material breach of the Escrow Agreement;
  - (viii) the Contractor fails or becomes unable to provide or procure a reputable and qualified person to maintain the Licensed IP in a prompt and efficient manner; or
  - (ix) the Escrow Agent is in material breach of the Escrow Agreement,(each, a **Release Event**).
- (b) If a Release Event occurs, subject to clause 38.5 the Parties agree that the Escrow Agent must release the Escrow Materials to TfNSW in accordance with the Escrow Agreement.
- (c) If a Release Event occurs, all Escrow Materials released to TfNSW as a result will remain subject to the terms and conditions of clauses 27 and 29 of this Deed.
- (d) This clause 38.3 will not apply to Contractor Licensed IP for which the licence has been terminated under clause 27.3.

### 38.4 Warranty of accuracy

- (a) The Contractor acknowledges, represents, warrants and undertakes that:
  - (i) release of the Escrow Material will allow TfNSW and other ETS Entities or third parties engaged by TfNSW or other ETS Entities to use the Source Code for the purposes of the continuation of the ETS Project (including that the Source Code will be able to be recompiled) provided that the individuals using the Source Code are appropriately qualified and trained;
  - (ii) it must advise the Escrow Agent and TfNSW of any change required by this clause 38 or the Escrow Agreement in relation to the Escrow Material (as a

result of any change in Software, documentation or other material used by TfNSW for the purposes of the ETS Project);

- (iii) it must ensure that the Escrow Material is current and accurate, and reflective of the relevant versions of the Escrow Material used by TfNSW in relation to the ETS Project (subject only to the specific requirements set out in clause 38.2); and
  - (iv) it must advise TfNSW of any addition to, or deletion of, any Escrow Material deposited with the Escrow Agent.
- (b) The Contractor acknowledges that TfNSW relies on the above warranty, representation and undertaking in entering into this Deed and the Escrow Agreement.

### 38.5 Expiry or termination of Escrow Agreement

If for any reason the Escrow Agreement is terminated or expires:

- (a) the Contractor must immediately deliver the Escrow Materials to TfNSW and TfNSW agrees not to use such Escrow Materials unless a Release Event occurs; and
- (b) the Parties must promptly enter into a replacement escrow agreement in a form reasonably satisfactory to TfNSW and in any event within 10 Business Days of such termination or expiry, with a new escrow agent nominated by TfNSW, following which, TfNSW must deliver the Escrow Materials to such new escrow agent.

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## 39 Viruses and hacking

- (a) The Contractor must ensure that:
  - (i) the ETS is and remains free of Viruses to the extent that the Contractor, conducting quality assurance tests in accordance with Good Industry Practice, can detect such Viruses;
  - (ii) it does not, as a result of the performance of the ETS Project, including that relating to integration and interfaces, insert any Viruses into the Operators' Environments;
  - (iii) it takes all steps in accordance with Good Industry Practice to ensure the ETS is secure and impermeable against, and its functionality and performance is not reduced by, any:
    - (A) unauthorised access (including for example hacking for fare evasion);
    - (B) denial of service attack; or
    - (C) other attack or abuse,(each a **Security Breach**);
  - (iv) it has adequate intrusion detection and monitoring to detect Security Breaches when they occur and to contain and minimise any resulting adverse impacts;

- (v) all information stored on or transmitted using the ETS is stored and transmitted securely; and
  - (vi) only Contractor Personnel who need to use and access the ETS for the purposes of allowing the Contractor to perform work under this Deed are permitted to access and use the ETS.
- (b) Without limiting clause 39(a), the Contractor must not activate any Virus for the purpose of disabling or limiting TfNSW's use of the ETS or the ETS Operational Services at any time, even after termination or expiry of this Deed.
- (c) Without limiting TfNSW's other rights or remedies, if a Security Breach occurs with respect to the ETS or a Virus is introduced into:
- (i) the ETS and except to the extent the Contractor can demonstrate that the Security Breach occurred or the Virus was introduced as a result of an act of an ETS Entity; or
  - (ii) any of the Operators' Environments a result of the Contractor's act or omission,
- then the Contractor must notify TfNSW as soon as reasonably practicable upon becoming aware of it.
- (d) In relation to a Virus or Security Breach notified by the Contractor under clause 39(c) or which an ETS Entity notifies the Contractor, the Contractor must do either or both of the following:
- (i) immediately remedy; and/or
  - (ii) provide all necessary assistance to allow the ETS Entities to remedy,
- the situation, including by removing the Virus or correcting the Security Breach and must reinstate the affected part of the ETS or the Operators' Environments (as applicable) and take all reasonable steps to prevent any recurrence.
- (e) The Contractor must comply with clause 39(d) at its own cost except to the extent the Contractor demonstrates to TfNSW's reasonable satisfaction that the Virus or Security Breach was not caused by it and if it does so, it may calculate its costs as if it were an Operational Services Variation and clause 26 will apply in that regard.

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## 40 Loss or damage

### 40.1 Make good

Except as otherwise provided in this Deed (including clause 24), the Contractor must promptly make good at its cost any loss or damage to the ETS or any property of the ETS Entities (including damage to associated or proximate equipment, vehicles and vessels) where, and to the extent, any such loss or damage is caused by any act or omission of the Contractor, including in accordance with clauses 23, 24 and 40.2 where applicable.

### 40.2 Insurance loss, damage or destruction

If any part of the ETS is lost, damaged or destroyed during the Term and such loss, damage or destruction is, or is likely to be, covered by an insurance policy held by the

Contractor or any ETS Entity, the Contractor must (without limiting its other obligations under this Deed):

- (a) allow a reasonable period for inspection by insurers; and
- (b) apply all insurance proceeds to which the Contractor is entitled in accordance with clause 41.6(c).

### 40.3 Discrepancies

The Contractor is responsible for all discrepancies in connection with this Deed or the ETS Project that result from fraud, misrepresentation, criminal or other wrongful act, theft or default, by the Contractor, its officers, employees, Subcontractors or agents or any Related Body Corporate of the Contractor or any Subcontractor and will indemnify the Indemnified Entities against any Losses or Claims they suffer or incur as a result of or in connection with such fraud, misrepresentation, criminal or other wrongful act, theft or default.

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## 41 Insurance

[Commercial-in-confidence]

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## 42 Liability and indemnity

[Commercial-in-confidence]

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## 43 Location of the ETS Project

- (a) Unless otherwise specified in the Scope of Works and Services or agreed under this clause 43, the Contractor may only perform the ETS Delivery and provide the ETS Operational Services from within Australia.
- (b) The Contractor may from time to time propose, by notice to that effect to TfNSW, to perform elements of ETS Delivery or ETS Operational Services from outside Australia. Any notice under this clause 43(b) must be given within sufficient time so as not to affect the ETS Delivery Program.
- (c) Within a reasonable period after receiving the Contractor's notice under clause 43(b), TfNSW may:
  - (i) notify the Contractor that it does not approve the proposal; or
  - (ii) require the Contractor to provide to TfNSW:
    - (A) a risk assessment and mitigation plan; and
    - (B) materials identifying the business and other benefits and risks to the ETS Entities of the proposal.
- (d) Within a reasonable period after receiving the plan and materials referred to in clause 43(c)(ii), TfNSW will notify the Contractor whether or not it agrees to the proposal and if TfNSW approves the proposal, the Contractor must comply with the plan and any relevant part of the materials. If TfNSW does not respond within such reasonable period, the Contractor's proposal is not approved.

## 44 Representations and warranties

### 44.1 Authority

Each Party acknowledges, represents, warrants and undertakes to the other Party on a continuing basis, that:

- (a) the execution and delivery of this Deed has been properly authorised;
- (b) it has full corporate power to execute, deliver and perform its obligations under this Deed;
- (c) this Deed constitutes a legal, valid and binding obligation of it enforceable in accordance with its terms by appropriate legal remedy; and
- (d) this Deed does not conflict with or result in the breach of or default under any provision of its constitution or provision of any Law to which it is subject or by which it is bound.

### 44.2 General Contractor warranties

The Contractor acknowledges, represents, warrants and undertakes to TfNSW:

- (a) on a continuing basis, that:
  - (i) it has all Approvals and otherwise complies with all Laws applicable to it in performing its obligations under this Deed;
  - (ii) to its knowledge, there are no Claims pending or threatened against it or by it which may have a material adverse effect upon it, or its ability to perform its financial or other obligations under this Deed;
  - (iii) it will not enter into any arrangement or contract which impedes or is likely to hinder its ability to perform the ETS Project as required under this Deed;
  - (iv) it will immediately notify TfNSW of the occurrence of, or the pending or threatened occurrence of, any event of which it is aware that may cause or constitute a breach of these provisions including any representation, warranty or undertaking in this Deed, including any event that may result in a material adverse change in the business of the Contractor or may affect the financial viability of the Contractor's business;
  - (v) all financial projections and information in relation to the financial position and prospects of the Contractor and the financial capability of the Contractor to fund its commitments under this Deed, given before or after the Execution Date, are complete and accurate and have been or will be given after diligent inquiry and investigation on the part of the Contractor and there has been no material adverse change in the financial position or prospects of the Contractor after the date to which the relevant financial projections and information relate;
  - (vi) 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); and

- (vii) it does not enter into this Deed in the capacity as agent for any person or trustee of a trust or settlement; and
- (b) as at the Execution Date, that it has not engaged in any uncompetitive behaviour or other practice which has denied or may deny legitimate business opportunities to other tenderers or other participants in the procurement process for the ETS Project, including:
  - (i) the payment of unsuccessful tender or similar fees; or
  - (ii) the payment to any third party of money, incentives or other concessions contingent upon the success of the procurement process which do not relate to the provision of bona fide services relevant to the object of the tender.

#### **44.3 Pricing warranty**

The Contractor warrants, for the benefit of TfNSW, that as at the Execution Date, the prices under this Deed (including the pricing for each of the ETS Delivery and the ETS Operational Services and any rates and prices set out in Schedule 7), is the same or lower than the prices offered by the Contractor or any Related Body Corporate for similar products or services anywhere in the world when determined on a like for like basis and taking into account the supply of the ETS and the performance of the ETS Project in Australia or any other location specified in the Scope of Works and Services or agreed under clause 43.

#### **44.4 Performance of obligations for the Term**

The Contractor acknowledges, represents, warrants and undertakes to TfNSW on a continuing basis that:

- (a) it will perform its obligations under this Deed:
  - (i) with the highest standards of care, skill, competence and diligence, with integrity and in a good and workmanlike manner;
  - (ii) in accordance with Good Industry Practice and so that the ETS and ETS Operational Services respectively are Fit for ETS Purposes; and
  - (iii) in a manner which ensures there is no delay or disruption to the business of any ETS Entity, other than as expressly contemplated under this Deed;
- (b) it is not in default of its obligations under this Deed;
- (c) it will not engage in any conduct that is misleading or deceptive or likely to mislead or deceive;
- (d) it will perform the ETS Project using an adequate number of appropriately trained, skilled and experienced Personnel; and
- (e) it will secure binding commitments in relation to the performance of the ETS Project throughout the Term for all Software and equipment incorporated in the ETS that is to be provided by any third party.



## 45 ETS security and disaster recovery

### 45.1 Security measures updated

The Contractor must update its security procedures as technology and security threats evolve to provide security capabilities at all times in accordance with Good Industry Practice and this Deed.

### 45.2 Security audit

- (a) The Contractor must:
  - (i) have the ETS and any Software, hardware, services, security procedures and physical facilities used in connection with the ETS Project audited on an annual basis by a qualified, nationally recognised auditing firm to confirm compliance with the provisions of this Deed which relate to security; and
  - (ii) take such action as necessary to comply with any exceptions or discrepancies discovered by any such audit, including compliance with a Corrective Action Plan under clause 45.2(b).
- (b) The Contractor must:
  - (i) provide TfNSW with a copy of each such audit report within 5 Business Days of it becoming available;
  - (ii) prepare a Corrective Action Plan as contemplated under clause 19 to deal with any exceptions or discrepancies discovered as a result of any such audit and provide TfNSW with a copy of that plan within 5 Business Days (or such other period of time as the Parties may agree) after provision of the audit under clause 45.2(b)(i);
  - (iii) within 5 Business Days after receipt of the original or any revised Corrective Action Plan from the Contractor, TfNSW may notify the Contractor that:
    - (A) it approves the Corrective Action Plan and require the Contractor to proceed to implement and perform the Corrective Action Plan; or
    - (B) the whole or part of the Corrective Action Plan does not address the concerns of TfNSW with respect to the exceptions or discrepancies referred to in clause 45.2(b)(ii) and direct the Contractor to resubmit within 5 Business Days (or such other period of time as the Parties may agree) after such direction, a revised Corrective Action Plan under clause 45.2(b)(ii) which addresses TfNSW's concerns; and
  - (iv) confirm promptly and in any event within 3 months of provision of the copy of the audit report under clause 45.2(b)(i) that it has performed all work disclosed by the audit and implemented and performed the Corrective Action Plan approved by TfNSW under clause 45.2(b)(iii).
- (c) The Contractor agrees that TfNSW may at any time and without notice to the Contractor carry out or engage a third party to carry out on its behalf an audit of the Contractor's security procedures and physical facilities to audit compliance by the Contractor with the provisions of this Deed in relation to security.



- (d) Without limiting TfNSW's obligations or rights under this Deed, TfNSW may provide the Contractor with a copy of all or part of such audit or a summary of it and require the Contractor to prepare a Corrective Action Plan in accordance with clause 45.2(b)(ii),(iii) and (iv), as if a reference in those clauses to an "audit" is a reference to the audit referred to in clause 45.2(c).

### **45.3 Breaches and threatened breaches of ETS security**

- (a) The Contractor must:

- (i) report:

- (A) any attempted or threatened breach of ETS security; and

- (B) any attempted or threatened unauthorised access to the ETS, including to any interfaces to the Operators' Environments or any Software, hardware, services, security procedures and physical facilities used in connection with the ETS Project,

- to TfNSW as soon as practicable and in any event within 48 hours of becoming aware of the attempted or threatened breach or unauthorised access;

- (ii) report:

- (A) any breach of ETS security; and

- (B) any unauthorised access to the ETS including to any interfaces to the Operators' Environments or any Software, hardware, services, security procedures and physical facilities used in connection with the ETS Project,

- to TfNSW as soon as practicable and in any event within the time period specified in this Deed on becoming aware of the relevant breach or unauthorised access; and

- (iii) where there has been a breach of ETS security or unauthorised access to the ETS, or any Software, hardware, services, security procedures and physical facilities, prepare a Corrective Action Plan as contemplated under clause 19 to address the breach or unauthorised access or both and provide the plan to TfNSW within 24 hours of the breach or unauthorised access.

- (b) Within 5 Business Days of receiving the Corrective Action Plan, TfNSW may notify the Contractor that:

- (i) the whole or part of the Corrective Action Plan does not address the concerns of TfNSW with respect to the security breach and direct the Contractor to prepare a revised Corrective Action Plan which addresses TfNSW's concerns within 5 Business Days of such direction (or such other period of time as the Parties may agree) and resubmit it under clause 45.3(a)(iii); and

- (ii) it approves that Corrective Action Plan and requires the Contractor to proceed to implement and perform the Corrective Action Plan and to take such steps as may reasonably be requested by TfNSW to prevent further breaches or unauthorised access.

#### **45.4 Business continuity and disaster recovery**

- (a) The Contractor warrants that the Business Continuity Plan attached at Schedule 24 complies with the requirements of the Scope of Works and Services.
- (b) The Contractor must prepare and submit to TfNSW for its approval (such approval not to be unreasonably withheld) an updated Business Continuity Plan at the same time that it provides TfNSW with the items referred to in clause 47.1(d)(i) and at any other time if requested to do so by TfNSW.
- (c) TfNSW may, within 10 Business Days of receipt of an updated Business Continuity Plan from the Contractor under clause 45.4(b), notify the Contractor whether or not it approves the plan to be in accordance with this Deed or reject it and provide its comments (if any). If a Business Continuity Plan is rejected, the Contractor must promptly, and in any event within 10 Business Days of such rejection, submit to TfNSW a redraft of the plan. The Contractor must promptly incorporate any comments of TfNSW in any revised Business Continuity Plan.
- (d) The Contractor must if requested by TfNSW, use its best endeavours to assist TfNSW with the implementation and management of its own business continuity plan.
- (e) Any agreement with a third party for disaster recovery or backup services will be subject to approval by TfNSW (such approval not to be unreasonably withheld), and must require the third party service provider to maintain the confidentiality of all Software, data and other Confidential Information of TfNSW.
- (f) The Contractor will not be entitled to payment of any Charges during any period that it does not have a Business Continuity Plan approved by TfNSW within the prior 12 months, provided that TfNSW must pay the Charges in respect of such period on a retrospective basis following completion and implementation of the approved Business Continuity Plan (less any amounts deducted by TfNSW on account of any loss or damage suffered by TfNSW or any ETS Entities during such period as a result of the Contractor's failure).

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## **46 Audit**

### **46.1 Audit rights**

- (a) Without limiting any other audit right under this Deed TfNSW has the right to audit and inspect, and appoint one or more third parties to audit and inspect:
  - (i) the Resources used by the Contractor in connection with the performance of the whole or any part of the ETS Project;
  - (ii) any practices or procedures of the Contractor relating to this Deed;
  - (iii) any Vested IP, Licensed IP or TfNSW IP in the Contractor's possession, custody or control;
  - (iv) any premises from which the whole or any part of the ETS Project is being performed; and
  - (v) such other premises, documents, records, practices, data and matters as TfNSW may from time to time reasonably request to audit and inspect in connection with the ETS Project,

for the purposes referred to in clause 46.1(b), provided that TfNSW is not entitled to access any confidential information of the Contractor's other customers as part of any audit and inspection. In this clause 46, "Resources" means Software, hardware, services, procedures, facilities, systems, equipment, processes, interfaces and other resources.

- (b) The purpose of carrying out the audit and inspection is:
  - (i) to verify whether the Contractor is performing the ETS Project in accordance with applicable Laws;
  - (ii) to verify whether the Contractor is complying with this Deed;
  - (iii) to verify or check any other act, matter or thing relating to this Deed notified by TfNSW to the Contractor from time to time; and
  - (iv) such other purposes of which TfNSW may reasonably notify the Contractor from time to time, having regard to the business needs and requirements of the ETS Entities.
- (c) TfNSW may not exercise its rights to conduct an audit and inspection under this clause 46 on more than two occasions each year, provided that if any non-compliance by the Contractor is discovered as a result of any such audit and inspection, TfNSW may undertake any further audits and inspections, related to the issues of non-compliance, in the relevant year as it considers appropriate.

#### **46.2 Assistance**

The Contractor must provide all reasonable assistance required by TfNSW, including:

- (a) providing appropriate office facilities in the relevant premises;
- (b) making appropriate Personnel available to answer queries;
- (c) installing and running audit Software; and
- (d) assisting with, and if requested participating in, joint audits.

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## **47 Accounting and financial obligations**

### **47.1 Books of account**

- (a) The Contractor must keep proper books of account and all other records relating to the ETS Project at its offices in Sydney. Such books of account must include as a minimum:
  - (i) the particulars of the actual operating expenditure relating to the ETS Delivery and of meeting the obligations of the Deed during the Operational Services Term, with an analysis showing the costs of staff, consumables, subcontracted and bought-in services;
  - (ii) the full particulars of the actual capital expenditure of the ETS Delivery and of meeting the obligations of the Deed in the Operational Services Term, including capital replacement costs and expected asset lives;
  - (iii) all interest expenses and any third party financing costs and expenses;

- (iv) details of the specific overhead recoveries that have been made; and
  - (v) the profit before interest and tax which the Contractor has achieved in the performance of the ETS Project.
- (b) The Contractor must ensure that its books of account and records referred to in clause 47.1 are available to TfNSW in an electronic media form and in hard copy form at all reasonable times (no more than once in any 6 month period, unless TfNSW has any reasonable concerns about the accuracy or completeness of the books of account and records or the financial stability of the Contractor) for examination, audit, inspection, transcription and copying. For the avoidance of doubt, any books of account will be the Contractor's Confidential Information.
- (c) On the expiry or termination of this Deed, the Contractor must give TfNSW access to all books of account and records referred to in clause 47.1.
- (d) The Contractor must provide to TfNSW:
- (i) as soon as practicable and in any event not later than 4 months after the close of its financial year a copy of its audited balance sheet, trading and profit and loss account, statement of financial position, statement of financial performance and statement of cashflow (including all notes to and forming part of the statements) for that financial year (**Audited Annual Financial Statements**);
  - (ii) as soon as practicable and in any event not later than 60 days after each half of its financial year, a copy of its balance sheet, trading and profit and loss accounts, statement of financial position, statement of financial performance and statement of cashflow for that half year (**Unaudited Half-yearly Financial Statements**), certified as correct by a director and a secretary of the Contractor.

## 47.2 Not Used

## 47.3 Management Accounts

- (a) The Contractor must provide to TfNSW:
- (i) as soon as practicable and in any event not later than 60 Business Days after the end of each half financial year, a copy of its unaudited management accounts (**Management Accounts**) including:
    - (A) summary financial statements based on the Management Accounts;
    - (B) statement of cashflow;
    - (C) statement of financial position; and
    - (D) statement of financial performance (containing at least the following detail: revenue by type, material, labour, overhead (excluding margin), gross margin; and
  - (ii) as soon as practicable and in any event not later than:
    - (A) 120 days after each financial year, a reconciliation of the Contractor's Management Accounts with its Audited Annual Financial Statements; and

- (B) such additional relevant financial or other information with respect to it or its Subcontractors, the ETS or the ETS Project as TfNSW may from time to time reasonably require and the Contractor can reasonably procure.
- (b) Where the Contractor performs a reconciliation in accordance with clause 47.3(a)(ii) and there is any difference between the Contractor's Management Accounts and its Audited Annual Financial Statements, the Contractor must fully explain the differences in writing. The Contractor must immediately draw any unexplained items to the attention of TfNSW.

#### 47.4 Fixed Asset and Spares Inventory Reporting

- (a) From the date on which the first payment is made to the Contractor under clause 33 and thereafter for each year ending 30 June during the Term, as soon as practicable and in any event not later than 31 July of each year, the Contractor must provide to TfNSW:
  - (i) a hard copy and an electronic copy (in an electronic format that can be easily migrated into Microsoft Excel without loss of format or data integrity) of the audited annual asset register of all assets, excluding Smartcards and consumable items, comprised in the ETS and owned by TfNSW pursuant to this Deed (**Audited Annual Asset Register**);
  - (ii) a hard copy and an electronic copy (in an electronic format that can be easily migrated into Microsoft Excel without loss of format or data integrity) of a detailed spares inventory, per asset class and per Operator, including Rotables Inventory and Spares Inventory and including a reconciliation that clearly identifies changes between the opening balance and the closing balance of the asset register (**Audited Annual Spares Inventory**); and
  - (iii) an annual certification of the Audited Annual Asset Register and Audited Annual Spares Inventory by an independent auditor who is acceptable to TfNSW, and where substantive testing will have regard to existing system controls,

and such additional relevant asset and inventory information with respect to it, the ETS or the ETS Project as TfNSW may from time to time reasonably require.

- (b) From the date on which the first payment is made to the Contractor under clause 33, the Contractor's systems must provide to TfNSW on the second Business Day of each new month, an electronic copy (in an electronic format that can be easily migrated into Microsoft Excel without loss of format or data integrity) of:
  - (i) an asset register of all assets excluding Smartcards and consumable items, comprised in the ETS and owned by TfNSW pursuant to this Deed, including a reconciliation that clearly identifies changes between the opening balance and the closing balance of the asset register as at the preceding month; and
  - (ii) a detailed account of the spares inventory levels per asset class and per Operator, including Rotables Inventory and Spares Inventory, including a reconciliation that clearly identifies changes between the opening balance and the closing balance of the asset register as at the preceding month,

and such additional relevant asset and inventory information with respect to it, the ETS or the ETS Project as TfNSW may from time to time reasonably require.

## 48 Privacy

- (a) Without limiting the Contractor's obligations under any other provision of this Deed, the Contractor must comply with all Privacy Obligations as if it were a public sector agency.
- (b) The Contractor must ensure that when it collects, uses, discloses or transfers Personal Information in the course of performing its obligations under this Deed, it complies with all the Privacy Obligations.
- (c) Without limiting the generality of clauses 48(a) and 48(b), the Contractor must:
  - (i) only use such Personal Information for the purpose of performing its obligations under this Deed or as required by Law;
  - (ii) not disclose any such Personal Information without the prior written consent of TfNSW or as required by Law;
  - (iii) ensure that no person engaged by the Contractor who has access to such Personal Information uses, discloses or retains such Personal Information, except for the purposes of performing that person's duties of engagement;
  - (iv) take all reasonable steps to protect any such Personal Information from misuse and loss and from unauthorised access, modification or disclosure;
  - (v) comply with all reasonable requests or directions of TfNSW concerning:
    - (A) the security, use and disclosure of such Personal Information;
    - (B) access to and correction of any such Personal Information by the individual to whom it relates; and
    - (C) any complaints about the handling of such Personal Information;
  - (vi) notify TfNSW as soon as reasonably practicable after the Contractor becomes aware that it may be required by Law to use or disclose any such Personal Information, and provide all reasonable assistance requested by TfNSW to resist or object to such use or disclosure to the extent permitted by Law;
  - (vii) notify TfNSW as soon as reasonably practicable after the Contractor becomes aware of any breach of this clause 48;
  - (viii) on the expiry or termination of this Deed for any reason, destroy or otherwise deal with any such Personal Information in accordance with the reasonable directions of TfNSW to the extent permitted by Law; and
  - (ix) not retain any record which could link a Cardholder with a Smartcard without the request or consent of the Cardholder.

## 49 Dispute resolution

### 49.1 Application of this clause and notification of Disputes

- (a) This clause 49 applies to any dispute or difference that arises between the Parties as to any fact, matter or thing arising out of or in connection with this Deed or the ETS Project (except where this Deed requires a matter to be referred to or resolved by Expert determination) (**Dispute**).
- (b) A Party must not commence any court proceedings relating to a Dispute unless it has complied with the provisions of this clause 49, except where:
  - (i) a Party seeks urgent injunctive or equitable relief;
  - (ii) the Dispute relates to compliance with this clause 49;
  - (iii) the Dispute relates to compliance with or the enforcement of a determination made by the Expert under clause 50 which is final and binding under clause 50.4; or
  - (iv) a Party claims that the Expert has made an error of law in their determination.
- (c) A Party claiming that a Dispute has arisen must give notice to the other Party setting out the nature of the Dispute (**Dispute Notice**) within 20 Business Days of first becoming aware of the Dispute, or of when it ought reasonably to have become aware. The Dispute Notice must set out reasonable particulars of the matter in dispute including the estimated sum of money in relation to the Dispute.
- (d) TfNSW may, subject to clause 49.1(f), invite relevant ETS Entity representatives to attend any meetings between the Parties under this clause 49.
- (e) The Contractor may, subject to clause 49.1(f), invite representatives of Approved Subcontractors who may have an interest in a Dispute, to attend any meeting of the Parties under this clause 49.
- (f) Any representatives invited to attend meetings under clauses 49.1(d) or 49.1(e) may only attend such meetings if they have executed appropriate confidentiality agreements that preserve the confidentiality and the “without prejudice” basis of the dispute process.

### 49.2 Senior executive meeting

- (a) Within 10 Business Days of receipt of a Dispute Notice by a Party, the Parties must each nominate a senior executive representative who has express authority to resolve the Dispute and notify the other Party of the identity of that representative.
- (b) Within 20 Business Days of receipt of a Dispute Notice by a Party, the representatives nominated under clause 49.2(a) must meet at TfNSW's offices or such other place as TfNSW requires to seek to resolve the Dispute by negotiation. All aspects of the meeting must be kept confidential and all communications between representatives at the meeting are made on a without prejudice basis.



### 49.3 Leadership team meeting

- (a) If the senior executive representatives are unable to resolve the Dispute under clause 49.2 within the 20 Business Day period referred to in clause 49.2(b), or if for any other reason the Dispute is not resolved within that period, then within 35 Business Days of the date of receipt of the Dispute Notice by a Party under clause 49.2(a), a representative of each Party's leadership teams as described in clause 4.9 with express authority to resolve the Dispute must meet at TfNSW's offices or such other place as TfNSW requires, to seek to resolve the Dispute by negotiation. The identity of the relevant representative must be notified promptly to the other Party.
- (b) All aspects of the meeting must be kept confidential and all communications between representatives at the meeting are made on a without prejudice basis.

### 49.4 Referral to Expert or commencement of court proceedings

If the two representatives of the leadership teams are unable to resolve the Dispute within 45 Business Days of the date of receipt of the Dispute Notice by a Party under clause 49.2(a) or if for any other reason the Dispute is not resolved within that period, either Party may initiate court proceedings unless both Parties agree to refer the Dispute to an Expert in accordance with clause 50 and Schedule 31.

### 49.5 Continued performance

Notwithstanding the existence of a Dispute the Parties must continue to perform their respective obligations under this Deed while the Dispute is being resolved.

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## 50 Expert determination

### 50.1 Appointment of Expert

- (a) Where:
  - (i) this Deed requires a matter to be referred to or resolved by Expert determination; or
  - (ii) the Parties agree to refer the Dispute to an Expert,

(a **Referred Matter**), the Referred Matter will be determined by the Expert and administered in accordance with this clause 50 and Schedule 31.
- (b) Within 10 Business Days of a Referred Matter arising, the Parties must endeavour to agree on the selection of an appropriate Expert, having regard to the particular subject matter of the Referred Matter.
- (c) If the Parties are unable to agree on the selection of an Expert under clause 50.1(b), either Party may request the Institute of Arbitrators & Mediators Australia to select the Expert.
- (d) The Parties must promptly enter into a deed with the Expert agreed or selected under clause 50.1(b) substantially in the form of Schedule 31.

### 50.2 Rules of Expert determination

The Expert must conduct his or her expert determination in accordance with Schedule 31.



### 50.3 Provision of information

- (a) The Contractor must provide the Expert with all relevant ETS Documentation and other information relevant to the Dispute, and all other information required to keep the Expert informed and able to perform his or her function in relation to the Dispute.
- (b) TfNSW may provide the Expert with any other relevant ETS Documentation and information relevant to the Dispute it considers necessary to keep the Expert informed and able to perform his or her function in relation to the Dispute.
- (c) A copy of all relevant ETS Documentation and other information provided by one Party to the Expert under clause 50.3(a) or 50.3(b) must be sent to the other Party.

### 50.4 Expert's finding

- (a) The determination of the Expert must be in writing and will be final and binding on each Party unless (except as otherwise provided in this Deed) the determination requires a Party to pay an amount greater than [REDACTED]
- (b) The Parties are to give effect to the determination of the Expert unless and until it is reversed, overturned or otherwise changed by any subsequent litigation proceedings.

### 50.5 Costs

The Parties will each pay one-half of the costs of the Expert.

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## 51 Force Majeure

### 51.1 Force Majeure notice

- (a) If an event of Force Majeure has occurred and the Contractor wishes to invoke this clause 51, it must give TfNSW prompt notice and in any event within 5 Business Days of first becoming aware or ought reasonably to have become aware of the event of Force Majeure together with full particulars of all relevant matters including:
  - (i) details of the event of Force Majeure;
  - (ii) details of the obligations affected;
  - (iii) details of the action that the Contractor has taken and/or proposes to take to remedy the situation;
  - (iv) an estimate of the time during which the Contractor will be unable to perform its obligations due to Force Majeure;
  - (v) an estimate of the costs that the Contractor will incur to remedy the situation; and
  - (vi) details of all insurance moneys upon which the Contractor will be able to rely in making good damage caused by the Force Majeure.

- (b) After giving notice under clause 51.1(a) the Contractor must continue to provide to TfNSW all relevant information pertaining to the Force Majeure.
- (c) If the Contractor fails to provide the notice within the time set out in clause 51.1(a), the Contractor cannot rely on clauses 12.5(c), 51.3(a) or section 1.3 of Schedule 9 or any other clause in this Deed which deals with Force Majeure.

## **51.2 Meeting of the Parties**

The Parties must meet within 5 Business Days of TfNSW receiving a notice of an event of Force Majeure in accordance with clause 51.1(a) to determine:

- (a) if the Force Majeure is covered by insurance;
- (b) the estimated length of time for which the Force Majeure may continue; and
- (c) a plan of action to remedy (if possible) the effects of the Force Majeure.

## **51.3 Suspension of obligations**

- (a) If a Force Majeure occurs, each Party's obligations under this Deed (other than under this clause 51 and TfNSW's obligation to pay any amount due and payable to the Contractor) which are precluded by the Force Majeure will be suspended but only to the extent and for so long as such obligations are precluded by the Force Majeure and only in accordance with clause 12.5 where that clause applies.
- (b) Upon TfNSW or the Contractor (as the case may be) becoming able to recommence performing its obligations which were suspended under clause 51.3(a), TfNSW or the Contractor (as the case may be) must recommence the performance of those obligations.

## **51.4 Duty to remedy Force Majeure**

- (a) Where there is a remedy, the Contractor must use its reasonable endeavours to remedy the effects of a Force Majeure promptly, including making any reasonable expenditure of funds which may mitigate or avoid the effect of the Force Majeure.
- (b) Where a Force Majeure has resulted in damage to the ETS, the Contractor must:
  - (i) promptly reconstruct, rectify or replace that part of the ETS which has been damaged, except where risk in any relevant component of the ETS has passed to TfNSW in accordance with clause 15.6; and
  - (ii) apply any insurance proceeds in fulfilment of its obligations under clause 51.4(b)(i) and, if it fails to do so, account to TfNSW for any insurance proceeds.

## **51.5 Termination for extended Force Majeure**

If a Force Majeure is continuing or its consequence remains such that the affected Party has been or is unable to comply with a material part of its obligations under this Deed for a continuous period of 180 days or more, then:

- (a) TfNSW may terminate this Deed in whole or in part, by giving 5 Business Days' notice to the Contractor. If TfNSW does so, and:

- (i) the Contractor is the affected Party, then other than amounts payable by TfNSW under clause 55 TfNSW will have no liability for any Losses or Claims suffered or incurred by the Contractor as a result of or in connection with such whole or partial termination; or
  - (ii) TfNSW is the affected Party, the Contractor will be entitled to compensation under clause 54.2 as if TfNSW had exercised its right of termination for convenience; and
- (b) if TfNSW does not exercise its right of termination under clause 51.5(a), upon recommencement of the performance of such obligations the Parties will meet to discuss and agree in good faith an appropriate Variation to reflect any increased costs incurred by the Contractor as a result of the delay (such as increased costs for the purchase or extended storage of raw materials and spare parts).

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## 52 TfNSW's step-in and temporary suspension rights

- (a) If:
  - (i) the ETS Project is not being performed by the Contractor in accordance with this Deed in a material respect (and the Contractor is not entitled to relief for such failure in accordance with this Deed, including under clauses 12.5, 12.6 and 51.3), there is real potential for this to lead to the occurrence of an Event of Default, and TfNSW is of the reasonable opinion that it should exercise its rights under this clause 52 as a consequence;
  - (ii) there is an Event of Default;
  - (iii) there is an Emergency;
  - (iv) TfNSW is of the reasonable opinion that TfNSW must take "step-in" action or stop or suspend work to exercise or discharge a legislative, public or constitutional right or duty (whether of itself, or another ETS Entity); or
  - (v) any other circumstance occurs which is expressly stated in this Deed as giving TfNSW the right to exercise its "step-in" rights or stop or suspend work under this Deed,

then TfNSW is entitled in its discretion to take any steps required to remedy the situation in accordance with Schedule 11 where applicable and without prejudice to any of its other rights and remedies (**Step-In Rights**).

- (b) In addition to its Step-In Rights or rights to require the Contractor to stop or suspend all or any portion of the ETS Project under clause 52(a), TfNSW may in its discretion by giving at least 5 Business Days' notice to the Contractor, direct the Contractor to stop or suspend all or any portion of the ETS Project for such period as TfNSW deems necessary and where TfNSW does so it will explain in writing its reason(s) for doing so.
  - (c) The Contractor agrees to provide reasonable assistance to TfNSW in the exercise of its Step-In Rights and rights to stop or suspend under clause 52(a) and (b) and will ensure that its Personnel, and Subcontractors do the same. The Contractor must comply immediately with a notice from TfNSW under clause 52(a) or (b) to stop or suspend all or any portion of the ETS Project.

- (d) Without limiting its rights under clause 52(a), TfNSW may, where it exercises a Step-In Right under clause 52(a), do:
  - (i) all things:
    - (A) which the Contractor is obliged to do under or in connection with any Project Agreement to which it is a party or any Law; and
    - (B) which TfNSW is under any Project Agreement or any Law authorised or empowered to do with respect to the Contractor; and
  - (ii) anything necessary to perform all or that part of the ETS Project, the subject of the step-in.
- (e) Where TfNSW has notified the Contractor that it is exercising a Step-In Right or right to stop or suspend under clause 52(a)(i), (ii) or (v):
  - (i) the ETS Project Fees will be reduced by an amount equal to the cost of TfNSW performing such steps including the things under clause 52(d) (taking into account any amounts which would otherwise be payable by TfNSW to the Contractor in respect of the ETS Project which is remedied by TfNSW under this clause); and
  - (ii) the Contractor must bear its own costs and Loss in relation to the step-in, stoppage or suspension,

provided that in circumstances where it is reasonable to do so, TfNSW has given the Contractor 5 Business Days (or such longer period of time as TfNSW may agree) notice of its intention to exercise such Step-In Rights or requiring a stoppage or suspension and the Contractor has failed to remedy the same within such notice period.
- (f) Where TfNSW has notified the Contractor that it is exercising a Step-In Right, or right to stop or suspend under clause 52(a)(iii) or (iv) or 52(b), unless this was due to an Event of Default or a failure by the Contractor to perform its obligations under this Deed, TfNSW will bear its own costs and Loss and subject to clause 52(h)(i)(B), the Contractor will bear its own costs and Loss, in relation to the step-in, stoppage or suspension.
- (g) Where TfNSW has notified the Contractor that it is exercising a Step-In Right, the Contractor must do all things necessary and desirable to enable TfNSW to have, protect and exercise, its rights under clause 41 and in particular its rights under clause 41.2(a)(v) and under clause 4.1 of the Subcontractor Deed.
- (h) Without limiting TfNSW's obligations to pay the ETS Project Fees due to the Contractor in accordance with this Deed, the Contractor acknowledges and agrees that:
  - (i) TfNSW will not have any liability to the Contractor, and the Contractor will not be entitled to make any Claim (including any Claim for an extension of time), as a result of or in connection with the exercise by TfNSW of its rights under this clause 52 except where:
    - (A) there is any negligent or fraudulent act or omission by TfNSW in the exercise of those rights; or

- (B) TfNSW exercises its rights under clauses 52(a)(iii) or (iv) or 52(b), in which case the Contractor is entitled to make a claim for an extension of time under clause 12.5 and costs relating to any extension of time granted, which costs will be limited to Delay Costs; and
- (ii) the exercise by TfNSW of its rights under this clause 52 does not limit any other right of TfNSW under this Deed, including any rights arising in relation to an Event of Default.
- (i) The Contractor will not be relieved of its obligations under this Deed as a result of the step-in, stoppage or suspension, except to the extent that such obligations (including any obligations in relation to the KPIs) cannot be performed as a result of the exercise by TfNSW of such rights.
- (j) TfNSW may at any time cease to exercise its rights under this clause 52 by giving the Contractor at least 5 Business Days notice.
- (k) Upon receipt of a notice under clause 52(j), the Contractor must as soon as practicable, but in any event within the period specified in that notice, and in accordance with that notice, resume all or that portion of the ETS Project the subject of the step-in, stoppage or suspension under this Deed.

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## 53 Default and termination

### 53.1 Events of Default

It is an Event of Default if:

- (a) the Contractor fails to commence, or to expeditiously and diligently perform, the ETS Project in accordance with this Deed and does not cure such failure within 10 Business Days of receiving notice from TfNSW to do so;
- (b) Completion of a Stage or (for those Planned Value Categories to which a Date for Completion applies as indicated in Schedule 3) Planned Value Category does not occur on or prior to the relevant Date for Completion;
- (c) a Stability Requirement is not met in relation to the period referred to in clause 35.2;
- (d) the Contractor:
  - (i) fails to provide the ETS Operational Services, or
  - (ii) ceases or threatens to cease providing the ETS Operational Services, in accordance with this Deed and does not cure such failure within 10 Business Days of receiving notice from TfNSW to do so (or such longer period of time as is specified by TfNSW in its sole discretion in the notice);
- (e) all or any part of this Deed or any Project Agreement:
  - (i) ceases to have effect, as against the Contractor or other party to the relevant Project Agreement otherwise than in accordance with its terms; or

- (ii) is or becomes, as against the Contractor or other party to the relevant Project Agreement, void, voidable, illegal, invalid, unenforceable or of limited force and effect;
- (f) the Contractor breaches any material obligations (including any representation, warranty or indemnity) under any Project Agreement which is capable of remedy and does not remedy such breach within 20 Business Days of receiving notice from TfNSW specifying the breach;
- (g) the Contractor breaches a material obligation (including any representation, warranty or undertaking) under any Project Agreement which is incapable of remedy;
- (h) the Contractor regularly or habitually commits breaches of any Project Agreement or commits a number of breaches which collectively constitute a material breach, and does not remedy such breaches (and, where applicable, its regular or habitual committing of them) within 40 Business Days of receiving notice from TfNSW specifying the breaches;
- (i) the Contractor fails to rectify a Defect under clause 23(h) within the time contemplated under that clause;
- (j) the Contractor fails to:
  - (i) comply with a direction of TfNSW given under this Deed;
  - (ii) provide the Security Bonds in accordance with this Deed;
  - (iii) provide evidence of insurance in accordance with this Deed; or
  - (iv) use the materials or standards of workmanship required by this Deed;
- (k) an Event of Insolvency occurs in relation to the Contractor;
- (l) an Event of Insolvency occurs in relation to:
  - (i) a Related Body Corporate of the Contractor supplying any goods or services to the Contractor in connection with the ETS Project;
  - (ii) an Approved Subcontractor; or
  - (iii) a Related Body Corporate of an Approved Subcontractor supplying any goods or services to the Approved Subcontractor in connection with the ETS Project,which in the reasonable opinion of TfNSW has a material impact upon the ETS Project or the performance by the Contractor of its obligations under this Deed;
- (m) without the consent of TfNSW:
  - (i) a material change occurs in the equipment supplied or to be supplied; or
  - (ii) a material change occurs in the scope or conduct of the work performed or to be performed,pursuant to a Subcontract;

- (n) a Change in Control of the Contractor or of any Related Body Corporate supplying any goods or services to the Contractor in connection with the ETS Project occurs without the consent of TfNSW under this Deed;
- (o) the shares of the Contractor or of any Related Body Corporate are at any time listed on any stock exchange, the listing is suspended or revoked and the suspension or revocation remains in force for a period greater than 30 Business Days;
- (p) any representation or warranty or statement made by the Contractor to TfNSW in any Project Agreement or in any document delivered under any Project Agreement proves to have been untrue in any material respect or there is fraud, collusive or misleading or deceptive conduct by the Contractor or any Subcontractor or any of their Related Bodies Corporate;
- (q) the Contractor incurs an Abatement of greater than [REDACTED] of the Monthly Fixed Services Charges twice in any period of three consecutive months;
- (r) any action is initiated by any competent Authority with a view to striking the Contractor or any of its Related Bodies Corporate off any register of companies;
- (s) the Contractor displays an intention to abandon the ETS Project or refuses to proceed with the ETS Project; or
- (t) any other material event occurs which gives TfNSW the right to terminate this Deed (not including any right under clause 51.5 or 54).

For clarity, the generality of any one Event of Default is not limited by the particularity of any other Event of Default.

### **53.2 Termination by TfNSW**

- (a) Upon the occurrence of an Event of Default, TfNSW may give the Contractor 20 Business Days' notice of its intention to:
  - (i) terminate this Deed in whole; or
  - (ii) terminate the Contractor's rights and obligations with respect to any part of this Deed.

During the 20 Business Day period, the Contractor has the right to remedy any Event of Default which is capable of remedy.

- (b) At the expiration of the 20 Business Day period referred to in clause 53.2(a) (and in the case of those Events of Default which are capable of remedy, if the Event of Default has not been remedied at the expiration of that period), TfNSW may terminate this Deed by issuing a notice to the Contractor specifying the effective date of termination.
- (c) Without limiting TfNSW's obligations to pay the ETS Project Fees due to the Contractor in accordance with this Deed, TfNSW will not be liable to pay to the Contractor any compensation or other money in respect of the termination and will not be liable for any Loss or Claim suffered or incurred by the Contractor as a result of or in connection with the termination.



### 53.3 Impact of Dispute Resolution Procedures

The fact that either Party requires a matter to be resolved in accordance with the Dispute Resolution Procedures or that a dispute has been referred to the Dispute Resolution Procedures will not affect either Party's rights under this clause 53.

### 53.4 Right to Damages

Subject to any limitations on liability under this Deed, any termination of this Deed by TfNSW will:

- (a) not in any way prejudice TfNSW's rights to claim and recover:
  - (i) liquidated damages under this Deed;
  - (ii) damages for any prior breach of contract by the Contractor; or
  - (iii) any amounts paid to the Contractor in relation to the ETS Project (whether under clause 53.2(c) or otherwise); and
- (b) entitle TfNSW to recover compensation for such other Loss or Claim as TfNSW may suffer or incur, or have suffered or incurred, as a result of or in connection with termination of this Deed.

### 53.5 Termination by the Contractor

- (a) Upon the occurrence of either of the following events:
    - (i) failure by TfNSW to pay any amount due and payable to the Contractor (excluding amounts which are the subject of a bona fide Dispute) which exceeds [REDACTED] and which has been unpaid for a period of 3 months after its due date, provided that:
      - (A) the Contractor has issued a demand for payment of such amount following expiry of such 3 month period which clearly states the Contractor's intention to terminate this Deed at the expiration of a 1 month period following receipt by TfNSW of such demand if such demand is not met; and
      - (B) such 1 month period has expired and TfNSW has failed to pay such amount; or
    - (ii) an Event of Insolvency occurs in relation to TfNSW which in the reasonable opinion of the Contractor has a material impact upon the performance by TfNSW of its obligations under this Deed,
- (TfNSW Events), the Contractor may give TfNSW 20 Business Days' notice of its intention to terminate this Deed.
- (b) During the 20 Business Day period, TfNSW has the right to remedy any of TfNSW Events referred to in clauses 53.5(a)(i) and 53.5(a)(ii).
  - (c) At the expiration of the 20 Business Day period referred to in clause 53.2(b) and if TfNSW Events referred to in clauses 53.5(a)(i) and 53.5(a)(ii) have not been remedied, the Contractor may terminate this Deed by issuing a notice to TfNSW specifying the effective date of termination.



- (d) The right to terminate under this clause 53.5 is the Contractor's sole right to terminate this Deed (whether at common law or otherwise) and any purported termination by the Contractor other than in accordance with this clause 53.5 will constitute a repudiation of this Deed by the Contractor.

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## 54 Termination for the convenience of TfNSW

### 54.1 Right to terminate

[Commercial-in-confidence]

### 54.2 Compensation

[Commercial-in-confidence]

### 54.3 Exercise of rights

TfNSW may exercise its rights under this clause 54 at any time notwithstanding the existence of a Dispute.

### 54.4 Partial termination for convenience

[Commercial-in-confidence]

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## 55 Termination of Deed and handback

### 55.1 Actions to be taken following termination

- (a) Without limiting the Contractor's other obligations under this clause 55, the Contractor must:
  - (i) stop work on the date and to the extent specified in a notice of termination and continue to perform such part (if any) of the ETS Project not so terminated;
  - (ii) within 20 Business Days of receipt of the notice of termination, notify TfNSW of all orders and Subcontracts to the extent that they relate to the performance of work terminated and if directed by TfNSW:
    - (A) terminate, or (as directed by TfNSW) assign and novate to TfNSW all of the right, title and interest of the Contractor in, all orders and Subcontracts to the extent that they relate to the performance of work terminated, with the effective date of such termination or assignment or novation being in accordance with TfNSW's notice of termination; and
    - (B) place no further orders and enter into no further Subcontracts for materials, services or facilities, except as may be necessary for the ongoing business of the Contractor or Related Body Corporate or for continued performance of such part of the Deed as is not terminated;
  - (iii) if directed by TfNSW, to the extent it has not otherwise done so transfer title and deliver to TfNSW in accordance with such direction:

- (A) the fabricated or unfabricated parts of the ETS, work in progress, completed work, supplies, and other material produced as a part of, or acquired in connection with the performance of the work terminated;
- (B) the completed or partially completed plans, drawings, manuals, information and other property which, if such work had been completed, would have been required to be furnished to TfNSW; and
- (C) if TfNSW elects to retain the Contractor Licensed IP in accordance with clause 55.3A, such Contractor Licensed IP not already delivered to TfNSW as at the effective date of termination,

subject to clauses 15 and 27, ownership of which vests in TfNSW free of encumbrances and third party rights;

- (iv) if directed by TfNSW, hand over to TfNSW electronic and hard copies of the latest versions of all ETS Documentation requested by TfNSW and any books of account and all other records relating to the ETS Project; and
  - (v) from the date the Contractor receives a notice of termination until the effective date of termination specified in the notice of termination, do all things requested by TfNSW and co-operate with TfNSW or any third party engaged or employed by TfNSW to perform the ETS Project.
- (b) If TfNSW gives a direction under clause 55.1(a)(iii) or (a)(iv) but has not already paid the Contractor for the items which are the subject of that direction (other than the Contractor Licensed IP, which TfNSW must pay for in accordance with clause 55.3A):
- (i) the Contractor must promptly on receiving the direction provide TfNSW with the relevant information necessary to demonstrate to TfNSW's satisfaction the items for which TfNSW has not already paid, and the cost payable by the Contractor for those items pursuant to this Deed, and which TfNSW must pay to the Contractor if TfNSW desires the transfer of title to and the delivery of those items to it (the **Price**); and
  - (ii) TfNSW may request, and the Contractor must immediately provide, such additional information as TfNSW may from time to time reasonably require to establish the Price. TfNSW will pay the Contractor the Price upon transfer of title to and the delivery of those items by the Contractor to TfNSW.
- (c) For the purposes of clause 55.1(a)(iv), ETS Documentation must be current at the time of delivery in accordance with this Deed.

## 55.2 Transfer

In the case of termination at any time after the first Certificate of Completion has been issued or expiration of this Deed, and where TfNSW so directs:

- (a) to the extent the matters the subject of the definition of "Transfer" are not yet transferred to TfNSW or a third party, the Contractor must carry out or facilitate the carrying out of the Transfer, including by:
  - (i) transferring title and delivering to TfNSW of the Contractor Project Materials, ownership of which vests in TfNSW free of encumbrances and third party rights; and

- (ii) assigning or novating to TfNSW all of the right, title and interest of the Contractor in all Subcontracts.

TfNSW will not, however, acquire any title to the Contractor Retained Assets, which remain owned by a third party, the Contractor or its Related Bodies Corporate;

- (b) the Contractor must use best endeavours to ensure that the Transfer from the Contractor to TfNSW or any third party takes place with minimal disruption to the ETS Entities and any Distributors and Cardholders; and
- (c) if required by TfNSW, the Parties agree to enter into:
  - (i) tripartite agreements with any new contractors nominated by TfNSW which will confirm the roles and responsibilities of each of the parties in relation to the ETS and the provision of the ETS Operational Services; and
  - (ii) any other agreements necessary to facilitate the Transfer,

all in accordance with this Deed (including the Handback Plan) and such direction.

### **55.3A Contractor Licensed IP**

[Commercial-in-confidence]

### **55.3 Handback Plan**

- (a) In addition to its obligations to update the Project Plans in accordance with clauses 6.2 to 6.4, the Contractor must prepare and submit to TfNSW for its approval an updated Handback Plan at least 1 month prior to the anniversary of the Commencement Date each year and 12 months prior to the expiry of the Term (or if TfNSW terminates this Deed with a notice period of less than 12 months, at a time specified by TfNSW in that notice).
- (b) TfNSW may, within 10 Business Days of receipt of an updated Handback Plan, advise the Contractor whether or not it considers such plan to be in accordance with this Deed, or reject it and provide its comments (if any). If an updated Handback Plan is rejected, the Contractor must promptly, and in any event within 10 Business Days, submit to TfNSW a redraft of the Handback Plan. The Contractor must take into account any comments of TfNSW in finalising the Handback Plan.
- (c) At any time prior to the expiration of the Term or the earlier termination of this Deed, TfNSW may propose a modification or alteration to the Contractor's proposed method of Transfer as set out in any agreed Handback Plan. The Contractor must amend any such Handback Plan in accordance with TfNSW's required modifications or alterations unless it is unreasonable to do so, and the amended Handback Plan must be approved by TfNSW.

### **55.4 Maintenance of workforce**

- (a) The Contractor must maintain a full and adequate workforce on the ETS Project until the last day of the Term.
- (b) The Contractor must ensure that prior to expiration or the earlier termination of this Deed the Specified Personnel set out in Schedule 19 co-operate with any incoming third party to ensure a smooth transition.

- (c) The Contractor must use reasonable efforts to make the Specified Personnel set out in Schedule 19 available to perform work reasonably requested by TfNSW in relation to the ETS Project for 9 months after the expiration or earlier termination of this Deed. TfNSW must pay the Contractor for the work requested by TfNSW under this clause 55.4(c), the Contractor's costs, based on time spent and materials used, at the rates for each which are set out in Schedule 7.
- (d) The Contractor will not prohibit or prevent its former Personnel from accepting an offer of employment or engagement made by an ETS Entity or any third party which is taking over operation of any part of the ETS Project. On notice from TfNSW and where the relevant Personnel agrees, the Contractor will facilitate the transfer of all Personnel of the Contractor to whom an ETS Entity or third party offers employment, on terms to be agreed.

### **55.5 Transition Out Services**

- (a) Without limiting the Contractor's obligations under clause 55, the Contractor must, for a period commencing:
  - (i) 12 months prior to expiration of the Term; or
  - (ii) on any earlier termination of the Deed in whole in part,provide for the orderly transition of the ETS Project to any ETS Entity or its nominee in accordance with this Deed and with minimal delay or disruption to the business of any ETS Entities and any Distributors or Cardholders.
- (b) The Contractor acknowledges and agrees that TfNSW may require the Contractor to continue to perform that part of the ETS Project that is terminated from the date of a termination notice until the effective date of termination of this Deed.
- (c) To the extent that the Contractor continues to perform the ETS Project until the effective date of termination of the whole or part of this Deed, TfNSW must continue to pay the Contractor the relevant ETS Project Fees in accordance with this Deed.

### **55.6 Warranty**

The Contractor warrants that the obligations set out in clauses 55.2, 55.3, 55.4 and 55.5 will be sufficient and adequate to enable appropriately trained, skilled and experienced Personnel of TfNSW or a new contractor to replace the ETS with another system and/or perform the ETS Project in accordance with this Deed.

### **55.7 Tender process**

- (a) The Contractor must provide full co-operation to TfNSW in relation to any Transfer, or facilitation of the Transfer, including in relation to any tender or other procurement process any ETS Entity or any person on their behalf carries out for the procurement of a third party to perform the ETS Project, including performing all acts reasonably requested by TfNSW in relation to any tender in an efficient, timely and professional manner.
- (b) In addition to the Contractor's obligation to co-operate in relation to any tender or other procurement process in relation to any Transfer under clause 55.7(a), the Contractor must in relation to any tender or other procurement process being carried out by an ETS Entity or any persons on their behalf at any time during the Term, co-operate with such ETS Entity or other persons, including by performing all

acts reasonably requested by TfNSW in relation to any such tender or other procurement process in an efficient, timely and professional manner.

- (c) If the Contractor's obligation to co-operate with TfNSW under clause 55.7(a) or an ETS Entity or other persons under clause 55.7(b) is in addition to the performance of obligations that the Contractor is otherwise required to perform under this Deed (such as the Contractor's reporting obligations) and directly results in a material increase in the Contractor's costs of performing its obligations under this Deed, the Parties agree to negotiate an appropriate Variation in respect of the Contractor's additional costs.

#### **55.8 Right to perform work**

Without limiting clause 20.2, if TfNSW exercises its rights under clause 53 or 54, the Contractor acknowledges that TfNSW may thereafter perform the work itself or employ or engage another person to perform the work.

#### **55.9 Expiration state of repair on handback**

The Contractor must ensure that:

- (a) the ETS is in a state of good repair upon expiration of the Term and that all overhauls, repairs and retrofits of equipment, facilities and other materials forming part of the ETS are completed (at the Contractor's expense) at least 6 months prior to the expiration of the Term to allow TfNSW sufficient time to inspect their condition;
- (b) all Subcontracts assigned or novated to TfNSW, after expiration of the Term, have a remaining term of, or extension options for, at least 12 months after the Term; and
- (c) it otherwise complies with Schedule 12 in relation to handback.

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## **56 Governing law**

This Deed will be governed by and construed in accordance with the laws of New South Wales. The Parties submit to the non-exclusive jurisdiction of the courts of New South Wales and waive any right to claim that those courts are an inconvenient forum.

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## **57 Assignment**

#### **57.1 Assignment by TfNSW**

TfNSW may at its own cost at any time assign, novate or otherwise transfer all or any of its rights or liabilities under this Deed to any person which has the financial capacity to perform the obligations of TfNSW under this Deed. The Contractor must execute any document reasonably required by TfNSW to give effect to such assignment, novation or transfer.

#### **57.2 Assignment by Contractor**

The Contractor cannot assign, novate, sell, mortgage, charge or otherwise transfer or encumber any of its rights, interest or liabilities under this Deed, or undergo a Change in Control in relation to itself or a Related Body Corporate of the Contractor, without the prior consent of TfNSW.

### 57.3 Change in Control

- (a) The Contractor must immediately notify TfNSW of any proposed Change in Control of the Contractor or any Related Body Corporate of the Contractor (or, in the case of a Change in Control due to the transfer of shares or securities in a publicly listed company, as soon as it becomes aware of that Change in Control or proposed Change in Control and is permitted by the Laws applicable to that publicly listed company to disclose that information to TfNSW) and must provide TfNSW with details of:
  - (i) the identity of each proposed Controller;
  - (ii) the address of each proposed Controller;
  - (iii) the extent and nature of the proposed Change in Control; and
  - (iv) any other information necessary for TfNSW to determine whether to consent, or not to consent, to the Change in Control of the Contractor or any Related Body Corporate (as the case may be).
- (b) Without limiting clause 58.18, TfNSW may withhold its consent to a proposed Change in Control of the Contractor, or any Related Body Corporate supplying any goods or services to the Contractor in connection with the ETS Project, if it has concerns that:
  - (i) the Controller:
    - (A) is not solvent or reputable;
    - (B) has an interest which conflicts in a material way with the interests of any ETS Entity or is involved in a business or activities which are incompatible with, or inappropriate in relation to the ETS Project; or
    - (C) does not have the same or greater financial and technical capacity than the person it is replacing or from which it is taking control;
  - (ii) the proposed Change in Control is against the public interest; or
  - (iii) the proposed Change in Control will impact adversely on the ability of the Contractor or Related Body Corporate supplying any goods or services to the Contractor in connection with the ETS Project (as applicable) to perform its obligations under this Deed.

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## 58 Miscellaneous

### 58.1 Notices

Every notice, approval, consent, demand, Claim, agreement, direction, instruction or other communication of any nature whatsoever required to be served, given or made under or arising from this Deed:

- (a) must be in writing in order to be valid;
- (b) must be left at the address of the addressee set out below or sent by prepaid ordinary post to the address of the addressee set out below or sent by facsimile to the facsimile number of the addressee set out below or if the addressee notifies

another address or facsimile number then to that address or facsimile number (and in addition a copy may also be sent by email to the email address of the addressee set out below, however that email copy will not of itself be valid for the purposes of this Deed):

**TfNSW**

Address: Level 1, 18 Lee Street  
Chippendale, New South Wales 2008  
Facsimile: (02) 8202 3536  
Attention: TfNSW's Representative, TfNSW  
Email: [ets@transport.nsw.gov.au](mailto:ets@transport.nsw.gov.au)

**The Contractor**

Address: Level 23, 219 – 227 Elizabeth Street  
Sydney, New South Wales 2000  
Facsimile: (02) 9275 9950  
Attention: Contractor's Representative  
Email: [ets@cubic.com](mailto:ets@cubic.com)

- (c) must be marked for the attention of the person referred to in clause 58.1(b);
- (d) is taken to be given, served or made in relation to a Party:
  - (i) (in the case of delivery by hand) on delivery;
  - (ii) (in the case of prepaid mail) 5 Business Days after the date of posting;
  - (iii) (in the case of facsimile) on receipt of a transmission report confirming successful receipt at the conclusion of the transmission; and
- (e) will be sufficient if executed by the Party giving, serving or making the same or on its behalf by any attorney, director, secretary, other duly authorised officer or solicitor of such Party.

**58.2 Copies of Project Agreement notices**

Each Party must provide to the other as soon as practicable certified copies of all material notices received by it under the Project Agreements from any of its co-contracting parties in order that the other Party is kept informed at all times of any material developments which could have an effect upon that Party's rights pursuant to any of the Project Agreements.

**58.3 Co-operation**

The Contractor must at all times throughout the Term co-operate with the ETS Entities to ensure the completion of the ETS Project in accordance with this Deed, subject always to the terms of clause 1.13.

**58.4 Advice regarding rights**

Each Party undertakes to advise the other as soon as practicable after an event has occurred which to a Party's actual knowledge could in any way materially prejudice the other Party's rights under this Deed by reason of the legitimate exercise of significant rights available to third parties arising from the Project Agreements.



### **58.5 Entire agreement**

All of the agreements and understandings between the Parties in respect of the scope of this Deed are embodied in the Project Agreements and, as from the Execution Date, such documents will supersede all prior agreements and understandings between the Parties in relation to such scope.

### **58.6 Variation**

No modification, variation or amendment of this Deed will be of any force unless such modification, variation or amendment is in writing and executed by each Party.

### **58.7 Waiver**

A failure to exercise or enforce or a delay in exercising or enforcing or a partial exercise or enforcement of any right, remedy, power or privilege under this Deed by either Party will not in any way:

- (a) preclude or operate as a waiver of any further exercise or enforcement of; or
- (b) constitute or operate as an election not to exercise or enforce,

that or any other right, remedy, power or privilege under this Deed or provided by Law.

### **58.8 Further assurance**

The Contractor must at its cost and expense immediately on demand by TfNSW perform all such acts and execute all such agreements, assurances and other documents and instruments as TfNSW reasonably requires to perfect the rights and powers afforded, created or intended by the Parties to be afforded to or created in favour of TfNSW by this Deed.

### **58.9 Severability of provisions**

Any provision of this Deed which is illegal, void or unenforceable will be ineffective to the extent only of such illegality, voidness or unenforceability without invalidating the remaining provisions of this Deed.

### **58.10 Counterparts**

This Deed may be executed in a number of counterparts and all such counterparts taken together will be deemed to constitute one and the same agreement.

### **58.11 Set-Off and application of reductions**

- (a) Notwithstanding any other provision of this Deed, TfNSW may set-off against any moneys which are due and payable by it to the Contractor (including any amount payable to the Contractor under clauses 33, and the value of any ETS Delivery Phase Variation or an Operational Services Variation determined in accordance with this Deed):
  - (i) any debt or other money due from the Contractor to TfNSW; and
  - (ii) the amount of any Claim which TfNSW may have against the Contractor whether for damages (including liquidated damages) or otherwise,whether under this Deed or otherwise at law relating to this Deed.



- (b) Any exercise by TfNSW of its rights under clause 58.11(a) is without prejudice to any other rights or remedies available to TfNSW under this Deed.
- (c) Without limiting clause 58.11(a);
  - (i) when TfNSW becomes entitled to a reduction in the ETS Project Fees in accordance with this Deed, TfNSW may apply those reductions against the next invoice or Monthly Invoice submitted by the Contractor (as applicable); and
  - (ii) if at the end of the Term there are any such reductions that have not yet been applied to reduce the ETS Project Fees payable, notwithstanding anything else in this Deed the Contractor must pay to TfNSW an amount equal to those unapplied reductions as a debt due and payable within 10 Business Days after the end of the Term.

#### **58.12 Indemnities**

Each indemnity in this Deed is a separate and independent obligation, and does not limit any other indemnity in this Deed or any other right or remedy of the indemnified person.

#### **58.12A Entitlement to costs and expenses**

Except where a fixed price Variation has been agreed by the Parties, where the Contractor is entitled to be paid for Delay Costs, amounts referred to in Schedule 10 (except the Termination for Convenience Fee referred to in paragraphs (a)(vi) and (c) of Schedule 10) or costs forming part of a Variation, the Contractor must:

- (a) demonstrate that such costs and expenses have been, or will be, incurred by the Contractor;
- (b) not claim costs or expenses that it has, or will, with reasonable certainty, recover by another means;
- (c) provide to TfNSW such information as the Contractor has or has access to, and such information as TfNSW may reasonably request, in relation to the calculation of those costs and expenses (other than in respect of any rates and prices set out in Schedule 7 forming part of a Variation); and
- (d) mitigate those costs and expenses to the extent reasonably practicable.

#### **58.13 Termination by TfNSW**

The exercise by TfNSW of its rights to terminate this Deed do not limit any other rights or remedies available to TfNSW.

#### **58.14 Australian currency**

All prices and sums of money referred to in, and payments required to be made under, this Deed will be in the lawful currency of the Commonwealth of Australia.

#### **58.15 Communications**

Every communication between the Parties must be in the English language.

#### **58.16 Measurements**

All measurements of physical quantities will be in Australian legal units of measurements in accordance with the *National Measurement Act 1960* (Cth).

#### **58.17 Approvals / acceptance / payment not to affect Contractor's obligations**

The giving of any approval, acceptance of any document or material, payment of any amounts under this Deed or the making of any direction or appointment or the exercise of any authority or discretion or the exercise, giving or making of any other matter or thing of any nature hereunder by TfNSW will not, except where this Deed expressly provides to the contrary, relieve the Contractor from its obligations under this Deed.

#### **58.18 Discretion of TfNSW**

- (a) Where under this Deed TfNSW has a right of approval or consent, or is given the ability to make a decision or exercise a right or discretion, or give a direction or instruction, such approval, consent, decision, right, discretion, direction or instruction may be given, withheld, taken or exercised by TfNSW in its sole and absolute discretion, unless otherwise expressly provided in this Deed.
- (b) Despite any obligation TfNSW has or may otherwise have under this Deed to use its best or reasonable endeavours, to conduct itself reasonably, not to conduct itself unreasonably, or to conduct itself in good faith, TfNSW is not required to:
  - (i) interfere with or influence the exercise by any person or Authority of a statutory power or discretion;
  - (ii) exercise a power or discretion or otherwise act in a manner that it regards as not in the public interest; or
  - (iii) develop or implement policy, or take any steps to procure legislation, by reference only or predominantly to the interests, objectives or expected outcomes of the ETS Project.

#### **58.19 Survival**

Clauses 5, 17, 18, 27, 28, 29, 30, 38, 41, 42, 46, 48, 49, 50, 53, 54, 55, 56, 57, 58.1, 58.5, 58.6, 58.7, 58.9, 58.11, 58.12, 58.12A, 58.13 and 58.17 to 58.24 (inclusive) survive termination or expiry of this Deed, together with any other term which is expressed under this Deed, or by its nature is intended, to do so.

#### **58.20 Non-merger**

None of the terms or conditions of this Deed nor any act, matter or thing done under or by virtue of or in connection with this Deed will operate as a merger of any of the rights and remedies of the Parties in or under this Deed all of which will continue in full force and effect until the respective rights and obligations of the Parties under this Deed have been fully performed and satisfied.

#### **58.21 Moratorium**

Unless application is mandatory by Law, no statute, ordinance, proclamation, order, regulation or moratorium present or future will apply to this Deed so as to abrogate, extinguish, impair, diminish, fetter, delay or otherwise prejudicially affect any rights, powers, remedies or discretions given or accruing to either Party under this Deed.

## **58.22 Exclusion of *Civil Liability Act 2002* (NSW)**

To the extent permitted by Law, the operation of Part 4 of the *Civil Liability Act 2002* (NSW) is excluded in relation to any and all rights, obligations and liabilities arising under or in relation to this Deed howsoever such rights, obligations or liabilities are sought to be enforced.

## **58.23 Rights held on trust and references to the ETS Entities and Indemnified Entities**

- (a) To the extent that any provisions of this Deed confer any rights or benefits on the ETS Entities or the Indemnified Entities (including any exclusions or limitations on the liability of the ETS Entities and the Indemnified Entities), those rights or benefits are conferred on the entities and individuals comprising the ETS Entities and Indemnified Entities, as the case may be, jointly and severally and a reference to the ETS Entities or Indemnified Entities is a reference to any one or more of the entities and individuals comprising the ETS Entities or Indemnified Entities, as the case may be.
- (b) To the extent that any provisions of this Deed confer any rights or benefits on the ETS Entities and the Indemnified Entities (other than TfNSW) (including any exclusions or limitations on the liability of the ETS Entities and the Indemnified Entities or any indemnities provided by the Contractor in favour of the Indemnified Entities), the ETS Entities and Indemnified Entities are intended to have the benefit of those provisions as if they were parties to this Deed, subject to the exclusions or limitations in this Deed on the liability of the Contractor.
- (c) This Deed is executed by the Contractor and operates as a deed poll in favour of the ETS Entities and the Indemnified Entities for the purpose of enabling the ETS Entities and the Indemnified Entities to enjoy the benefit of the exclusions and limitations referred to in clause 58.23(b), and may be relied upon directly by each of the ETS Entities and Indemnified Entities for that purpose as if they were a party to this Deed in response to any claim.
- (d) This Deed is also executed by the Contractor on the basis that it provides the Contractor with the benefit of the exclusions or limitations in this Deed on the liability of the Contractor.
- (e) Without limiting clause 42.4 or the effect of the deed poll referred to above, TfNSW holds the benefits of the provisions referred to in clause 58.23(b) on trust for the ETS Entities and the Indemnified Entities (other than TfNSW), and can enforce those provisions on their behalf, subject to the exclusions or limitations in this Deed on the liability of the Contractor. TfNSW must pay all stamp duties payable in relation to such trust arrangements.

## **58.24 Capacity**

Except as expressly provided in this Deed (including under clause 58.23), each person who executes this Deed does so solely in its own legal capacity and not as agent or trustee for or a partner of any other person.

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# Execution page

**Executed as a deed.**

---

Signed, sealed and delivered by the Public Transport Ticketing Corporation in the presence of:

---

Signature of the Chief Executive Officer on behalf of the Public Transport Ticketing Corporation pursuant to section 35X(2) of the *Transport Administration Act 1988* (NSW):

---

Signature of witness

---

Name of Chief Executive Officer (print)

---

Name of witness (print)

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Signed, sealed and delivered by Cubic Transportation Systems (Australia) Pty Limited in accordance with section 127 of the *Corporations Act 2001* (Cth) and by:

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Signature of director

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Signature of director/secretary

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Name of director (print)

---

Name of director/secretary (print)

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## Schedule 1 — Stages

[Commercial-in-confidence]

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## Schedule 2 — Completion Pre-Conditions

In addition to and without limiting the applicable terms of this Deed (including clause 14.2), the following pre-conditions must be achieved before the Contractor may submit its second (or any subsequent) Extent of Completion Claim under clause 14.2(a):

1. [REDACTED] of the Scope of Works and Services have been updated by the Contractor following the Re-baselining Date in accordance with clause 6.3 (including in accordance with clause 1.2(j)) and, to the extent requested by TfNSW following its review under clause 6.4, clause 6.5; and
2. the Overall ETS Delivery Program has been updated by the Contractor in accordance with clause 8 following the Re-baselining Date.

In addition to and without limiting the applicable terms of this Deed, the following pre-conditions must be achieved before the Entitlement to Claim Criteria for a Planned Value Category can be met.

In respect of each Entitlement to Claim Criteria for a Planned Value Category, the following pre-conditions have been satisfied to the extent they are relevant to that Entitlement to Claim Criteria for that Planned Value Category (except in relation to the requirement in item 2 which must have been satisfied in respect of all Entitlement to Claim Criteria:

1. all Approvals and licences required to be obtained by the Contractor have been obtained and each of the relevant conditions to such Approvals and licences have been satisfied;
2. all insurances required to be effected have been effected in accordance with this Deed;
3. the Contractor has provided to TfNSW the best available warranties from all of its Subcontractors directly in favour of TfNSW;
4. all tests which are required by the Deed to be carried out and passed have been carried out and passed;
5. all Design Documentation has been provided to TfNSW;
6. all DDI Reviews have been completed in accordance with this Deed;
7. all "as built" drawings of all designs have been submitted to TfNSW; and
8. all other ETS Documentation required in accordance with this Deed, including the Scope of Works and Services, has been provided to TfNSW.

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## Schedule 3 — Planned Value Category Payment Schedule

[Commercial-in-confidence]



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## Schedule 4 — Not used

[Commercial-in-confidence]

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## Schedule 5 — Fixed Service Charge

[Commercial-in-confidence]

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## Schedule 6 — Usage Service Charge

[Commercial-in-confidence]

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**Schedule 7 — Schedule of Prices and Work Rates (for Usage Charge or Variations)**

[Commercial-in-confidence]

*NOTE: some clauses and Schedules have been partly or completely removed under the provisions of the GIPA Act. For details, refer to TfNSW's Government Contracts Register – Project Deed.*

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# Schedule 8 — Indexation

- (a) A range of indexable components stated in Schedules 5, 6, and 7 will be adjusted for rise and fall in accordance with the provisions of this Schedule 8.
- (b) The indexable components will be adjusted by the Indexation Factor calculated in respect of each indexable component at the commencement of each Quarter.
- (c) [Commercial-in-confidence]
- (d) **CPI Quarter End** means each 3 month period ending on 31 March, 30 June, 30 September and 31 December.
- (e) **WI Quarter End** means each 3 month period ending on 31 August, 30 November, 28 February, 31 May.
- (f) **Base Date** means 1 January 2010.
- (g) The indexed proportion in respect of each indexable component is identified in Table 1 below:  
  
[Commercial-in-confidence]
- (h) **Consumer Price Index** or **CPI** means the "Weighted Average of Eight Capital Cities: All Groups Consumer Price Index" as maintained and published quarterly by the Australia Bureau of Statistics (**ABS**) provided that:
  - (i) if for any reason the CPI is not published for any quarter, or if publication is delayed until after the relevant date under the Deed or other date in respect of which a determination is to be made, the interim number determined by the Reserve Bank of Australia for application in regard to Commonwealth of Australia Treasury Indexed Bonds will be used for the purposes for which the actual CPI figure would have been applied. If no such interim number is determined by the Reserve Bank of Australia then the CPI published for the previous quarter will apply in the interim. In the event of subsequent publication of the actual CPI figure for that quarter by the ABS, adjustment to the charges will be made;
  - (ii) if the ABS ceases to publish the CPI and publishes another index which is stated to be in replacement of the CPI, then that will be used for the relevant determination;
  - (iii) if the ABS ceases to publish the CPI without publishing a replacement index, or if any change is made to the coverage, periodicity, or basic calculation of the CPI which, in the opinion of the Treasurer of the Commonwealth of Australia, constitutes a change in the CPI which is materially detrimental to the interests of Commonwealth of Australia Treasury Indexed Bond holders then, in such circumstances, the index to be announced by the Treasurer of the Commonwealth of Australia for use with Commonwealth of Australia Treasury Indexed Bonds will be substituted for the CPI. In the event of no such index being established, the President of the Institute of Actuaries of Australia or his/her nominee acting as an independent arbitrator will be called upon to calculate an index which he/she determines to be appropriate as a general indication of the rate of price change for consumer goods and services in the capital cities of Australia; and
  - (iv) if the reference base of the CPI is changed, the index which will be used will be the CPI numbers expressed on the new base as published by the ABS.

- (i) **Wages Index or WI** means the “Average Weekly Earnings of Employees: Full Time Adults, (Persons, Full Time Adult Ordinary Time Earnings)” as maintained and published quarterly by the ABS provided that:
  - (i) if for any reason the WI is not published for any quarter, or if publication is delayed until after the relevant date under the Deed or other date in respect of which a determination is to be made, the WI published for the previous quarter will apply in the interim. In the event of subsequent publication of the actual WI figure for that quarter by the ABS, adjustment to the charges will be made;
  - (ii) if the ABS ceases to publish the WI and publishes another index which is stated to be in replacement of the WI, then that will be used for the relevant determination;
  - (iii) if the ABS ceases to publish the WI and no other index is provided in replacement of the WI, then the parties will determine in good faith an alternative method of adjusting the WI indexed component of the charges as most closely reflects the intent of the provisions set out in this Schedule 8.
  - (iv) if the reference base of the WI is changed, the index which will be used will be the WI numbers expressed on the new base as published by the ABS.
- (j) The Parties agree that any dispute as to the value of CPI or WI will be determined in accordance with the Dispute Resolution Procedures.
- (k) Either Party may request a review of the indexation formula upon an Indexation Review Date on the grounds that the formula (including Table 1 of this Schedule 8) no longer reasonably reflects the changes in the categories of costs included in each indexable component which can be reasonably anticipated. If agreement cannot be reached TfNSW's Representative will make a determination as to whether the formula requires adjustment because it will not reasonably reflect the changes in the categories of costs included in each indexable component which can be reasonably anticipated. If TfNSW's Representative determines this to be the case then it will determine an adjusted formula to reasonably reflect the changes in the categories of costs included in each indexable component. Any dispute about this determination will be subject to the Dispute Resolution Procedures.

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## Schedule 9 — Key Performance Indicators

[Commercial-in-confidence]



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## **Schedule 10 — Payment on Termination for Convenience**

[Commercial-in-confidence]

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## Schedule 11 — Step-In Procedure

- (a) If clause 52 of this Deed applies and the PTTC wishes to exercise its Step-In Rights, the PTTC must notify the Contractor in writing of the following:
  - (i) the action it wishes to take and/or any action that has already been taken by it;
  - (ii) the reason for such action;
  - (iii) the date it wishes to commence such action, if such action has not already been taken;
  - (iv) the time period which it believes may be necessary for such action; and
  - (v) to the extent practicable, the effect on the Contractor and its obligations to perform the ETS Project during the period such action is being taken.
- (b) The PTTC and/or its representatives may take such action as notified in paragraph (a) and any consequential additional action as it reasonably believes is necessary (together, the **Required Action**) and the Contractor must give all reasonable assistance to the PTTC and/or its representatives while it is taking the Required Action.
- (c) Except to the extent the Required Action is taken as a result of a breach of the obligations of the Contractor under this Deed, PTTC must use its reasonable endeavours to complete the Required Action promptly upon cessation of the relevant event which gave rise to the exercise of the Step-In Rights.

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## Schedule 12 — End of Term Handback Condition

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## 1 Handback Condition

The Contractor must handback the ETS at the end of the Term to meet a residual life of [REDACTED] for Device Infrastructure (as determined by the Handback Audit), where residual life means the duration which the Device Infrastructure will continue to operate in a manner that will satisfy the Key Performance Indicators, with due allowance being made for:

- (a) routine maintenance at ordinary levels; and
- (b) items which are no longer available for purchase but for which the Contractor holds sufficient spares that are transferred to the PTTC as part of Transfer,

(Handback Condition).

---

## 2 Audit on Expiry and Handback Security

### 2.1 Handback Audit

- (a) Without prejudice to any other provision of this Deed:

- (i) 3 years; and

- (ii) 1 year,

prior to the expiration of the Term, the PTTC will be entitled to procure a project audit by an independent assessor (the **Independent Assessor**) appointed by agreement between the Parties (or in default of agreement within 10 Business Days of a nomination made in writing by the PTTC, appointed by the President of the Australian Institute of Quantity Surveyors) (the **Handback Audit**) of the ETS to assess whether it has been and is being maintained by the Contractor in accordance with its obligations under this Deed and to determine the aggregate of the amount (if any) required to be expended for the balance of the period up until the expiration of the Term to ensure that the ETS meets or exceeds the Handback Condition on the expiration of the Term (less any amounts which will be paid by the Contractor during that period for any scheduled maintenance or lifecycle replacements to be performed during the period) and the amount (if any) for making good or rectifying any breaches by the Contractor of this Deed.

- (b) The cost of each Handback Audit will be shared equally between the Parties.

### 2.2 Results of Handback Audit

If the Handback Audit reveals work required to rectify breaches of the Contractor's obligations under this Deed or to ensure the ETS meets or exceeds the Handback Condition on the expiration of the Term (taking into account any scheduled maintenance or lifecycle replacement to be performed during the period), the Independent Assessor:

- (a) must notify the Contractor of the required rectification (which, for the purposes of this paragraph 2.2 includes repair and/or replacement) and/or other work; and
- (b) must specify a reasonable period within which the Contractor must perform such work.

### **2.3 Rectification work**

The Contractor must perform the required rectification and/or maintenance work notified pursuant to paragraph 2.2 to the satisfaction of the Independent Assessor within the period specified and any costs it incurs in performing such rectification and/or maintenance work will be at its own expense.

### **2.4 Failure to perform work**

- (a) If and to the extent that the Contractor fails to perform the necessary rectification and/or maintenance work to the appropriate level of professional care, in accordance with Good Industry Practice and to the satisfaction of the Independent Assessor, and within the specified period as notified pursuant to paragraph 2.2(b), the PTTC will be entitled to perform itself, or procure, such rectification and/or maintenance work, and the cost of such rectification and/or maintenance work will be a reduction in the ETS Project Fees payable by the PTTC.
- (b) The PTTC may deduct or set-off that amount against any amount otherwise payable by the PTTC to the Contractor, or may take any other enforcement action available to it including under the security provided, in respect of an unpaid debt owed to it.

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## Schedule 13 — Defect Rectification

[Commercial-in-confidence]

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## Schedule 14 — Operators' Sites

[Commercial-in-confidence]



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## Schedule 15 — Operator List

The Operators are:

- (a) RailCorp;
- (b) STA;
- (c) Ferries;
- (d) Private Bus Operators;
- (e) Airport Link; and
- (f) any other transport operator required by the PTTC to be subject to the provisions of this Deed, subject only to clause 11.1(f) or 26.1(f).

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## Schedule 16 — Not Used

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## Schedule 17 — Scope of Works and Services

[Commercial-in-confidence]

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## Schedule 18 — Information Documents

[Commercial-in-confidence]

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## Schedule 19 — Specified Personnel

[Commercial-in-confidence]

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## Schedule 20 — Approved Subcontractors

*NOTE: some clauses and Schedules have been partly or completely removed under the provisions of the GIPA Act. For details, refer to TfNSW's Government Contracts Register – Project Deed.*

- 1 Downer EDI Engineering Power Pty Ltd (ABN 53 000 983 700) of 9 Modal Place, Canning Vale WA 6155
- 2 Commonwealth Bank of Australia (ABN 48 123 123 124) Level 22, DP1, 201 Sussex Street, Sydney NSW 2000
- 3 Epay Australia Pty Ltd (ABN 71 093 566 057) of Level 9, 131 York Street, Sydney NSW, 2000
- 4 Parkeon Pty Ltd (ABN 47 122 259 303) of Level 29, 66 Goulburn Street, Sydney NSW 2000



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## Schedule 21 — Licensed IP

[Commercial-in-confidence]

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## Schedule 22 — Site Access Plan

[Commercial-in-confidence]

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## Schedule 23 — Testing Plan

## 1 Testing framework

### 1.1 Purpose

The purpose of this Schedule is to:

- (i) set out the Contractor's obligations in relation to testing; and
- (ii) set out at a high level the process that applies to testing.

for the various components of the ETS as delivered by the Contractor in the performance of the ETS Project. Such testing is of the Tested Components of the ETS for each Stage and Milestone of ETS Delivery.

As a result, this Schedule does not deal with all of the Contractor's evaluation and approval obligations under this Deed.

### 1.2 Structure of the testing provisions of this Deed

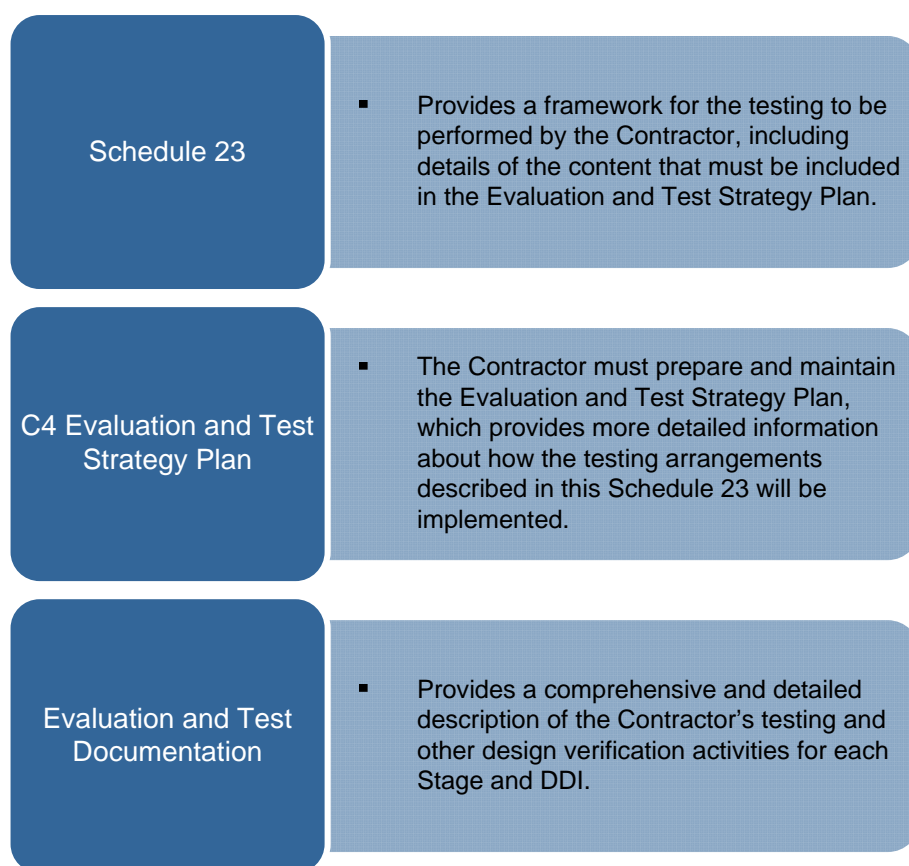
By way of summary, the following parts of this Deed describe the main obligations of the Contractor relating to the testing referred to in paragraph 1.1 above:

- (a) this Schedule 23 provides a framework for the testing to be performed by the Contractor, including details of the content that must be included in the Evaluation and Test Strategy Plan and the Evaluation and Test Documentation;
- (b) as described in section Section 2.2.4 of Appendix A7 of Schedule 17, the Contractor must prepare and maintain an Evaluation and Test Strategy Plan, which must be consistent with the requirements of this Schedule 23, and provide more detailed information about how the testing arrangements described in this Schedule 23 will be implemented by the Contractor; and
- (c) as described in Table 6 of Section 2 of Appendix A8 of Schedule 17, the Contractor must prepare and maintain Evaluation and Test Documentation for each Stage and DDI, which must be consistent with the requirements of this Schedule 23, Section 2 of Appendix A8 and the Evaluation and Test Strategy Plan.

Other parts of this Deed may also be relevant to the testing obligations of the Contractor.

This structure can be shown diagrammatically as follows:

**Figure 1 – Structure of Testing Provisions**



### 1.3 Overview

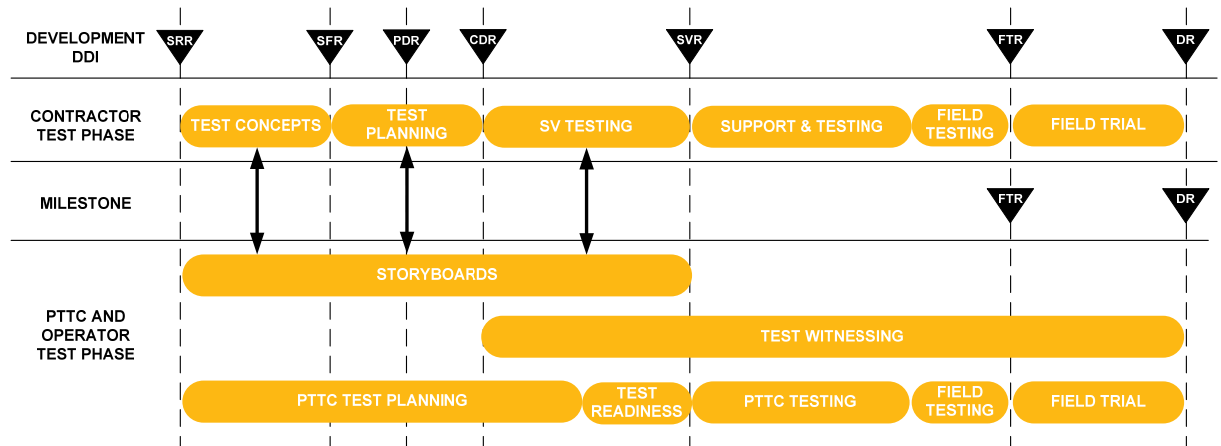
The ETS Project is divided into a number of:

- (a) design development increments, or DDIs, as described in Appendix A8 of the Scope of Works and Services; and
- (b) Stages, each with one or more Milestones, as described in Schedule 1.

Each of the Milestones in Stage 1 is associated with its own set of development DDIs as shown in Figure 2. Between each of the development DDIs there are Testing Activities specific to each of the Contractor Test Phase and the PTTC and Operator Test Phase. These Testing Activities include the planning associated with testing, the development of storyboards, testing conducted in the Integrated Test Facilities, field testing and field trials. Table 1 and Table 2 provide a description and the objectives of each Test Activity, including the entities involved in the Test Activity.

NOTE: some clauses and Schedules have been partly or completely removed under the provisions of the GIPA Act. For details, refer to TfNSW's Government Contracts Register – Project Deed.

**Figure 2 – Test Phases, Test Activities, DDIs and related Milestones**



**Table 1 –Contractor Test Phase Activities**

Test Activity	Description	Objective	Test Entities
Test Concepts	Development of high level testing concepts	Ensure the Tested Components are ready for Test Planning and support PTTC Test Planning	<ul style="list-style-type: none"> <li>Contractor</li> </ul>
Test Planning	Development of Evaluation and Test Documentation including test scripts	Ensure the ETS is ready for Contractor Testing	<ul style="list-style-type: none"> <li>Contractor</li> </ul>
SV Testing	Testing as defined in the Contractor's Evaluation and Test Strategy Plan and the Evaluation and Test Documentation to meet the requirements of SVR	Ensure the ETS is robustly tested before the commencement of PTTC Testing	<ul style="list-style-type: none"> <li>Contractor</li> <li>Independent Certifier</li> </ul>
Support & Testing	Support for PTTC Testing activities. Re-testing as a result of non-compliances identified during PTTC Testing	Ensure the ETS is robustly tested	<ul style="list-style-type: none"> <li>Contractor</li> </ul>
Field Testing	A range of field testing activities conducted at a nominated site or environment.	Test business processes and identify field related defects or issues.	<ul style="list-style-type: none"> <li>Contractor</li> <li>Operator associated with Milestone</li> <li>PTTC</li> <li>Independent Certifier</li> </ul>
Field Trial	This is the first stage of deployment where the relevant parts of the ETS are installed and tested at a nominated operating trial site with selected users being engaged for the purpose of measuring and monitoring solution success.	The field trial will validate the solution in an operating environment with selected users.	<ul style="list-style-type: none"> <li>Contractor</li> <li>PTTC</li> <li>Operators associated with Milestone</li> <li>Independent Certifier</li> </ul>

**Table 2 –PTTC and Operator Test Phase Activities**

Test Activity	Description	Objective	Test Entities
Storyboards	<p>A set of end-to-end business scenarios made up of multiple, discrete test steps. Each test step refers to a single business process . A new business process is said to occur when there is:</p> <ul style="list-style-type: none"> <li>• A change from one process map step to the other</li> <li>• A change in the role performing the step</li> <li>• A change in technology</li> <li>• A change in computer screens</li> </ul> <p>Each test step should have a defined deliverable associated with the step (e.g. process map, system screen, interface file, call script). If the deliverable is not ready, then the test will be a 'simulated test'</p>	Provides the link between business requirements, system requirements and testing requirements.	<ul style="list-style-type: none"> <li>▪ Contractor</li> <li>▪ PTTC</li> <li>▪ Operators associated with Milestone</li> </ul>
Test Witnessing	Witnessing of tests performed during the Contractor Test Phase	Builds confidence in the validity of Contractor Test Phase activities	<ul style="list-style-type: none"> <li>▪ PTTC</li> <li>▪ Operators associated with Milestone</li> <li>▪ Independent Certifier</li> </ul>
PTTC Test Planning	Development of detailed testing plans to meet PTTC and Operator needs	Confirms the ETS is ready for Test Readiness and PTTC Testing	<ul style="list-style-type: none"> <li>▪ PTTC</li> <li>▪ Operators associated with Milestone</li> </ul>
Test Readiness	<p>Test Readiness is intended to confirm that in the PTTC test environment:</p> <ul style="list-style-type: none"> <li>▪ the relevant hardware and software is all present and functioning.</li> <li>▪ that connectivity between sub-systems and interfaces is established.</li> <li>▪ the Contractor is ready to support PTTC testing.</li> </ul>	Provide confidence that the test environment is ready to begin comprehensive PTTC and operator testing activities.	<ul style="list-style-type: none"> <li>▪ PTTC</li> <li>▪ Operators associated with Milestone</li> </ul>

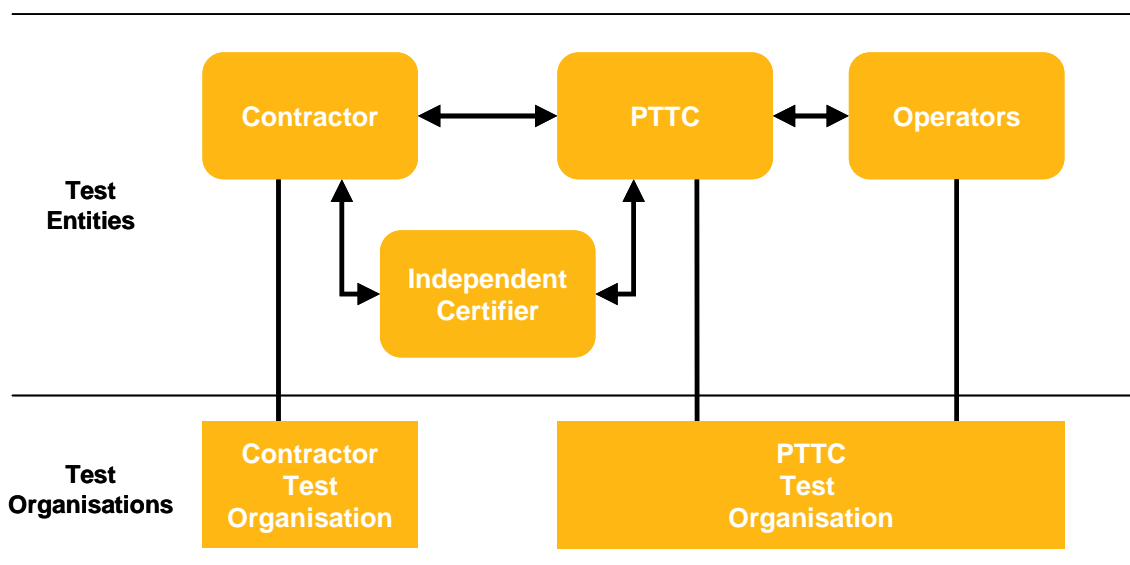
Test Activity	Description	Objective	Test Entities
PTTC Testing	A range of testing activities which aims to test key functional areas, test scenarios and business processes.	PTTC managed testing activity to confirm ETS readiness for Field Testing.	<ul style="list-style-type: none"> <li>PTTC</li> <li>Operators associated with Milestone</li> <li>Independent Certifier</li> <li>Contractor (support)</li> </ul>
Field Testing	A range of field testing activities conducted at a nominated site or environment.	test business processes and identify environmental related defects or issues.	<ul style="list-style-type: none"> <li>Contractor</li> <li>Operator associated with Milestone</li> <li>PTTC</li> <li>Independent Certifier</li> </ul>
Field Trial	This is the first stage of deployment where the relevant parts of the ETS are installed and tested at a nominated operating trial site with selected users being engaged for the purpose of measuring and monitoring solution success.	The field trial will validate the solution in an operating environment with selected users.	<ul style="list-style-type: none"> <li>Contractor</li> <li>PTTC</li> <li>Operators associated with Milestone</li> <li>Independent Certifier</li> </ul>

#### 1.4 Test organisation

There are a number of entities that are involved in the testing processes described in this Schedule, as identified in Figure 3. The key test objectives of each entity are described in Table 3.



**Figure 3 – ETS Project Test Entities and Test Organisations**



**Table 3 – ETS Project Test Entities and Key Test Objectives**

Entity	Key Test Objectives
The PTTC	<p>The PTTC has the right to conduct testing to among other things confirm that:</p> <ul style="list-style-type: none"> <li>the ETS complies with the requirements of this Deed;</li> <li>the ETS does not adversely impact the operational performance or capacity of an ETS Entity's existing infrastructure;</li> <li>any risk of any non-conformances to the requirements of this Deed are being properly managed by the Contractor; and</li> <li>the ETS has met Customer and Stakeholder requirements.</li> </ul> <p>The PTTC will coordinate and manage the testing activities of Operators.</p>
Contractor	<p>The Contractor must conduct testing in accordance with this Deed to:</p> <ul style="list-style-type: none"> <li>ensure that the ETS complies with the requirements of this Deed;</li> <li>deliver an ETS which has been robustly tested;</li> <li>provide sufficient test support for any testing the PTTC or any other ETS Entity may choose to perform;</li> <li>resolve non-compliances discovered as a result of testing; and</li> <li>identify and correct defects</li> </ul>
Operators	<p>The Operators have the right to conduct testing, to among other things confirm that:</p> <ul style="list-style-type: none"> <li>the ETS complies to the requirements in this Deed that are specific to each Operator;</li> <li>the ETS does not adversely impact the operational performance or capacity of that Operator's existing infrastructure other than as may be expressly contemplated in this Deed; and</li> <li>that the ETS presents a high degree of usability for key users of the ETS.</li> </ul>
Independent Certifier	<p>The Independent Certifier provides an assessment of deliverables to determine whether the requirements of this Deed are met.</p>

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## Schedule 24 — Business Continuity Plan

[Commercial-in-confidence]

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## Schedule 25 — Interface Plan

[Commercial-in-confidence]

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## Schedule 26 — ETS Entities' Works

[Commercial-in-confidence]

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## Schedule 27 — Security Bonds

[Commercial-in-confidence]

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## Schedule 28 — Insurance Policies

[Commercial-in-confidence]

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## Schedule 29 — Overall ETS Delivery Program

[Commercial-in-confidence]

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## Schedule 30 — Overall Operational Services Program

[Commercial-in-confidence]



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## Schedule 31 — Deed of Appointment of Expert

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# Deed of Appointment of Expert Electronic Ticketing System for the Greater Sydney region

Public Transport Ticketing Corporation ABN 57 443 320 873

Cubic Transportation Systems (Australia) Pty Limited ABN 82 003 617 561

[insert name of Expert]

**DEED** made at Sydney on

Parties      **PUBLIC TRANSPORT TICKETING CORPORATION**, ABN 57 443 320 873  
of Level 20, Town Hall House, 456 Kent Street, Sydney NSW 2000 (the  
**PTTC**)

**CUBIC TRANSPORTATION SYSTEMS (AUSTRALIA) PTY LIMITED**,  
ABN 82 003 617 561, of Level 12, 95 Pitt Street, Sydney NSW 2000 (the  
**Contractor**)

**[INSERT NAME]** of **[insert address]** (**Expert**)

---

## Recitals

- A.    The PTTC and the Contractor have entered into an agreement dated [            ]  
entitled "Project Deed – Electronic Ticketing System for the Greater Sydney  
region" (**Project Deed**).
- B.    The Expert has been appointed by the PTTC and the Contractor to determine  
disputes or differences under the procedure described in the Project Deed.

**This Deed witnesses**

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## 1 Interpretation

Unless the contrary intention appears, capitalised terms used in this Deed that are  
defined in the Project Deed have the same meaning attributed to such terms in the  
Project Deed.

---

## 2 Decide on disputes

The Expert will be required to determine disputes or differences referred to the Expert in  
accordance with the procedures set out in the Project Deed and will, in discharging the  
Expert's obligations under this Deed, abide and be bound by the provisions of the Project  
Deed.

---

## 3 Meeting

The Expert must within 5 Business Days of being appointed, meet with the PTTC and the  
Contractor to determine a procedure to resolve the dispute or difference.

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## 4 The Expert released

The Expert will not be liable to the parties or either of them or to any third party or  
stranger for anything done or omitted by the Expert under this Deed and the parties  
release and indemnify the Expert from and against any claims for negligence (other than  
actual fraud, bias or misconduct) in the course of discharging the Expert's obligations  
under this Deed.

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## 5 Expert's powers

The Expert will in discharging the Expert's obligations under this Deed:

- (a)    act as an expert and not as an arbitrator;

- (b) proceed in such manner as the Expert thinks fit without being bound to observe the rules of evidence;
- (c) take into consideration all documents, material and other written and oral information that the parties place before the Expert including documents, materials and information relating to the facts in dispute and to arguments and submissions upon the matters in dispute;
- (d) not be expected or required to obtain or refer to any other documents, materials or information but may do so if the Expert so desires;
- (e) make a decision in such written form as the Expert considers appropriate stating the Expert's determination of the matters in dispute and the reasons for the determination; and
- (f) act in good faith and with expedition to make a decision within the time period required by the Project Deed.

---

## **6 Meet with parties**

The Expert may as a part of the procedure to be determined under clause 50 of the Project Deed further meet with the parties to discuss the dispute or difference and at and in connection with any such meeting:

- (a) neither party may be accompanied by their legal representative; and
- (b) the parties agree to be bound by such procedural directions as may be given by the Expert both in preparation for and during the course of the meeting.

The parties agree that any such meeting or meetings will not in any way be regarded as a formal hearing.

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## **7 Decision binding**

Subject to clause 50.4 of the Project Deed, the Expert's decision will be final and binding.

---

## **8 Remuneration**

In consideration of the Expert performing the Expert's obligations under this Deed but subject to the receipt by the PTTC and the Contractor of a valid tax invoice for GST purposes, the PTTC and the Contractor will each pay to the Expert one-half of the amount set out in the Schedule or such other amount as is agreed between all parties to this Deed.

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## **9 Confidentiality**

The Expert must not, at any time, whether before or after the expiration or sooner termination of this Deed, without the consent of the PTTC and the Contractor divulge to any person any details concerning:

- (a) the subject matter of any dispute or difference referred to the Expert under this Deed;
- (b) any of the contents of the Project Deed or this Deed or any other agreements collateral or supplemental to the Project Deed or this Deed;

- (c) any of the commercial bases of the Project Deed or any information relating to the negotiations concerning the same or any information which may have come to the Expert's knowledge in the course of such negotiations; or
- (d) the operations, dealings, transactions, contracts, commercial or financial arrangements or affairs of the PTTC and the Contractor as contemplated by the Project Deed.

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## 10 Nature of Expert's role

- (a) The Expert must be independent from the PTTC and the Contractor and (without limitation) the Expert warrants that he or she has no conflict of interest in acting under this Deed. Nothing in this Deed will be deemed to make the Expert an agent, employee or partner of the PTTC or the Contractor.
- (b) The Expert will assume full responsibility and liability for the payment of all taxes (including GST) due on moneys received by the Expert under this Deed.

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## 11 Release

The PTTC and the Contractor release and indemnify the Expert from and against all claims, except in the case of fraud, bias or misconduct on the part of the Expert, which may be made against him or her by any person in respect of the Expert's appointment to determine the dispute or difference.

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## 12 Termination

This Deed may be terminated by either the PTTC or the Contractor by giving the other parties 10 Business Days' notice in any of the following events:

- (a) the Expert being declared of unsound mind or mentally ill;
- (b) the Expert being declared bankrupt;
- (c) the Expert committing any proven act of dishonesty or, by wilful act or omission or by gross neglect, behaving in a fashion clearly prejudicial to the interests of the PTTC or the Contractor;
- (d) the Expert failing to observe and fulfil any of the substantive terms of this Deed; or
- (e) the Expert being prevented by prolonged illness or incapacity from performing the Expert's obligations under this Deed.

---

## 13 Notices

All notices to be given to the Expert under this Deed will be properly given if hand delivered to the Expert or if sent by certified or registered mail to the Expert's address shown in this Deed or to such other address as the Expert may from time to time advise by notice.

---

## 14 Governing Law

This Deed will be construed for all purposes under the laws of New South Wales.

*NOTE: some clauses and Schedules have been partly or completely removed under the provisions of the GIPA Act. For details, refer to TfNSW's Government Contracts Register – Project Deed.*

## THE SCHEDULE

Expert's Remuneration (including any GST)

**[to be inserted]**

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## Execution page

**EXECUTED** as a deed.

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Signed, sealed and delivered by the Public Transport Ticketing Corporation in the presence of:

---

Signature of the Chief Executive Officer on behalf of the Public Transport Ticketing Corporation pursuant to section 35X(2) of the *Transport Administration Act 1988* (NSW):

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Signature of witness

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Name of Chief Executive Officer (print)

---

Name of witness (print)

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Signed, sealed and delivered by Cubic Transportation Systems (Australia) Pty Limited in accordance with section 127 of the *Corporations Act 2001* (Cth) and by:

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Signature of director

---

Signature of director/secretary

---

Name of director (print)

---

Name of director/secretary (print)

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Signed sealed and delivered by [Expert] in the presence of:

---

Signature of witness

---

Signature of [Expert]

---

Name of witness (print)

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## Schedule 32 — Parent Company Guarantee

[Commercial-in-confidence]



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## Schedule 33 — Escrow Agreement

[Commercial-in-confidence]

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## Schedule 34 — Subcontractor Deed

[Commercial-in-confidence]

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**Schedule 35      —    Independent Certifier Deed**

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# Independent Certifier Deed Electronic Ticketing System for the Greater Sydney region

Transport for NSW ABN 18 804 239 602

Cubic Transportation Systems (Australia) Pty Limited ABN 82 003 617 561

Arup Pty Ltd ABN 18 000 966 165

**Independent Certifier Deed executed at Sydney on**

## Parties

- 1 **Transport for NSW ABN 18 804 239 602** of Level 1, 18 Lee Street, Chippendale NSW 2008 (**TfNSW**)
- 2 **Cubic Transportation Systems (Australia) Pty Limited ABN 82 003 617 561** of Level 23, 219 – 227 Elizabeth Street, Sydney NSW 2000 (**Contractor**)
- 3 **Arup Pty Ltd ABN 18 000 966 165** of Level 10, 201 Kent Street, Sydney NSW 2000 (**Independent Certifier**)

## Background

- A. The Parties have entered into this Deed to appoint the Independent Certifier as the Independent Certifier for the purposes of the ETS Project.
- B. By entering into this Deed the Independent Certifier accepts its appointment under this Deed and agrees to independently carry out its obligations and fulfil its functions under this Deed.

## 1 Interpretation

## 1.1 Definitions

In this Deed:

**Certification Services Plan** means the plan which the Independent Certifier is required to prepare and update in accordance with clause 4.2 of this Deed.

**Deed** means this deed entitled “Independent Certifier Deed” between TfNSW, the Contractor and the Independent Certifier and includes the attached Schedules.

## Fee means

**Functions** means those functions listed in Schedule 1, and any other obligation, function, task, duty or service contemplated to be performed by the Independent Certifier under this Deed or the Project Deed.

### Independent Certifier Developed IP means

**Independent Certifier Project IP means**

**Independent Certifier Retained IP means**

**IC Deed Commencement Date** means the date on which each of the conditions precedent in clause 1A have been satisfied, or waived, as confirmed in writing by TfNSW to the Independent Certifier.

**IC Deed Execution Date** means the date of execution of this Deed as specified at the front of this Deed.

**Insurance** means [REDACTED]

**Insurance Letter** means [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

**Party** means each of TfNSW, the Contractor and the Independent Certifier and **Parties** means all of them.

**Payment Schedule** means Schedule 2 of this Deed.

**Project Budget** means [REDACTED]

**Project Deed** means the deed entitled "Project Deed - Electronic Ticketing System for the Greater Sydney region" dated on or about the date of this Deed between TfNSW and the Contractor (as amended from time to time).

**Project Support Function** means any Function covered by the Project Budget which is not in respect of a Planned Value Category Requiring Certification or DDI Review.

**Representative** means any of the Independent Certifier's Personnel, who perform, or are appointed by the Independent Certifier to perform, any of the Functions and any other person appointed by the Independent Certifier under clause 5.3(b).

**Schedule of Rates** means [REDACTED]

**Security Interest** means a right, interest, power or arrangement in relation to an asset which provides security for the payment or satisfaction of a debt, obligation or liability, including under a bill of sale, mortgage, charge, lien, pledge, trust, power, deposit, hypothecation or arrangement for retention of title, and includes an agreement to grant or create any of those things.

**Specified Personnel** means the Representatives listed in Schedule 7 and any replacement of such people in accordance with clause 5.4(d).

## **1.2 Definitions in Project Deed**

Unless expressly stated otherwise, terms used in this Deed that are not defined in this Deed but are defined in the Project Deed have the same meanings in this Deed as they have in the Project Deed.

## **1.3 Application of certain provisions of the Project Deed**

Clauses 1.2 – 1.6, 1.13(a), 58.18 and 58.22 of the Project Deed apply to this Deed as if they were set out in full in this Deed.

## **1.4 Approvals and consents**

Unless expressly stated otherwise, all approvals or consents required to be given by the Independent Certifier under this Deed must not be unreasonably withheld or delayed.

## **1.5 Exercise of functions**

Clause 1.7 of the Project Deed applies to this Deed as if it were set out in full in this Deed, provided that references in that clause 1.7 to “the Contractor” will be read as references to “the Contractor or the Independent Certifier”.

## **1.6 TfNSW's Representative**

Clause 4.5 of the Project Deed applies to this Deed as if it were set out in full in this Deed, provided that references in that clause 4.5 to “the Contractor” will be read as references to “the Contractor and the Independent Certifier”.

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# **1A Conditions precedent**

- (a) The obligations of the Parties under this Deed (other than those under this clause 1A and clauses 10 and 18 and any provisions which by their nature are intended to commence on the IC Deed Execution Date) do not come into force until satisfaction, or waiver by TfNSW, of each of the following:
  - (i) the Independent Certifier effecting the insurances required in clause 12.1;
  - (ii) provision by the Independent Certifier to TfNSW of the Insurance Letter; and
  - (iii) provision by the Independent Certifier to TfNSW of a copy of its most recent audited financial statements,

**(Conditions Precedent).**
- (b) The Independent Certifier must notify TfNSW and the Contractor promptly following the satisfaction of each of the Conditions Precedent.
- (c) TfNSW may agree in writing to waive any Condition Precedent.
- (d) If any of the Conditions Precedent are not satisfied or waived by the date which is 5 Business Days after the IC Deed Execution Date, then TfNSW may terminate this Deed by at least 5 Business Days' notice to the other Parties.
- (e) If TfNSW terminates this Deed under clause 1A(d), no Party will have any liability for any Losses or Claims suffered or incurred by any other Party as a result of or in connection with such termination.

---

## 2 Appointment of Independent Certifier

### 2.1 Appointment of Independent Certifier

- (a) TfNSW and the Contractor appoint the Independent Certifier under this Deed to perform the Functions.
- (b) The Independent Certifier confirms its acceptance of the appointment referred to in clause 2.1(a).
- (c) The Independent Certifier must perform the Functions in accordance with this Deed.
- (d) The Independent Certifier's appointment commences on the IC Deed Commencement Date or as agreed by the Parties and expires at the end of the Term, unless terminated earlier in accordance with clause 13 of this Deed.

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## 3 Payment

[Commercial-in-confidence]

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## 4 Independent Certifier's obligations

### 4.1 Acknowledgments by Independent Certifier

The Independent Certifier acknowledges and agrees that:

- (a) it has received a copy of the Project Deed;
- (b) it has read and is familiar with the terms of the Project Deed and the nature of the work necessary for the performance of the Functions;
- (c) it has reviewed this Deed and the Project Deed for the accuracy and completeness of the description of the Functions;
- (d) the Fees payable to it covers the costs of it complying with the Functions; and
- (e) subject to this clause 4, for the purpose of, and in the course of, performing the Functions, it will:
  - (i) attend those Sites:
    - (A) required by the Certification Services Plan;
    - (B) which the Independent Certifier considers are appropriate or necessary to attend; and
    - (C) reasonably requested by TfNSW or the Contractor; and
  - (ii) conduct all appropriate or necessary tests and inspections of the Planned Value Category Requiring Certification, the Sites and the ETS as required or contemplated under the Certification Services Plan and the Project Deed.



## **4.2 Certification Services Plan**

- (a) Within 10 Business Days of the IC Deed Commencement Date, the Independent Certifier must prepare and submit a Certification Services Plan to TfNSW and the Contractor that meets the requirements specified for the Certification Services Plan in Schedule 3.
- (b) The Independent Certifier must prepare and submit to TfNSW and the Contractor an updated Certification Services Plan:
  - (i) prior to the date which is 6 months from the IC Deed Commencement Date and thereafter, at intervals not exceeding 6 months; and
  - (ii) if reasonably requested by TfNSW.
- (c) The Contractor may notify TfNSW of any comments on a Certification Services Plan within 10 Business Days of receipt of such Certification Services Plan from the Independent Certifier under clauses 4.2(a) or 4.2(b) and TfNSW will take such comments into account in its review of the Certification Services Plan.
- (d) TfNSW may, within 15 Business Days of receipt of a draft Certification Services Plan from the Independent Certifier under clauses 4.2(a) or 4.2(b), notify the Independent Certifier of any comments on the Certification Services Plan, including whether the Certification Services Plan complies with the requirements set out in Schedule 3 and is otherwise consistent with this Deed and the Project Deed.
- (e) If TfNSW provides comments to the Independent Certifier under clause 4.2(d), the Independent Certifier must promptly, and in any event, within 10 Business Days of receipt of those comments, submit to TfNSW a redraft of the plan which, subject to clause 9.1, addresses TfNSW's comments.
- (f) The Independent Certifier must comply with the Certification Services Plan in performing the Functions.

## **4.3 Monthly report**

The Independent Certifier must provide to TfNSW by the 5th Business Day of each month a report in such format as is required by TfNSW containing or setting out such information as is specified in the Certification Services Plan, or as otherwise reasonably requested by TfNSW.

## **4.4 Project Budget**

- (a) The Independent Certifier must prepare and submit to TfNSW an updated Project Budget at the same time it provides an updated Certification Services Plan to TfNSW under clause 4.2(b)(i).
- (b) TfNSW will notify the Independent Certifier whether it approves the updated Project Budget within 20 Business Days of receipt of such Project Budget. If TfNSW does not approve the updated Project Budget, TfNSW and the Independent Certifier will meet to discuss and agree in good faith the updated Project Budget.

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## 5 Acknowledgments of Independent Certifier

### 5.1 Not employee or agent

- (a) The Independent Certifier is an independent contractor and is not an employee or agent of TfNSW or the Contractor.
- (b) The Independent Certifier's Representatives are not the Personnel or representatives of TfNSW or the Contractor. The Independent Certifier assumes full responsibility for the acts and omissions of each of its Representatives.

### 5.2 Independence of the Independent Certifier

The Independent Certifier acknowledges, represents, warrants and undertakes to TfNSW and the Contractor that in performing the Functions it will:

- (a) act independently of TfNSW and the Contractor, and in good faith;
- (b) act honestly, reasonably and with the degree of professional care, knowledge, experience, skill and diligence which may be expected of a qualified person or a firm of project management consultants experienced in the performance of the same or similar services to the Functions and not do anything which would give rise to a conflict of interest in its performance of the Functions;
- (c) act within the time prescribed under this Deed and the Project Deed, or, where no time is prescribed, within a reasonable time;
- (d) immediately notify TfNSW and the Contractor in writing upon becoming aware of the existence or possibility of a conflict of interest; and
- (e) not accept any role in relation to the ETS Project other than as set out in this Deed.

### 5.3 Acknowledgements regarding the Independent Certifier certifying an Extent of Completion Claim

- (a) In certifying, for each Planned Value Category Requiring Certification included in an Extent of Completion Claim, the extent to which the Entitlement to Claim Criteria have been met in accordance with the requirements of the Project Deed, without in any way limiting any other obligations of the Independent Certifier under this Deed, the Independent Certifier:
  - (i) must carry out those inspections:
    - (A) required by the Certification Services Plan;
    - (B) which the Independent Certifier considers are appropriate or necessary to undertake; and
    - (C) reasonably requested by TfNSW or the Contractor;
  - (ii) subject to clause 5.3(b), acting reasonably, is entitled to rely upon reports produced by suitably qualified and experienced experts, consultants and contractors but only to the extent the subject matter of such reports is within the field of the expertise of the relevant expert, consultant or contractor; and
  - (iii) subject to clause 5.3(b), acting reasonably, is entitled to rely upon certificates produced by suitably qualified and experienced experts but only

to the extent that the subject matter of such certificates is within the field of such expert's expertise.

- (b) If the Independent Certifier deems it necessary for it to determine for any Planned Value Category Requiring Certification including in an Extent of Completion Claim the extent to which the Entitlement to Claim Criteria have been met in accordance with the requirements of the Project Deed, the Independent Certifier may engage an independent expert, consultant or contractor acceptable to both TfNSW and the Contractor to assist with such determination. Before engaging such expert, consultant or contractor, TfNSW and the Independent Certifier will agree a fee for such expert, consultant or contractor and the provisions of the Payment Schedule will apply to such fee.

#### **5.4 Representatives**

- (a) The Independent Certifier must provide:
  - (i) Specified Personnel to perform the roles specified in Schedule 7; and
  - (ii) other experienced and skilled Representatives to perform the Functions and must within 10 Business Days of the IC Deed Commencement Date give written notice to the Parties of the identity and contact details of such Representatives.
- (b) The Independent Certifier must ensure that all of its Representatives:
  - (i) act honestly, reasonably and with the degree of professional care, knowledge, experience, skill and diligence which may be expected of a qualified person experienced in the performance of the same or similar services to the Functions;
  - (ii) perform the services required of their respective positions; and
  - (iii) are available for consultation as TfNSW and Contractor may reasonably require from time to time.
- (c) The Independent Certifier must ensure that none of its Representatives are removed without the prior written consent of TfNSW and the Contractor (which consent must not be unreasonably withheld or delayed), and if any such Representative is removed, must be replaced by a person of at least equivalent skill and experience.
- (d) The Independent Certifier acknowledges that it will have full charge and control and assumes full responsibility for the acts and omissions of its Representatives.

#### **5.5 Subcontracting**

The Independent Certifier:

- (a) must not subcontract the performance of any of the Functions to any person (other than an approved subcontractor listed in Schedule 4) without the prior written consent of TfNSW and the Contractor and on such terms and conditions as determined by TfNSW and the Contractor, other than as permitted under clause 5.3(b);
- (b) remains responsible for the performance of the Functions in accordance with this Deed, notwithstanding any such subcontracting;

- (c) is liable for the acts, omissions or defaults of its subcontractors as fully as if they were the Independent Certifier's own acts, omissions or defaults; and
- (d) must ensure that any subcontract includes a provision to the effect that, to the extent permitted by Law, the operation of Part 4 of the *Civil Liability Act 2002* (NSW) is excluded in relation to any and all rights, obligations and liabilities arising under or in relation to the subcontract howsoever such rights, obligations or liabilities are sought to be enforced.

## 5.6 Quality assurance

- (a) The Independent Certifier must implement a quality assurance system in accordance with ISO9000, and otherwise in a form reasonably acceptable to TfNSW and the Contractor, to ensure compliance of the Functions with the requirements of this Deed.
- (b) The Independent Certifier will not be relieved of any requirement to perform any Functions as a result of:
  - (i) compliance with the quality assurance requirements of this Deed; or
  - (ii) any acts or omissions of the other Parties with respect to the quality assurance requirements of this Deed, including any audit under clause 5.7 of this Deed.

## 5.7 Audit

- (a) The Independent Certifier must:
  - (i) allow any audit of its quality assurance system or its performance of the Functions under this Deed by a third party, at the request of TfNSW or the Contractor; and
  - (ii) fully co-operate with that third party in respect of the carrying out of the audit.
- (b) Without limiting the foregoing, the Independent Certifier must, at all times:
  - (i) give to the third party referred to in clause 5.7(a)(i) access to premises occupied by the Independent Certifier where the Functions are being undertaken; and
  - (ii) permit such third party to inspect applicable information relevant to the audit.

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# 6 Benefit of Independent Certifier's Obligations

- (a) The Independent Certifier acknowledges and agrees that:
  - (i) TfNSW and the Contractor:
    - (A) are relying upon its independence;
    - (B) are relying upon its skill and experience in the performance of the Functions in accordance with this Deed;
    - (C) will rely upon its certification for the purposes of the Project Deed; and

- (D) may suffer a Loss if it does not perform the Functions in accordance with the requirements of this Deed; and
- (ii) it has no authority to give directions to TfNSW or the Contractor other than that (if at all) expressly set out in this Deed or the Project Deed.
- (b) The Independent Certifier represents, warrants and undertakes to TfNSW and the Contractor that, in performing the Functions, it will comply with all Laws.
- (c) The Independent Certifier acknowledges that in carrying out the Functions, the Independent Certifier must do so in a manner which will not prevent, hinder, disrupt, delay or otherwise interfere with any work or services performed by any person (including the Contractor and the ETS Entities), except where it is the unavoidable consequence of performing the Functions, in which case the Independent Certifier will give reasonable prior notice to each affected person.
- (d) Without limiting clause 6(c), the Independent Certifier must, in carrying out the Functions, comply with the Site Access Plan to the extent relevant.

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## 7 Not used

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## 8 Change to Functions, Suspension of Functions and Appointment of Substitute Certifier

### 8.1 Change of Functions

- (a) TfNSW and the Contractor may, by written notice to the Independent Certifier jointly signed by them, direct the Independent Certifier to carry out a change to the Functions (including an addition or omission) which is within the general scope of this Deed, and the Independent Certifier must comply with that direction. For clarification, this clause 8.1 does not apply to a change in the scope of the Functions in respect of a DDI Review, Planned Value Category Requiring Certification or Project Support Function.
- (b) The Fee to be paid to the Independent Certifier in relation to a change to the Functions (or, in relation to any omission of any of the Functions, a reduction in the Fees) referred to in clause 8.1(a) will be determined in accordance with the Schedule of Rates. If an additional amount (or reduction) for the change to the Functions cannot be determined by reference to the Schedule of Rates, the amount will be a reasonable amount determined by TfNSW in consultation with the Independent Certifier.

### 8.2 Suspension of Functions

TfNSW and the Contractor may, by written notice to the Independent Certifier jointly signed by them, direct the Independent Certifier to suspend any or all of the Functions for the period of time specified in that notice.

### 8.3 Substitute Certifier

- (a) TfNSW and the Contractor may appoint another certifier (**Substitute Certifier**) to carry out those Functions which TfNSW and the Contractor have directed to be omitted or suspended under clause 8.1 or 8.2, and (as between TfNSW and the Contractor), in connection with those Functions:

- (i) any decision of a Substitute Certifier has the same effect as a decision of the Independent Certifier; and
  - (ii) the Substitute Certifier will be required to enter into a deed on substantially the same terms as this Deed (with any substantial departures from such terms being agreed by TfNSW and the Contractor).
- (b) Notwithstanding a change to the Functions or the appointment of a Substitute Certifier, the Independent Certifier must continue to perform the Functions, as varied in accordance with this clause 8, in accordance with this Deed. Without affecting any rights, obligations or liability relating to the performance of the Independent Certifier, the Independent Certifier is not responsible for the performance of the Substitute Certifier.

#### **8.4 Force Majeure**

- (a) For the purposes of this clause 8.4, “Force Majeure” has the same meaning as in the Project Deed, except that a reference to “Party” in the definition of “Force Majeure” in the Project Deed will be taken to include the Independent Certifier.
- (b) Subject to paragraph 8.4(c), no party is liable for any failure or delay in performing its obligations under this Deed to the extent such failure or delay is caused by a Force Majeure event.
- (c) As between TfNSW and the Contractor, any liability of TfNSW or the Contractor in respect of a Force Majeure event is governed by the Project Deed, which applies in all respects to this Deed as if this Deed formed a part of the Project Deed. TfNSW and the Contractor agree that, for clarification and by way of example, if the Independent Certifier is excused from its liability for any failure or delay in performing its obligations under this Deed in relation to any DDI Deliverables, the 20 Business Day timeframe referred to in clause 9.3(a) of the Project Deed may be extended accordingly in accordance with clause 51 of the Project Deed.

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## **9 Obligations of TfNSW and the Contractor**

### **9.1 No interference or influence**

- (a) Subject to clause 9.1(b), TfNSW and the Contractor must not interfere with or attempt to influence the Independent Certifier in the performance of the Functions.
- (b) Clause 9.1(a) will not prevent either TfNSW or the Contractor from providing information or written submissions to the Independent Certifier setting out that Party's opinion on a particular matter relating to this Deed or the Functions, provided that nothing in this clause 9.1(b) itself will require the Independent Certifier to act in accordance with that information or written submission. If TfNSW or the Contractor provides any information or written submissions to the Independent Certifier then that Party must, at the same time, provide a copy of such information and submissions to the other Party.

### **9.2 Cooperation**

Without limiting their obligations under clause 9.1, TfNSW and the Contractor must:

- (a) co-operate with the Independent Certifier;
- (b) provide all necessary information and documents within its possession, custody or control to the Independent Certifier; and

- (c) procure for the Independent Certifier access to such premises owned, leased or licensed to it as may be reasonably necessary,

to enable the Independent Certifier to perform the Functions.

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## **10 General representations and warranties of Independent Certifier**

- (a) The Independent Certifier represents, warrants and undertakes that:
  - (i) it is a company duly incorporated and existing under Law and has the power to execute, deliver and perform the Functions and that all necessary corporate and other action has been taken to authorise that execution, delivery and performance;
  - (ii) the information provided by it in connection with this Deed is true, accurate and complete in all material respects and not misleading in any material respect (including by omission);
  - (iii) its obligations under this Deed are valid, legal and binding obligations enforceable against it in accordance with the terms of this Deed, subject to equitable remedies and Laws in respect of the enforcement of creditors' rights;
  - (iv) the execution, delivery and performance of this Deed by it will not contravene any Law to which it is subject or any deed or arrangement binding on it;
  - (v) it does not (in any capacity) 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); and
  - (vi) no litigation, arbitration, tax claim, dispute or administrative or other proceeding has been commenced or threatened against it which is likely to have a material adverse effect upon its ability to perform the Functions.
- (b) Except as otherwise provided, each representation and warranty contained in this Deed:
  - (i) is made on the IC Deed Execution Date; and
  - (ii) will be deemed to be repeated immediately before each notice or certificate is issued by the Independent Certifier under this Deed,with reference to the facts and circumstances then subsisting.

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## **11 Security Interests**

The Independent Certifier must not:

- (a) create or allow to exist any Security Interest over its rights under this Deed; or
- (b) deal with, sell, assign, transfer, novate or otherwise dispose of, its rights or obligations under this Deed.



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## 12 Insurance and Indemnity

[Commercial-in-confidence]

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## 13 Termination of Appointment and Novation

### 13.1 Termination by the other Parties

- (a) TfNSW or the Contractor may terminate this Deed by notice in writing delivered to the Independent Certifier and the other Party:
  - (i) if the Independent Certifier is in breach of this Deed and the breach is not remediable in the reasonable opinion of the Party giving notice to terminate;
  - (ii) if the Independent Certifier is in breach of this Deed and the breach, being remediable in the reasonable opinion of the Party giving notice to terminate, has not been remedied within 10 Business Days of the service by such Party of a notice requiring the breach to be remedied;
  - (iii) if an Insolvency Event occurs in relation to the Independent Certifier;
  - (iv) for the convenience of TfNSW or the Contractor at any time and for any reason, upon 20 Business Days written notice to the Independent Certifier by TfNSW or the Contractor; or
  - (v) if there is a Change in Control of the Independent Certifier.
- (b) Notwithstanding clause 13.1(a) and unless TfNSW and the Contractor otherwise agree, TfNSW or the Contractor may only terminate this Deed if TfNSW and the Contractor first agree to the appointment of another person to perform the Functions on such terms and conditions as TfNSW and the Contractor reasonably propose.

### 13.2 Termination of the Project Deed

If the Project Deed is terminated then this Deed is terminated with effect from the date of termination of the Project Deed and without necessity of notice.

### 13.3 Time of termination

Unless TfNSW and the Contractor otherwise agree, the termination of this Deed under clause 13.1 will take effect upon the Independent Certifier's receipt of notice from TfNSW and the Contractor confirming the appointment of a replacement to the Independent Certifier under clause 13.1(b).

### 13.4 Obligations following termination or expiry

- (a) Upon termination or expiry of this Deed:
  - (i) the Independent Certifier must deliver up to TfNSW all books, computer records and other records, drawings, specifications, documents and other materials in the possession, custody or control of the Independent Certifier relating to the Functions; and
  - (ii) subject to any applicable provisions of the Project Deed, TfNSW has the right to use the materials referred to in clause 13.4(a)(i) for any purpose.



- (b) Where this Deed is terminated under clauses 13.1 or 13.2, the Independent Certifier must provide full assistance to TfNSW, the Contractor and any successor to the Independent Certifier appointed in order to enable such successor to be in a position to perform the Functions under this Deed with effect from the date of appointment of such successor.
- (c) Nothing in this clause 13.4 will prevent the Independent Certifier from retaining for its records one copy of the books, records, drawings, specifications and other documents referred to in clause 13.4(a)(i), provided however that nothing contained in this clause 13.4 will relieve the Independent Certifier of its obligations under clause 18.

### **13.5 Compensation**

- (a) Where this Deed is terminated under clauses 13.1(a)(iv), the Independent Certifier is only entitled to be paid by TfNSW and the Contractor the proportion of the Fee for Functions performed up to the date of the termination and the Independent Certifier agrees that its only right against TfNSW and/or the Contractor arising from such a termination is to claim for payment under this clause 13.5(a).
- (b) Where this Deed is terminated under clauses 13.1(a)(i), (ii), (iii) or (v), the Independent Certifier is not entitled to any unpaid proportion of the Fee for Functions not performed in accordance with this Deed up to the date of the termination, and has no rights against TfNSW and/or the Contractor arising from such termination.

### **13.6 Termination without prejudice**

Termination of this Deed is without prejudice to any accrued rights or liabilities of the Parties.

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## **14 Expenses, Stamp Duties and GST**

### **14.1 Expenses**

Each Party must pay its own costs and expenses in connection with the negotiation, preparation, execution and performance of this Deed.

### **14.2 Stamp duties**

TfNSW must pay all stamp duty (apart from financial institutions duties or bank account debit taxes which will lie between the Parties as they fall) and any related fines and penalties in respect of this Deed, the performance of this Deed and each transaction effected by or made under or pursuant to this Deed.

### **14.3 GST**

- (a) Words defined in *A New Tax System (Goods and Services Tax) Act 1999* (Cth) have the same meaning in this clause 14.3.
- (b) If a Party makes a supply to another Party under or in connection with this Deed, then (unless the consideration is expressly stated to be inclusive of GST) the consideration for that supply is exclusive of GST, and in addition to paying or providing that consideration the recipient must:
  - (i) pay to the supplier an amount equal to any GST for which the supplier is liable on that supply, without deduction or set-off of any other amount; and

- (ii) make that payment as and when the consideration or part of it must be paid or provided, except that the recipient need not pay unless the supplier has issued to the recipient a tax invoice (or an adjustment note) for that supply.
- (c) The supplier must refund to the recipient any overpayment by the recipient for GST, but the supplier need not refund to the recipient any amount for GST paid to the Commissioner of Taxation unless the supplier is entitled to a refund or credit of that amount.
- (d) If a Party provides a payment for or in satisfaction of a Claim or a right to make a Claim under or in connection with this Deed that gives rise to a liability for GST, the provider must pay, and indemnify the recipient on demand against, the amount of that GST.
- (e) If a Party has a Claim under or in connection with this Deed for a cost on which that Party must pay an amount for GST, the Claim is for the cost plus the amount for GST (except any amount for GST for which that Party is entitled to an input tax credit).
- (f) If a Party has a Claim under or in connection with this Deed whose amount depends on actual or estimated revenue or which is for a loss of revenue, revenue must be calculated without including any amount received or receivable as reimbursement for GST (whether that amount is separate or included as part of a larger amount).

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## 15 Choice of Law and Submission to Jurisdiction

- (a) This Deed is governed by the Law in force in New South Wales.
- (b) Each Party 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 waives any right it might have to claim that those courts are an inconvenient forum.

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## 16 Notices

### 16.1 How to give a notice

A notice, consent or other communication under this Deed is only effective if it is:

- (a) in writing, signed by or on behalf of the person giving it;
- (b) addressed to the person to whom it is to be given; and
- (c) either:
  - (i) delivered or sent by pre-paid mail (by airmail, if the addressee is overseas) to that person's address; or
  - (ii) 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.

### 16.2 When a notice is given

A notice, consent or other communication that complies with this clause 16 is regarded as given and received:

- (a) if it is delivered or sent by fax:
  - (i) by 5.00 pm (local time in the place of receipt) on a Business Day - on that day; or
  - (ii) after 5.00 pm (local time in the place of receipt) on a Business Day, or on a day that is not a Business Day - on the next Business Day; and
- (b) if it is sent by mail:
  - (i) within Australia – 2 Business Days after posting; or
  - (ii) to or from a place outside Australia – 5 Business Days after posting.

### **16.3 Address for notices**

A person's address and fax number are those set out below, or as the person notifies the sender:

#### **TfNSW**

Address: Level 1, 18 Lee Street, Chippendale, New South Wales 2008

Fax number: (02) 8202 3536

Attention: TfNSW's Representative, TfNSW

#### **The Contractor**

Address: Level 23, 219 – 227 Elizabeth Street, Sydney, New South Wales 2000

Fax number: (02) 9275 9950

Attention: Contractor's Representative

#### **The Independent Certifier**

Address: Arup Pty Ltd, Level 10, 201 Kent Street, Sydney New South Wales 2000

Fax number: (02) 9320 9321

Attention: Steve Lennon, Project Director

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## **17 Dispute Resolution**

### **17.1 Procedure for resolving disputes**

- (a) This clause 17 applies only in respect of disputes between:
  - (i) the Independent Certifier; and
  - (ii) the Contractor and/or TfNSW.

The Project Deed will apply in respect of any disputes (including those relating to this Deed) between the Contractor and TfNSW to which the Independent Certifier is not a party.

- (b) Subject to clause 17.1(c), the Parties agree that they will attempt to resolve all disputes in accordance with the procedures set out in this clause 17 and that it is a condition precedent to the referral of a dispute to litigation that a Party first exhausts the procedures referred to in clause 17.2.
- (c) Nothing in this clause 17 will prevent a Party seeking urgent injunctive or equitable relief.

## 17.2 Negotiation

- (a) If a dispute arises, then a Party may give notice to the other Parties to the dispute, requesting that the dispute be referred for resolution to the respective chief executive officers of those Parties.
- (b) A notice under clause 17.2(a) must:
  - (i) be in writing;
  - (ii) state that it is a notice under this clause 17.2; and
  - (iii) include, or be accompanied by, reasonable particulars of the matters in dispute.
- (c) If a dispute is referred to the persons referred to in clause 17.2(a), then those persons (or the persons for the time being acting in those positions) (**DR Representatives**) must meet and use reasonable endeavours acting in good faith to resolve the dispute within 10 Business Days of the date on which the notice under clause 17.2(a) is received. The joint decisions (if any) of the DR Representatives must be reduced to writing within the 10 Business Days referred to in this clause 17.2(c) and will be contractually binding on the Parties to the dispute.
- (d) The 10 Business Days referred to in clause 17.2(c) may be extended by agreement of the Parties in writing.
- (e) For clarification, a Party may commence litigation in relation to a dispute if the Parties have not:
  - (i) resolved the dispute; and
  - (ii) reduced their joint decisions to writing,at the conclusion of the 10 Business Days referred to in clause 17.2(c) (as that period may be extended under clause 17.2(d)).

## 17.3 Continue to perform

Notwithstanding the existence of a dispute, the Independent Certifier must continue to perform the Functions.

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# 18 Information and Confidentiality

## 18.1 Applicability of this clause 18

- (a) This clause 18 applies only in respect of information disclosed:
  - (i) by the Independent Certifier to TfNSW and vice versa; and

- (ii) by the Independent Certifier to the Contractor and vice versa.
- (b) The provisions of the Project Deed will apply in respect of any confidential information disclosed by the Contractor to TfNSW and vice versa.
- (c) In relation to the information contained within the Insurance Letter and any financial statements provided by the Independent Certifier under this Deed:
  - (i) TfNSW acknowledges that the Independent Certifier claims that such information and financial statements are “commercial-in-confidence” for the purposes of the *Freedom of Information Act 1989* (NSW); and
  - (ii) clauses 18.3(f), 18.3(g) and 18.3(h) will not apply.

## 18.2 Keep confidential

The Parties must keep confidential all matters relating to this Deed and must use all reasonable endeavours to prevent their employees and agents from making any disclosure to any person of any matters relating to this Deed. This obligation of confidence extends to confidential information provided to or obtained by a Party prior to entry into this Deed.

## 18.3 Permitted disclosure

Clause 18.2 will not apply to:

- (a) any disclosure of information that is reasonably required by persons engaged in the performance of the obligations of a Party to this Deed for the purposes of such performance;
- (b) any matter which a Party can demonstrate is already generally available and in the public domain otherwise than as a result of breach of clause 18.2;
- (c) any disclosure which is required by any Law (including any order of a court of competent jurisdiction) or in accordance with clause 17;
- (d) any disclosure of information which is already lawfully in the possession of the receiving Party, prior to its disclosure by the disclosing Party;
- (e) any disclosure of information to any prospective permitted assigns;
- (f) any disclosure by TfNSW of information relating to the design, construction, operation and maintenance of the ETS Project and such other information as may be reasonably required for the purpose of conducting a due diligence exercise to any proposed new Contractor, its advisers and lenders should TfNSW decide to re-tender this Deed pursuant to the terms of the Project Deed;
- (g) any disclosure of information by TfNSW to any ETS Entity; and
- (h) any disclosure by TfNSW of any document relating to this Deed and which the Contractor (acting reasonably) has agreed with TfNSW contains no commercially sensitive information.

## 18.4 Obligations preserved

Where disclosure is permitted under clause 18.3, other than clauses 18.3(b), (c), (f) or (g), the Party providing the disclosure must ensure that the recipient of the information will be subject to the same obligation of confidentiality as that contained in this Deed.

### **18.5 Auditor-General**

Notwithstanding the other provisions of this clause 18, the Parties acknowledge that the Project Documents will be made available to the Auditor-General in accordance with the *Public Finance and Audit Act 1983* (NSW), and information concerning the Project Documents will be tabled in Parliament by or on behalf of TfNSW and will be published in accordance with the Guidelines, and TfNSW may make the Project Documents available to any person, subject to the deletion of commercially sensitive information.

### **18.6 Exploitation of information**

Except with the written consent of TfNSW, the Independent Certifier must not make use of this Deed or any information issued or provided by or on behalf of TfNSW in connection with this Deed otherwise than for the purposes of this Deed.

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## **19 Intellectual property**

[Commercial-in-confidence]

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## **20 General**

### **20.1 Variation**

No modification, variation or amendment of this Deed will be of any force unless such modification, variation or amendment is in writing and executed by each Party.

### **20.2 Waiver**

A failure to exercise or enforce or a delay in exercising or enforcing or a partial exercise or enforcement of any right, remedy, power or privilege under this Deed by either Party will not in any way:

- (a) preclude or operate as a waiver of any further exercise or enforcement of; or
- (b) constitute or operate as an election not to exercise or enforce,

that or any other right, remedy, power or privilege under this Deed or provided by Law.

### **20.3 Operation of indemnities**

- (a) No indemnity in this Deed limits the effect or operation of any other indemnity in this Deed.
- (b) Unless expressly provided otherwise, each indemnity in this Deed is a continuing obligation, separate and independent from the other obligations of the Parties.
- (c) Each indemnity in this Deed survives the expiry or termination of this Deed.
- (d) A Party may recover a payment under an indemnity in this Deed before it makes the payment in respect of which the indemnity is given.

### **20.4 Giving effect to this Deed**

Each Party must do anything (including execute any document) that the other Party or Parties may reasonably require to give full effect to this Deed.

## **20.5 Counterparts**

This Deed may be executed in a number of counterparts and all such counterparts taken together will be deemed to constitute one and the same agreement.

## **20.6 Attorney**

Each person who executes this document 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.

## Schedule 1 — Functions

### Project Deed functions

The Independent Certifier must discharge the functions which the Project Deed contemplates will be discharged by the Independent Certifier including the following:

- (a) The Independent Certifier must take receipt of each Extent of Completion Claim delivered to it by the Contractor under clause 14.2 of the Project Deed.
- (b) Following receipt of the Extent of Completion Claim under paragraph (a), the Independent Certifier must:
  - (i) consult with the Contractor about the tasks necessary to meet the Entitlement to Claim Criteria for each Planned Value Category Requiring Certification that is included in that Extent of Completion Claim; and
  - (ii) attend the relevant Site, take input from appropriately qualified persons regarding specialist activities necessary to meet the Entitlement to Claim Criteria for each Planned Value Category Requiring Certification that is included in that Extent of Completion Claim, and conduct all appropriate or necessary tests and inspections of the Sites and the ETS to determine for each such Planned Value Category.
- (c) The Independent Certifier must take receipt of any information provided to it by TfNSW and the Contractor in respect of the relevant Extent of Completion under paragraph (a) to determine, for each Planned Value Category Requiring Certification included in that Extent of Completion Claim, the extent to which the Entitlement to Claim Criteria have been met in accordance with the requirements of the Project Deed.
- (d) The Independent Certifier must take receipt of documentation and results relating to any tests performed by TfNSW or the Contractor (without limiting the Independent Certifier's obligation under paragraph (b)).
- (e) The Independent Certifier must consider whether there are any Defects in the relevant Planned Value Category.
- (f) The Independent Certifier must, for each Extent of Completion Claim, issue a certificate substantially in the form set out in Schedule 5 of this Deed certifying the extent to which the Entitlement to Claim Criteria have been met. The Independent Certifier must provide details of any Defects in the relevant Planned Value Category in the form set out in Schedule 6 of this Deed.
- (g) The Independent Certifier must, if it is not satisfied that the Entitlement to Claim Criteria have been met as claimed by the Contractor in the Extent of Completion Claim, notify TfNSW and the Contractor the extent to which the Independent Certifier is satisfied the Entitlement to Claim Criteria have been met.
- (h) The Independent Certifier must when requested by TfNSW review any copies of DDI Deliverables provided to it by the Contractor under clause 9.2 of the Project Deed and must provide comments to TfNSW within 15 Business Days of receipt of the DDI Deliverables from the Contractor as to whether it considers that such DDI Deliverables are in accordance with the Project Deed.



## **Schedule 2 — Payment Schedule**

[Commercial-in-confidence]

## **Schedule 3 — Requirements for Certification Services Plan**

The Certification Services Plan must include the following:

- 1 A comprehensive schedule of activities to be undertaken by the Independent Certifier in order to determine for each Planned Value Category Requiring Certification included in an Extent of Completion Claim, the extent to which the Entitlement to Claim Criteria have been met in accordance with the requirements of the Project Deed and otherwise, to perform the Functions.
- 2 The Independent Certifier's methodology, detailed processes and approach of performing the Functions (which includes but is not limited to):
  - (i) the management team structures including nominated Personnel and subcontractors, their positions and the roles and tasks they will perform in respect of the Functions;
  - (ii) the minimum skill, expertise and experience levels of each position;
  - (iii) resource levels for each component of the Functions;
  - (iv) the governance structures that apply including internal and external lines of authority, communication and reporting, including those with TfNSW's Representative and the Contractor;
  - (v) the identification of delegated authorities of the Independent Certifier's Personnel, including identification of Personnel with delegated authority to execute the notices and certificates to be issued under this Deed on behalf of the Independent Certifier;
  - (vi) all compliance records to be maintained, in the form of a schedule; and
  - (vii) details of the monthly report to be provided in accordance with clause 4.3 of this Deed.

## **Schedule 4 — Approved Subcontractors**

1. Logica Australia Pty Limited (ABN 39 001 260 699) of Level 13, 100 Pacific Highway North Sydney NSW 2060
2. Edgar, Dunn & Company Pty Limited (ABN 77 078 626 892) of Level 4, 222 Clarence Street, Sydney NSW 2000
3. Grant Thornton Australia Pty Limited (ABN 41 127 556 389) of Level 17, 383 Kent Street, Sydney NSW 2000

## **Schedule 5 — Independent Certifier's Certificate**

[Commercial-in-confidence]

NOTE: some clauses and Schedules have been partly or completely removed under the provisions of the GIPA Act. For details, refer to TfNSW's Government Contracts Register – Project Deed.

## Schedule 6 – Extent of Completion Report

Planned Value Category Requiring Certification (including Stage)	Extent of Completion Claim number	Aggregate Extent of Completion previously achieved under clause 14.4 (%)	Incremental Extent of Completion for the purposes of clause 14.3(b) (%)	Aggregate Extent of Completion now achieved under clause 14.4 (%)	Deficiencies with Entitlement to Claim Criteria claimed

## **Schedule 7 – Specified Personnel**

[Commercial-in-confidence]

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## Execution page

### Executed as a deed.

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Signed, sealed and delivered by Transport for NSW for and on behalf of the Director-General of the Department of Transport in accordance with section 3C(4) of the *Transport Administration Act* by:

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Signature of authorised signatory:

---

Signature of witness

---

Name of authorised signatory (print)

---

Name of witness (print)

---

Signed, sealed and delivered by Cubic Transportation Systems (Australia) Pty Limited in accordance with section 127 of the *Corporations Act 2001* (Cth) and by:

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Signature of director

---

Signature of director/secretary

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Name of director (print)

---

Name of director/secretary (print)

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Signed, sealed and delivered by Arup Pty Ltd in accordance with section 127 of the *Corporations Act 2001* (Cth) and by:

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Signature of director

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Signature of director/secretary

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Name of director (print)

---

Name of director/secretary (print)

# Schedule 36 — Notices and Certificates of Completion



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## Part A: Notice of Completion

### Form of Notice of Completion

ETS Project

To: TfNSW's Representative  
Level 1  
18 Lee Street  
Chippendale, New South Wales 2008

*[Independent Certifier]*

From: Cubic Transportation Systems (Australia) Pty Ltd

This notice is given by the Contractor under clause 14.5(a) of the Project Deed between Transport for NSW and Cubic Transportation Systems (Australia) Pty Ltd dated 7 May 2010 and in respect of the ETS Project (**Project Deed**).

The Contractor considers it has achieved all of the criteria necessary for Completion of the Stage or Planned Value Category referred to below (except the issue of a Certificate of Completion) in accordance with the requirements of the Project Deed.

<b>Description of Stage or Planned Value Category</b>	
<b>Date of Contractor's notice of Completion</b>	

Capitalised terms have the meaning given in the Project Deed.

Signed by

.....

Contractor's Representative

## Part B: Certificate of Completion

### Form of Certificate of Completion

ETS Project

To: Contractor's Representative  
Level 23, 219-227 Elizabeth Street  
Sydney, New South Wales 2000

From: Transport for NSW

This Certificate is given under clause 14.3(a) of the Project Deed between Transport for NSW and Cubic Transportation Systems (Australia) Pty Ltd dated 7 May 2010 and in respect of the ETS Project (**Project Deed**).

TfNSW is satisfied that Completion of the Stage or Planned Value Category referred to below has been achieved.

[Set out in the Schedule are minor Defects in respect of the Stage or Planned Value Category referred to below and the time within which the Contractor is required to rectify each minor Defect in accordance with the requirements set out in the Project Deed.] (*\*delete if not applicable*)

<b>Description of Stage or Planned Value Category</b>	
<b>Date of Contractor's notice of Completion</b>	
<b>Date of Independent Certifier's certificate</b>	
<b>Date of certification by TfNSW</b>	

Capitalised terms have the meaning given in the Project Deed.

Signed by

.....

TfNSW's Representative

*NOTE: some clauses and Schedules have been partly or completely removed under the provisions of the GIPA Act. For details, refer to TfNSW's Government Contracts Register – Project Deed.*

## **SCHEDULE**

*[If applicable, list minor Defects and rectification times]*

## Part C: Extent of Completion Claim

### Form of Extent of Completion Claim

ETS Project

To: TfNSW's Representative  
Level 1  
18 Lee Street  
Chippendale, New South Wales 2008

*[Independent Certifier]*

From: Cubic Transportation Systems (Australia) Pty Ltd

This notice is given by the Contractor under clause 14.2(a) of the Project Deed between Transport for NSW and Cubic Transportation Systems (Australia) Pty Ltd dated 7 May 2010 and in respect of the ETS Project (**Project Deed**).

The Contractor considers it has achieved the Entitlement to Claim Criteria for one or more Planned Value Categories referred to below in accordance with the requirements of the Project Deed.

<b>Date of Contractor's Extent of Completion Claim</b>	
--	--

<b>Planned Value Category (including Stage and sub-category)</b>	<b>Extent of Completion Claim number</b>	<b>Entitlement to Claim Criteria met</b>	<b>Aggregate Extent of Completion previously achieved under clause 14.4 (%)</b>	<b>Incremental Extent of Completion being claimed (%)</b>	<b>Aggregate Extent of Completion being claimed (%)</b>

Capitalised terms have the meaning given in the Project Deed.

Signed by

.....

Contractor's Representative

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## Part D: Extent of Completion Certificate

### Form of Extent of Completion Certificate

ETS Project

To: Contractor's Representative  
Level 23, 219-227 Elizabeth Street  
Sydney, New South Wales 2000

From: Transport for NSW

This Certificate is given under clause 14.4(a) of the Project Deed between Transport for NSW and Cubic Transportation Systems (Australia) Pty Ltd dated 7 May 2010 and in respect of the ETS Project (**Project Deed**).

TfNSW is satisfied that the Contractor has met the Entitlement to Claim Criteria for the Planned Value Categories to the extent set out in the Schedule.

<b>Date of Contractor's Extent of Completion Claim</b>	
<b>Date of Independent Certifier's certificate</b>	
<b>Date of certification by TfNSW</b>	

Capitalised terms have the meaning given in the Project Deed.

Signed by

.....

TfNSW's Representative

NOTE: some clauses and Schedules have been partly or completely removed under the provisions of the GIPA Act. For details, refer to TfNSW's Government Contracts Register – Project Deed.

SCHEDULE

Planned Value Category (including Stage and sub-category)	Extent of Completion Claim number	Deficiencies with Entitlement to Claim Criteria claimed	Aggregate Extent of Completion previously achieved under clause 14.4 (%)	Incremental Extent of Completion for the purposes of clause 14.4(b) (%)	Aggregate Extent of Completion now achieved under clause 14.4 (%)

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## Schedule 37 — Options

[Commercial-in-confidence]

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## Schedule 38 — ETS Accounts

[Commercial-in-confidence]



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## Schedule 39 — FX Protocol

[Commercial-in-confidence]

*NOTE: some clauses and Schedules have been partly or completely removed under the provisions of the GIPA Act. For details, refer to TfNSW's Government Contracts Register – Project Deed.*

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# Schedule 40 — Security Deed

## Specific Security Deed

**Date:**

### Parties

- 1 **Cubic Transportation Systems (Australia) Pty Ltd**  
ACN 003 617 561 of Level 23, 219 – 227 Elizabeth Street, Sydney NSW 2000 (the **Grantor**)
- 2 **Transport for NSW** ABN 18 804 239 602 of Level 1, 18 Lee Street, Chippendale NSW 2008 (the **Secured Party**)

### Background

The Grantor has agreed to grant security in the Secured Property to secure the payment of the Secured Moneys and performance of the Secured Obligations on the terms set out in this deed.

## 1 Definitions and interpretation

### 1.1 Definitions – general

In this deed:

**Attorney** means an attorney appointed under this deed.

**Authority** means any governmental, semi-governmental, municipal, statutory or other public authority or entity.

**Business Day** means a day that is not a Saturday, Sunday or a public holiday in Sydney, New South Wales.

**Controller** means a controller as defined in section 9 of the Corporations Act appointed under or in respect of this deed and includes any Receiver.

**Corporations Act** means the *Corporations Act 2001* (Cth).

**Costs** means, in relation to the Secured Party, a Controller or an Attorney, any costs incurred by that party including any legal costs and expenses and any professional consultant's fees, on a full indemnity basis.

**Event of Default** means each of the following (whether or not within the control of the Grantor or any other person):

- (a) an 'Event of Default' (as defined in the Project Agreement) occurs;
- (b) all or any part of this deed or any Right of Entry:
  - (i) ceases to have effect otherwise than in accordance with its terms; or
  - (ii) is or becomes void, voidable, illegal, invalid, unenforceable or of limited force and effect;

- (c) all or any part of any Right of Entry granted in favour of the Secured Party in relation to any leasehold interest of the Grantor:
  - (i) ceases to have effect otherwise than in accordance with its terms;
  - (ii) is or becomes void, voidable, illegal, invalid, unenforceable or of limited force and effect; or
  - (iii) is varied or assigned without the Secured Party's consent;
- (d) the Grantor breaches any material obligations (including any representation, warranty, undertaking or indemnity) under this deed which is capable of remedy and does not remedy such breach within 20 Business Days of receiving notice from the Secured Party specifying the breach;
- (e) the Grantor breaches a material obligation (including any representation, warranty, undertaking or indemnity) under this deed which is incapable of remedy;
- (f) the Grantor regularly or habitually commits breaches of this deed or commits a number of breaches which collectively constitute a material breach, and does not remedy such breaches (and, where applicable, its regular or habitual committing of them) within 40 Business Days of receiving notice from the Secured Party specifying the breaches;
- (g) the Grantor fails to comply with a direction of the Secured Party given under this deed;
- (h) an Event of Insolvency occurs in relation to the Grantor;
- (i) an Event of Insolvency occurs in relation to a Lessor; or
- (j) any other material event occurs which gives the Secured Party the right to terminate this deed.

For clarity, the generality of any one Event of Default is not limited by the particularity of any other Event of Default.

**Event of Insolvency** has the meaning given in the Project Deed.

**Lessor** means the lessor under any Lease, or licensor under any licence, in respect of any land or premises on or in which the Secured Property may be situated from time to time.

**Lease** means any present or future lease or sub-lease or arrangement to grant a lease or sub-lease of any premises or land and includes any licence to enter onto any premises or land..

**Liquidation** means official management, appointment of an administrator or provisional liquidator, compromise, arrangement, merger, amalgamation, reconstruction, winding up, dissolution, deregistration, assignment for the benefit of creditors, scheme, composition or arrangement with creditors, insolvency, bankruptcy, or a similar procedure or, where

applicable, changes in the constitution of any partnership or person, or death.

**Loss** means any claim, action, damage, loss, liability, cost, charge, expense, outgoing or payment.

**Power** means any right, power, authority, discretion or remedy conferred on the Secured Party, a Receiver or an Attorney by any Transaction Document or any applicable law.

**PPSA** means the *Personal Property Securities Act 2009* (Cth).

**PPS Law** means:

- (a) the PPSA;
- (b) any PPS Regulations;
- (c) any legislative instrument made under the PPSA;
- (d) any amendment to any of the above, made at any time; or
- (e) any amendment made at any time to any other legislation as a consequence of a PPS Law referred to in paragraphs (a) to (d).

**PPSR** means the Personal Property Securities Register established under the PPS Law.

**PPS Regulations** means regulations made at any time under the PPSA.

**Project Deed** means the Project Deed – Electronic Ticketing System for the Greater Sydney Region dated 7 May 2010 between the Grantor and the Secured Party as amended and amended and restated from time to time.

**Receiver** means a receiver or receiver and manager appointed under this deed.

**Relevant Goods** means any goods or other tangible property owned or paid for by the Secured Party, or to which the Secured Party has title, or which have otherwise vested in the Secured Party, of which the Grantor has possession, or in respect of which the Grantor has any other right or interest and which have not been (as applicable) irrevocably delivered to the Secured Party or installed at the direction of, and to the satisfaction of, the Secured Party, from time to time.

**Right of Entry** has the meaning given in clause 6.2 (*Right of entry*).

**Secured Moneys** means all debts and monetary liabilities of the Grantor (whether alone or not) to or for the account of any of the Secured Party in any capacity under or in relation to any Transaction Document, irrespective of whether the debts or liabilities:

- (a) are present or future;
- (b) are actual, prospective, contingent or otherwise;
- (c) are at any time ascertained or unascertained;

- (d) are owed or incurred by or for the account of the Grantor alone, or severally or jointly with any other person;
- (e) are owed to, or incurred for the account of, the Secured Party, alone, or severally or jointly with any other person;
- (f) are owed to any other person as agent (whether disclosed or not) for or on behalf of the Secured Party;
- (g) are owed or incurred as principal, interest, fees, charges, taxes, damages (whether for breach of contract, tort or incurred on any other ground), losses, costs or expenses, or on any other account; or
- (h) would have been payable to a the Secured Party but remains unpaid by reason of the Grantor being the subject of an Event of Insolvency,

and includes future advances.

**Secured Obligations** means any obligation or liability of any kind of the Grantor (whether present, prospective or contingent and whether jointly or severally and in any capacity) to deliver, provide or otherwise make available the Secured Property to the Secured Party under or in accordance with the Transaction Documents or any transaction contemplated by them, and any and all damages, losses, claims, liabilities costs and expenses arising directly or indirectly from a breach of any such obligations.

**Secured Property** means:

- (a) all of the Grantor's present and future right and interest at any time in any or all of the Relevant Goods and any firmware (however described) installed in (or to be installed in) the Relevant Goods; and
- (b) any proceeds of, or arising from the disposal of or other dealing with, any Relevant Goods and/or any firmware (however described) installed in (or to be installed in) the Relevant Goods.

**Security Interest** means any security arrangement (including a security interest as defined in the PPSA, 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 or any arrangement having a similar effect) which secures payment of money, performance of obligations or protection against default. It also includes any agreement to create any such security arrangement or allow any such security arrangement to exist.

**Transaction Documents** means:

- (a) this deed;
- (b) the Project Deed; and
- (c) any other document which the parties agree is a 'Transaction Document' for the purposes of this deed.

## 1.2 PPS Law

- (a) As the context requires, the following terms when used in this deed have the meaning given to them in the PPSA:
  - (i) account;
  - (ii) amendment demand;
  - (iii) attaches;
  - (iv) financing change statement;
  - (v) financing statement; and
  - (vi) possession.
- (b) The term “control” when used in this deed means control as such term is used in the PPSA and control within its ordinary meaning.
- (c) The term “proceeds” includes proceeds for the purpose of the PPS Law but is not limited to them.

## 1.3 Interpretation

In this deed the following rules of interpretation apply unless the contrary intention appears:

- (a) Any reference in this deed to:
  - (i) “**assets**” includes present and future properties, revenues and rights and interests of every description;
  - (ii) a “**Transaction Document**” or any other agreement, document or instrument is a reference to that Transaction Document or other agreement, document or instrument as amended, varied, transferred, assigned, supplemented or novated from time to time;
  - (iii) “**indebtedness**” includes any obligation (whether incurred as principal or as surety) for the payment or repayment of money, whether present or future, actual or contingent;
  - (iv) a “**person**” or “**entity**” includes any person, firm, company, corporation, government, state or agency of a state, body politic or any association, trust or partnership (whether or not having separate legal personality) or two or more of the foregoing and any reference to a particular person or entity (as so defined) includes a reference to that person's or entity's executors, administrators, successors, substitutes (including by novation) and assigns;
  - (v) a “**regulation**” includes any regulation, rule, official directive, request or guideline (whether or not having the force of law) of any governmental, intergovernmental or supranational body, agency, department or regulatory, self-regulatory or other authority or organisation and if not having the force of law, with which responsible entities in

the position of the relevant party would normally comply;

- (vi) the words “**including**”, “**for example**” or “**such as**” when introducing an example do not limit the meaning of the words to which the example relates to that example or examples of a similar kind;
- (vii) a provision of a law or a regulation is a reference to that provision as amended or re-enacted;
- (viii) subject to any provision to the contrary in the Project Deed, where the day on or by which any thing is to be done is not a Business Day, that thing must be done on or by the preceding Business Day; and
- (b) section, clause and Schedule headings are for ease of reference only;
- (c) unless a contrary indication appears, a term used in any notice given under or in connection with this deed has the same meaning in that notice as in this deed; and
- (d) a Default is “**continuing**” or “**subsisting**” if it has not been waived in writing by the Secured Party or remedied to the satisfaction of the Secured Party.

## 1.4 Consideration

The Grantor enters into this deed for valuable consideration from the Secured Party, and acknowledges receipt of that consideration including the agreement of the Secured Party to enter into certain documents at the request of the Grantor.

## 2 Grant of Security

### 2.1 Security

The Grantor grants security in all of its Secured Property to the Secured Party to secure the payment of the Secured Moneys and the performance of the Secured Obligations. The security granted by the Grantor under this deed operates as a fixed charge over the Secured Property.

### 2.2 Priority

- (a) The parties to this deed intend that the Security Interests granted under this deed take priority over all other Security Interests over the Secured Property other than any Security Interest mandatorily preferred by law.
- (b) Each Security Interest granted under this deed has the same priority in respect of all Secured Moneys and Secured Obligations, including future advances and obligations.
- (c) Nothing in this deed shall be construed as an agreement or consent by the Secured Party to subordinate the Security Interests granted under this deed in favour of any person.

## 2.3 Attachment

The Security Interest granted under this deed attaches to the Secured Property in accordance with the PPSA and the parties to this deed confirm that they have not agreed that the Security Interest granted under this deed attaches at any later time.

## 2.4 Grantor's liability

The Secured Party's liability under this deed will be subject to clause 42.2 of the Project Deed as if the Secured Party's liability under this deed was liability arising under the Project Deed.

# 3 Discharge of Security Interests

## 3.1 Discharge

Subject to clause 3.2 (*Final discharge*), at the written request of the Grantor, the Secured Party must discharge and release the Security Interests granted under this deed if the Secured Moneys have been paid in full, and the Secured Obligations have been fully performed and observed.

## 3.2 Final discharge

- (a) The Secured Party is not obliged to discharge or release a Security Interest granted by the Grantor under clause 3.1 (*Discharge*) if, at the time the requirements of clause 3.1 (*Discharge*) are satisfied, the Secured Party is of the reasonable opinion that the Grantor or any other Security Provider owes or will owe further Secured Moneys or has or will have any Secured Obligations to the Secured Party after the date the Grantor requests the discharge or release of the Security Interests.
- (b) Paragraph (a) overrides any other provision to the contrary in this deed.

# 4 Dealing with the Secured Property

## 4.1 Dealing with the Secured Property

Except with the prior written consent of the Secured Party, the Grantor shall not:

- (a) create or allow to exist any Security Interest over any Secured Property;
- (b) sell, hire, assign, transfer, sublet or otherwise dispose of any Secured Property;
- (c) part with possession of any Secured Property other than to the Secured Party or as required to perform its obligations under the Project Deed; or
- (d) give control of any Secured Property to any person other than to the Secured Party or as required to perform its obligations under the Project Deed.

The Grantor agrees to do everything necessary to ensure that a third person cannot acquire an interest in any Secured Property free of, or having priority over, the Security Interests granted under this deed, except as permitted under the Transaction Documents.

## 4.2 No agreement to deal

The Grantor acknowledges and agrees that if it disposes of or otherwise deals with the Secured Property or an interest in it in breach of clause 4.1 (*Dealing with the Secured Property*) that the Secured Party has not authorised the disposal or agreed that the dealing would extinguish its Security Interest, and that the Secured Party's Security Interest continues in such Secured Property or interest, despite the disposal or dealing.

## 4.3 Notification of change in details

The Grantor shall notify the Secured Party in writing:

- (a) at least 14 days before it changes any of its details set out in Schedule 1 of this deed, including its name or if it becomes a trustee of trust, or a partner in a partnership which is not stated in that section; and
- (b) immediately, if:
  - (i) any ABN, ARBN or ARSN allocated to it, a trust of which it is a trustee or any partnership of which it is a partner, changes, is cancelled or otherwise ceases to apply to it, or
  - (ii) it is proposed that any ABN, ARBN or ARSN allocated to it, a trust of which it is a trustee or any partnership of which it is a partner will change, will be cancelled or will otherwise cease to apply to it; or
  - (iii) if it does not have an ABN, ARBN or ARSN, one is allocated, or otherwise starts to apply, to it.

# 5 Representations and warranties

## 5.1 Representations and warranties

The Grantor represents and warrants to and for the benefit of the Secured Party that:

- (a) its execution of this deed has been properly authorised;
- (b) it has full corporate power to execute, deliver and perform its obligations under this deed;
- (c) this deed constitutes a legal, valid and binding obligation of it enforceable in accordance with its terms by appropriate legal remedy;
- (d) this deed does not conflict with or result in the breach of or default under any provision of its constitution or provision of any law to which it is subject or by which it is bound;
- (e) it does not enter into this deed in the capacity as agent for any person, trustee of a trust or settlement or partner in a partnership;
- (f) all its representations and warranties in the Project Deed are, or will be, true and correct in all respects when made or regarded as having been made;



- (g) the Security Interests granted under this deed are effective security over the Secured Property;
- (h) no person other than the Secured Party has a Security Interest over the Secured Property; and
- (i) except as disclosed in writing by it, or on its behalf, to the Secured Party, its details set out in Schedule 1 are true and correct in all respects and reflects the information contained in the source from which information in relation to it must be taken for the purposes of the PPS Regulations in order to register a financing statement in respect of the Security Interests granted under this deed or any other Transaction Document.

## 5.2 Survival of representations and warranties

The representations and warranties in clause 5.1 (*Representations and warranties*) are taken to be made by the Grantor (by reference to the facts and circumstances then existing):

- (a) on the date of this deed;
- (b) on any date on which a representation and warranty is made, or is taken to be made, under the Project Deed; and
- (c) on the date on which the Grantor acquires, or has an interest in, any Secured Property.

## 5.3 Reliance

The Grantor acknowledges that it has not entered into this deed or any other Transaction Document in reliance on any representation, warranty, promise or statement of the Secured Party or of any person on behalf of the Secured Party.

# 6 Undertakings

## 6.1 Undertakings in respect of Secured Property

The Grantor agrees:

- (a) not do or omit to do anything which might render the Secured Property liable to forfeiture, cancellation, avoidance or loss or might otherwise adversely affect the value of the Secured Property or the interest of the Secured Party; and
- (b) at the request of the Secured Party, to immediately give to the Secured Party copies of all reports and other documents received by it in in respect of the Secured Property; and
- (c) to comply with all of its obligations under the Project Deed; and

## 6.2 Right of entry

If requested by the Secured Party, the Grantor must procure that a Lessor enters into an agreement with the Secured Party under which the Secured Party is granted a licence to enter onto any premises or land the subject of a Lease on terms satisfactory to the Secured Party (acting reasonably) (a **Right of Entry**).

## 6.3 Performance under the Project Deed

The Grantor must ensure that no Event of Default occurs.

## 6.4 Further assurances

The Grantor must, at its own cost, promptly do anything which the Secured Party requests which more satisfactorily:

- (a) secures to the Secured Party the Secured Property or the full benefit of its rights under this deed;
- (b) perfects a Security Interest intended to be granted or which is granted under this deed;
- (c) ensures the priority required by the Transaction Documents of a Security Interest granted under this deed and that such Security Interest is fully effective and enforceable;
- (d) vests or assigns absolutely any Secured Property in or to the Secured Party or any other person nominated by the Secured Party (including a purchaser); or
- (e) aids in the exercise of any Power of the Secured Party or the enforcement of this deed.

## 6.5 Priority agreement

Where, by law, the Grantor may create another Security Interest over the Secured Property of the Grantor without the consent of the Secured Party, the Grantor agrees:

- (a) if the Grantor intends to create another Security Interest, to notify the Secured Party at least 5 Business Days before it proposes to do so; and
- (b) at the request of the Secured Party, to obtain an agreement acceptable to the Secured Party regulating priority between the Security Interests granted under this deed and any other Security Interests in connection with that Secured Property.

# 7 Enforcement

## 7.1 Enforcement

- (a) Upon the occurrence of an Event of Default, immediately and, subject to clause 12.1 (*Exclusions of notice periods and consents*), without the need for any demand or notice to be given to the Grantor or any other person other than a demand or notice required by the terms of a Transaction Document or required by law, the Secured Party may:
  - (i) declare that the Secured Obligations are required to be immediately performed;
  - (ii) declare that the Secured Obligations are required to be performed on demand;
  - (iii) declare that the Secured Moneys are immediately due and payable;
  - (iv) declare that the Secured Moneys are payable on demand;

- (v) terminate or suspend all or any obligations of the Secured Party under the Transaction Documents;
- (vi) enforce the Security Interests of the Grantor granted under this deed; and/or
- (vii) exercise any Power or any right or power of the Grantor in relation to its Secured Property.
- (b) The Grantor agrees that on the enforcement of a Security Interest granted under this deed, the Grantor shall have no right to deal, for any purpose, with the Secured Property, other than by or through the Secured Party, a Controller or an Attorney.
- (c) For the avoidance of doubt, the Security Interests of the Grantor granted under this deed that has been enforced in accordance with this clause 7 (*Enforcement*) may continue to be enforced even if no Event of Default is continuing at that time.

## 8 Controller

### 8.1 Appointment of Controller

The Secured Party may:

- (a) appoint any person or any two or more persons jointly, or severally, or jointly and severally to be a receiver or a receiver and manager of the Secured Property, but only while an Event of Default is continuing;
- (b) remove or terminate the appointment of any Controller at any time and on the removal, retirement or death of any Controller, appoint another Controller and, at any time give up, or re-take, possession of the Secured Property; and
- (c) fix the remuneration and direct payment of that remuneration and any Costs, charges and expenses of a Controller out of the proceeds of any realisation of the Secured Property.

### 8.2 Agency of Controller

- (a) Subject to clause 8.4 (*Status of Controller after commencement of winding up*), each Controller is the agent of the Grantor.
- (b) The Grantor is responsible for the acts, defaults and remuneration of the Controller which has been appointed in respect of the Secured Property.

### 8.3 Powers of Controller

Subject to any express exclusion by the terms of the Controller's appointment, a Controller appointed in respect of any Secured Property has all of the rights of the Secured Party at law or under this deed, in addition to any powers conferred on the Controller by applicable law or otherwise, and whether or not in possession of the Secured Property or any part of it, including without limitation, the following powers:

- (a) **seize, manage, possession or control:** to seize, manage, enter into possession or assume control of the Secured Property;
- (b) **sale:** to sell or concur in selling any of the Secured Property to any person:
  - (i) by auction, private treaty or tender;
  - (ii) on such terms and special conditions as the Secured Party or the Controller thinks fit;
  - (iii) for cash or for a deferred payment of the purchase price, in whole or in part, with or without interest or security;
  - (iv) in conjunction with the sale of any property by any other person; or
  - (v) in one lot or in separate parcels;
- (c) **income and bank accounts:** to do anything to maintain or obtain income or revenue from any Secured Property including opening and operating a new bank account;
- (d) **insure Secured Property:** to insure any Secured Property;
- (e) **compromise:** to make or accept any compromise or arrangement;
- (f) **surrender Secured Property:** to surrender or transfer any Secured Property to any person;
- (g) **exchange Secured Property:** to exchange with any person any Secured Property for any other property, whether of equal value or not;
- (h) **employ or discharge:** to employ or discharge any person as an employee, contractor, agent, professional advisor or auctioneer for any of the purposes of this deed;
- (i) **delegate:** to delegate to any person any Power of the Controller;
- (j) **perform or enforce documents:** to observe, perform, enforce, exercise or refrain from exercising any right, power, authority, discretion or remedy of the Grantor under, or otherwise obtain the benefit of:
  - (i) any document, agreement or right which attaches to or forms part of the Secured Property; and
  - (ii) any document or agreement entered into in exercise of any Power by the Controller;
- (k) **take proceedings:** to commence, discontinue, prosecute, defend, settle or compromise in its name or on behalf of the Grantor, any proceedings including proceedings in relation to any insurance in respect of any Secured Property;
- (l) **insolvency proceedings:** to make any debtor bankrupt, wind up any company, corporation or other entity and do all things in relation to any bankruptcy or winding up which the Controller thinks necessary or desirable including



- attending and voting at creditors' meetings and appointing proxies for those meetings;
- (m) **execute documents:** to enter into and execute any document or agreement in the name of the Controller or the name or on behalf of the Grantor including bills of exchange, cheques or promissory notes for any of the purposes of this deed;
- (n) **ability of Grantor:** to do anything the Grantor could do in respect of the Secured Property; and
- (o) **incidental power:** to do anything necessary or incidental to the exercise of any Power of the Controller.

#### 8.4 Status of Controller after commencement of winding up

- (a) The power to appoint a Controller under clause 8.1 (*Appointment of Controller*) may be exercised even if, at the time an Event of Default occurs or at the time a Controller is appointed, an order has been made or a resolution has been passed for the winding up of the Grantor.
- (b) If, for any reason, including operation of law, a Controller:
  - (i) appointed in the circumstances described in paragraph (a); or
  - (ii) appointed at any other time, ceases to be the agent of the Grantor as a result of an order being made or a resolution being passed for the winding up of the Grantor, then the Controller immediately becomes the agent of the Secured Party.

#### 8.5 Powers exercisable by the Secured Party

- (a) Whether or not a Controller is appointed under clause 8.1 (*Appointment of Controller*), the Secured Party may, on or after the occurrence of an Event of Default and without giving notice to any person (other than any notice required by law):
  - (i) exercise any Power of the Controller in addition to any Power of the Secured Party; and
  - (ii) otherwise do anything that the Grantor could do in relation to the Secured Property.
- (b) This clause does not limit any other provision of this deed or any other Transaction Document.
- (c) The exercise of any Power by the Secured Party, a Controller or an Attorney does not, except to the extent provided by law, cause or deem the Secured Party, Controller or Attorney:
  - (i) to be a mortgagee in possession;
  - (ii) to account as mortgagee in possession; or

- (iii) to be answerable for any act of omission for which a mortgagee in possession is liable.

## 9 Application and receipts of money

### 9.1 Order of application

At any time after any Security Interest granted under this deed is enforceable, all moneys received by the Secured Party, a Controller, an Attorney or any other person acting on their behalf under this deed must be applied in the following order and manner:

- (a) first, in payment of all amounts which, to the extent required by law, have priority over the payments specified in the balance of this clause 9.1 (*Order of application*);
- (b) second, in payment of all costs, charges and expenses (including any applicable goods and services tax) of the Secured Party, any Controller or any Attorney incurred in, or incidental to, the exercise or performance or attempted exercise or performance of any Power;
- (c) third, in payment of any other outgoings due to the Secured Party, a Controller or an Attorney;
- (d) fourth, in payment of the surplus, if any, without interest to the Grantor. The Secured Party, any Controller or Attorney may pay the surplus to the credit of a bank account in the name of the Grantor in the books of any bank carrying on business in Australia and having done so is under no further liability in respect of that surplus.

### 9.2 Money actually received

In applying any money towards satisfaction of the Secured Moneys, the Grantor is to be credited only with so much of the money which is available for that purpose (after deducting any goods and services tax or any similar tax imposed) and which is actually received by the Secured Party, a Controller or an Attorney. The credit dates from the time of receipt.

### 9.3 Suspense account

- (a) The Secured Party may apply to the credit of a suspense account any:
  - (i) amounts received under this deed;
  - (ii) other amounts received from any other person in respect of the Secured Moneys or the Secured Obligations.
- (b) The Secured Party may retain the amounts in the suspense account for as long as it determines and is not obliged to apply them in or towards satisfaction of the Secured Moneys.

### 9.4 Notice of a subsequent Security Interest

- (a) If the Secured Party receives actual or constructive notice of a subsequent Security Interest in respect of the Secured Property, the Secured Party:

- (i) may open a new account in the name of the Grantor in its books; or
- (ii) is regarded as having opened a new account in the name of the Grantor in its books,  
on the date it received, or was regarded as having received, notice of the subsequent Security Interest.
- (b) From the date on which that new account is opened or regarded as opened:
  - (i) all payments made by the Grantor to the Secured Party; and
  - (ii) all financial accommodation and advances by the Secured Party to the Grantor,  
are, or are regarded as, credited and debited, as the case may be, to the new account.
- (c) The payments by the Grantor under paragraph (b) must be applied:
  - (i) first, in reduction of the debit balance, if any, in the new account; and
  - (ii) second, if there is no debit balance in the new account, in reduction of the Secured Moneys which have not been debited or deemed to have been debited to the new account.

#### 9.5 Secured Party's statement of indebtedness

A certificate from the Secured Party stating:

- (a) the amount of the Secured Moneys due and payable; or
- (b) the amount of the Secured Moneys, whether currently due and payable or not,

is sufficient evidence of that amount as at the date stated on the certificate, or failing that, as at the date of the certificate, unless it is manifestly incorrect or the contrary is proved.

#### 9.6 Secured Party's receipts

- (a) The receipt from the Secured Party for any money payable to or received by the Secured Party under this deed exonerates the payer from all liability to enquire whether any of the Secured Moneys have become payable.
- (b) Every receipt from the Secured Party effectually discharges the payer from:
  - (i) any future liability to pay the amount specified in the receipt; and
  - (ii) being concerned to see to the application of, or being answerable or accountable for any loss or misapplication of, the amount specified in the receipt.

## 10 Power of attorney

### 10.1 Appointment of attorney

In consideration of the Secured Party entering into the Transaction Documents and for other consideration received, the Grantor irrevocably appoints the Secured Party, each Controller and each officer of the Secured Party severally as its attorney for the purposes set out in clause 10.2 (*Purposes of appointment*).

### 10.2 Purposes of appointment

The Attorney may, in its name or in the name of the Grantor, Secured Party or Controller, at any time after the occurrence of an Event of Default, but only while it is continuing, do any of the following:

- (a) do anything which ought to be done by the Grantor under this deed;
- (b) do anything which ought to be done by the Grantor in respect of its Secured Property under this deed;
- (c) exercise any right, power, authority, discretion or remedy of the Grantor under:
  - (i) this deed; or
  - (ii) any agreement forming part of the Secured Property;
- (d) do anything which, in the reasonable opinion of the Secured Party, Controller or Attorney, is necessary or expedient for securing or perfecting the Security Interests granted under this deed;
- (e) execute deeds of assignment, composition or release in respect of the Secured Property;
- (f) sell or otherwise part with the possession of any of the Secured Property; and
- (g) generally, do any other thing, whether or not of the same kind as those set out in paragraphs (a) to (d), which in the reasonable opinion of the Secured Party, Controller or Attorney is necessary or expedient:
  - (i) to more satisfactorily secure the Secured Property; or
  - (ii) in relation to any Secured Property.

### 10.3 Delegation and substitution

The Attorney may, at any time, for any of the purposes in clause 10.2 (*Purposes of appointment*), appoint or remove any substitute or delegate or sub attorney.

## 11 Protection of Secured Party, Controller and Attorney

The Secured Party, a Controller or an Attorney is not liable for any loss or damage including consequential loss or damage, arising directly or indirectly from:

- (a) the exercise, attempted exercise, non-exercise or purported exercise of any Power; or
- (b) the neglect, default or dishonesty of any manager, officer, employee, agent, accountant,

auctioneer or solicitor of the Grantor, the Secured Party, a Controller or an Attorney.

## 12 Saving provisions

### 12.1 Exclusion of notice periods and consents

- (a) Before enforcing or exercising a right under this deed, or exercising any Power, the Secured Party, a Controller or an Attorney is not required to give any notice or demand to any person or allow the expiration of any time that is required by law unless the notice, demand or lapse of time cannot be excluded.
- (b) If a law provides that a period of notice or lapse of time must be given or occur, but may be stipulated or fixed by this deed, then one day is stipulated and fixed as that period of notice or lapse of time.
- (c) The Secured Party, a Controller or an Attorney is not required:
  - (i) except to the extent required by law, to give notice of the Security Interests granted under this deed to any debtor or creditor of the Grantor or to any other person; or
  - (ii) to obtain the consent of the Grantor to any exercise of a Power.

### 12.2 Continuing security

A Security Interest granted under this deed is a continuing security despite:

- (a) any settlement of account; or
- (b) the occurrence of any other thing,

and remains in full force and effect until the Secured Party has given a discharge and release of the Security Interests in respect of all of the Secured Property under clause 3 (Discharge of Security Interests).

### 12.3 No merger of security

- (a) Nothing in this deed merges, extinguishes, postpones, lessens or otherwise prejudicially affects:
  - (i) any Security Interest in favour of the Secured Party;
  - (ii) any indemnity in favour of the Secured Party contained in any Transaction Document; or
  - (iii) any right, power, authority, discretion or remedy which the Secured Party may have against the Grantor or any other person at any time.
- (b) No other Security Interest or Transaction Document which the Secured Party has the benefit of in any way prejudicially affects any Power.

### 12.4 Exclusion of moratorium

To the extent permitted by law, a provision of any legislation which directly or indirectly

- (a) lessens or otherwise varies or affects in favour of the Grantor any obligations under this deed or any Transaction Document; or
- (b) stays, postpones or otherwise prevents or prejudicially affects the exercise by the Secured Party, a Controller or an Attorney of any Power,
- (c) is excluded from this deed and any Transaction Document and all relief and protection conferred on the Grantor by or under that legislation is also excluded.

### 12.5 Conflict

Where any right, power, authority, discretion or remedy of the Secured Party, a Controller or an Attorney under this deed or any Transaction Document is inconsistent with the powers conferred by applicable law then, to the extent not prohibited by that law, those powers conferred by applicable law are regarded as negated or varied to the extent of the inconsistency.

### 12.6 Reinstatement of Security Interests

- (a) Whenever a claim is made that a transaction (including a payment) in connection with the Secured Moneys or Secured Obligations is void or voidable and that claim is upheld, conceded or compromised, then:
  - (i) the Secured Party immediately becomes entitled against the Grantor to all rights in respect of the Secured Moneys or Secured Obligations (as the case may be) to which it was entitled immediately before the transaction; and
  - (ii) the Grantor must immediately do or cause to be done everything the Secured Party requests to restore the Secured Party to the position it held with respect to such Grantor immediately before the transaction.
- (b) The obligations under this clause 12.6 (*Reinstatement of Security Interests*) are continuing obligations, independent of the Grantor's other obligations under this deed, and survive the discharge of the Security Interests granted under this deed or the termination of this deed.

## 13 Third party provisions

### 13.1 Independent obligations

This deed is enforceable against the Grantor:

- (a) without first having recourse to any other security;
- (b) whether or not the Secured Party or any other person has:
  - (i) made a demand on any person other than the Grantor;

- (ii) given notice to any other person in respect of any thing; or
- (iii) taken any other steps against any other person;
- (c) whether or not any Secured Moneys is then due and payable;
- (d) whether or not the performance of any of the Secured Obligations is then due; and
- (e) despite the occurrence of any event described in clause 13.2 (*Unconditional nature of obligations*).

### 13.2 Unconditional nature of obligations

- (a) The Security Interests granted under this deed and the obligations of the Grantor under the Transaction Documents are absolute, binding and unconditional in all circumstances.
- (b) The Security Interests granted under this deed and the obligations of the Grantor under the Transaction Documents are not released or discharged or otherwise affected by anything which but for this provision might have that effect, including:
  - (i) the grant to any other person of any time, waiver, covenant not to sue or other indulgence;
  - (ii) the release (including a release as part of any novation) or discharge of any other person;
  - (iii) the cessation of the obligations, in whole or in part, of any other person under any other document or agreement;
  - (iv) the Liquidation of any other person;
  - (v) any arrangement, composition or compromise entered into by the Secured Party or any other person;
  - (vi) any Transaction Document or another document or agreement being in whole or in part illegal, void, voidable, avoided, unenforceable or otherwise of limited force or effect;
  - (vii) any extinguishment, failure, loss, release, discharge, abandonment, impairment, compounding, composition or compromise, in whole or in part of any Transaction Document or another document or agreement;
  - (viii) any Security Interest being given to the Secured Party or any other person by the Grantor or any other person;
  - (ix) any alteration, amendment, variation, supplement, renewal or replacement of a Transaction Document or any other document or agreement;
  - (x) any moratorium or other suspension of a Power;

- (xi) the Secured Party, a Controller or Attorney exercising or enforcing, delaying or refraining from exercising or enforcing, or not being entitled or unable to exercise or enforce any Power;
- (xii) the Secured Party obtaining a judgment against any other person for the payment of any of the Secured Moneys or the performance of the Secured Obligations;
- (xiii) any transaction, agreement or arrangement that may take place with the Secured Party or any other person;
- (xiv) any payment to the Secured Party, a Controller, an Attorney, including any payment which at the payment date or at any time after the payment date is, in whole or in part, illegal, void, voidable, avoided or unenforceable;
- (xv) any failure to give effective notice to any other person of any default under a Transaction Document or another document or agreement;
- (xvi) any legal limitation, disability or incapacity of any other person;
- (xvii) any breach of a Transaction Document or another document or agreement;
- (xviii) the acceptance of the repudiation of, or termination of, a Transaction Document or another document or agreement;
- (xix) any Secured Moneys being irrecoverable for any reason;
- (xx) any Secured Obligation being unperformable for any reason;
- (xxi) any disclaimer by any other person of any Transaction Document or any other document or agreement;
- (xxii) any assignment, novation, assumption or transfer of, or other dealing with, any Powers or any other rights or obligations under a Transaction Document or any other document or agreement;
- (xxiii) the opening of a new account of the Grantor with the Secured Party or any transaction on or relating to the new account;
- (xxiv) any prejudice (including, material prejudice) to a person as a result of any thing done, or omitted by the Secured Party or any other person;
- (xxv) any prejudice (including, material prejudice) to any person as a result of the Secured Party, a Controller, Attorney or any other person selling or realising any property the subject of a Security Interest at less than the best price;



- (xxvi) any prejudice (including, material prejudice) to a person as a result of a failure or neglect by the Secured Party, a Controller, Attorney or any other person to recover the Secured Moneys or require the performance of the Secured Obligations or by the realisation of any property the subject of a Security Interest;
- (xxvii) any prejudice (including, material prejudice) to any person as a result of any other thing;
- (xxviii) the receipt by the Secured Party of any dividend, distribution or other payment in respect of any Liquidation;
- (xxix) the failure of any other person to execute any Transaction Document or any other document; or
- (xxx) any other act, omission, matter or thing whatsoever whether negligent or not.
- (c) Paragraphs (a) and (b) apply irrespective of:
  - (i) the consent or knowledge or lack of consent or knowledge, of the Secured Party or any other person of any event described in paragraph (b); or
  - (ii) any rule of law or equity to the contrary.

### 13.3 No competition

- (a) At any time while any Secured Moneys which are due and payable remain unpaid or the Secured Obligations which are required to be performed have not been performed in full (unless the Security Interests granted under this deed have been fully discharged under clause 3 (*Discharge of Security Interests*)), except to the extent permitted by any other Transaction Document, the Grantor is not entitled to:
  - (i) be subrogated to the Secured Party;
  - (ii) claim or receive the benefit of any Security Interest or other right, document or agreement of which the Secured Party has the benefit;
  - (iii) claim or receive the benefit of any moneys held by the Secured Party;
  - (iv) claim or receive the benefit of any Power;
  - (v) raise any defence or counterclaim in reduction or discharge of its obligations under the Transaction Documents.
- (b) The Grantor must not do or seek, attempt or purport to do anything referred to in paragraph (a).

### 13.4 No challenge of disposal

The Grantor agrees that if the Secured Party, a Controller or an Attorney disposes of the Secured Property, the Grantor will not challenge the acquirer's

right to the Secured Property and will not seek to reclaim that property or asset.

## 14 PPS Law

### 14.1 Exclusion of certain PPSA provisions

Without limiting clause 7 (*Enforcement*), to the extent the law permits:

- (a) for the purposes of sections 115(1) and 115(7) of the PPSA:
  - (i) the Secured Party need not comply with sections 95, 118, 121(4), 125, 130, 132(3)(d) or 132(4); and
  - (ii) sections 142 and 143 are excluded;
- (b) for the purposes of section 115(7) of the PPSA, the Secured Party need not comply with sections 132 and 137(3);
- (c) the Secured Party may, in writing after the date of this deed, notify the Grantors that any other provision of the PPSA is excluded; and
- (d) each Grantor agrees not to exercise its rights to make any request of the Secured Party under section 275 of the PPSA, to authorise the disclosure of any information under that section or to waive any duty of confidence that would otherwise permit non-disclosure under that section.

### 14.2 Exercise of rights by Secured Party

If the Secured Party exercises a Power in connection with this deed, that exercise is taken not to be an exercise of a Power under the PPSA unless the Secured Party states otherwise at the time of exercise. However, this clause does not apply to a right, power or remedy which can only be exercised under the PPSA.

### 14.3 Registration on the PPSR

The Grantor consents to the Secured Party effecting a registration on the PPSR (in any manner the Secured Party considers appropriate, including as a purchase money security interest), or giving any notification, in relation to any Security Interests granted under or in connection with this deed. The Grantor agrees not to make any amendment demand.

### 14.4 Confidentiality

To the extent permitted by section 275 of the PPSA, the parties to this deed agree to keep all information of the kind mentioned in section 275(1) of the PPSA confidential and not to disclose that information to any other person, except where disclosure is otherwise permitted or authorised under the Finance Documents.

## 15 General

### 15.1 Notices

Clause 58.1 of the Project Deed applies to this deed as if set out in full in this deed, with all necessary changes.

## 15.2 Performance by Secured Party of Grantor's obligations

If the Grantor fails to perform an obligation under this deed, the Secured Party may do all things which the Secured Party considers necessary or desirable to make good or attempt to make good that failure without adversely affecting a Power of the Secured Party.

## 15.3 Grantor to bear cost

Any thing which must be done by the Grantor under this deed, whether or not at the request of the Secured Party, is to be done at the cost of the Grantor.

## 15.4 Authority to fill in blanks

The Grantor agrees that:

- (a) the Secured Party may fill in any blanks in this deed, any other Transaction Document or a document connected with a Transaction Document (such as Corporations Act forms and PPSA forms (including financing statements and financing change statements)); and
- (b) at any time after a Security Interest of the Grantor created under this deed has become enforceable, the Secured Party, a Controller, Attorney or any officer of the Secured Party may complete, in favour of the Secured Party, any appointee of the Secured Party or any purchaser, any instrument or transfer executed in blank by or on behalf of the Grantor and deposited with the Secured Party under this deed.

## 15.5 Prompt performance

- (a) If this deed specifies when the Grantor agrees to perform an obligation, the Grantor agrees to perform it by the time specified. The Grantor agrees to perform all other obligations promptly.
- (b) Time is of the essence in this deed in respect of an obligation to pay money.

## 15.6 Consent of Secured Party

- (a) Whenever the doing of anything by the Grantor is dependent upon the consent of the Secured Party, a Controller or an Attorney, the Secured Party, Controller or Attorney may withhold its consent or give it conditionally or unconditionally in its absolute discretion unless expressly stated otherwise in a Transaction Document.
- (b) Any conditions imposed on the Grantor under paragraph (a) must be complied with by the Grantor.

## 15.7 Discretion of TfNSW

- (a) Where under this deed the Secured Party, Controller or an Attorney has a right of approval or consent, or is given the ability to make a decision or exercise a right or discretion, or give a direction or instruction, such approval, consent, decision, right, discretion, direction or instruction may be given, withheld, taken or

exercised by TfNSW in its sole and absolute discretion, unless otherwise expressly provided in this deed.

- (b) Despite any obligation the Secured Party has or may otherwise have under this deed to use its best or reasonable endeavours, to conduct itself reasonably, not to conduct itself unreasonably, or to conduct itself in good faith, the Secured Party is not required to:
  - (i) interfere with or influence the exercise by any person or Authority of a statutory power or discretion;
  - (ii) exercise a power or discretion or otherwise act in a manner that it regards as not in the public interest; or
  - (iii) develop or implement policy, or take any steps to procure legislation, by reference only or predominantly to the interests, objectives or expected outcomes of the ETS Project.

## 15.8 No assignment

- (a) The Grantor may not assign or novate any of its rights and obligations under this deed without the prior written consent of the Secured Party.
- (b) Subject to any Transaction Document, the Secured Party may assign or novate any of its rights and obligations under this deed without the consent of the Grantor.

## 15.9 Variation

No modification, variation or amendment of this deed will be of any force unless such modification, variation or amendment is in writing and executed by each party.

## 15.10 Waiver

A failure to exercise or enforce or a delay in exercising or enforcing or a partial exercise or enforcement of any right, remedy, power or privilege under this deed by either party will not in any way:

- (a) preclude or operate as a waiver of any further exercise or enforcement of; or
- (b) constitute or operate as an election not to exercise or enforce,

that or any other right, remedy, power or privilege under this deed or provided by law.

## 15.11 Severability of provisions

Any provision of this deed which is illegal, void or unenforceable will be ineffective to the extent only of such illegality, voidness or unenforceability without invalidating the remaining provisions of this deed.

## 15.12 Partial Invalidity

If, at any time, any provision of this deed is or becomes illegal, invalid or unenforceable in any respect under any law of any jurisdiction, neither the legality, validity or enforceability of the remaining provisions nor the legality, validity or enforceability of

*NOTE: some clauses and Schedules have been partly or completely removed under the provisions of the GIPA Act. For details, refer to TfNSW's Government Contracts Register – Project Deed.*

such provision under the law of any other jurisdiction will in any way be affected or impaired.

#### **15.13 Cumulative rights**

Except as expressly provided in this deed, the rights of the Secured Party, a Controller and an Attorney under this deed are in addition to and do not exclude or limit any other rights or remedies provided by law and where the Secured Party, Controller or an Attorney has Powers in addition to, or existing separately from, those in Chapter 4 of the PPSA, those Powers will continue to apply and are not limited or excluded (or otherwise adversely affected) by the PPSA.

#### **15.14 Counterparts**

- (a) This deed may be executed in any number of counterparts, and this has the same effect as if the signatures on the counterparts were on a single copy of this deed.
- (b) This deed binds the Grantor even if another signatory does not sign it or is otherwise not bound by this deed.

#### **15.15 Governing law**

This deed will be governed by and construed in accordance with the laws of New South Wales. The parties submit to the non-exclusive jurisdiction of the courts of New South Wales and waive any right to claim that those courts are an inconvenient forum.

NOTE: some clauses and Schedules have been partly or completely removed under the provisions of the GIPA Act. For details, refer to TfNSW's Government Contracts Register – Project Deed.

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## Schedule 1 — Grantor

Name	Entity type for the purposes of the PPS Law	ACN/ABN/ARBN
Cubic Transportation Systems (Australia) Pty Ltd	Body Corporate	003 617 561



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## Execution page

### Grantor

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Signed, sealed and delivered by Cubic  
Transportation Systems (Australia) Pty  
Ltd in accordance with section 127 of the  
*Corporations Act 2001* (Cth) and by:

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Signature of director

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Signature of director/secretary

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Name of director (print)

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Name of director/secretary (print)

### Secured Party

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Signed, sealed and delivered by Transport for  
NSW for and on behalf of the Director-General of  
the Department of Transport in accordance with  
section 3C(4) of the *Transport Administration Act*  
by:

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Signature of witness

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Signature of authorised signatory

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Name of witness (print)

---

Name of authorised signatory (print)

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## Schedule 41 —

[Commercial-in-confidence]

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## Schedule 42 — [REDACTED]

[REDACTED]

[Commercial-in-confidence]

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## Exhibit A — Insurance Policies

[Commercial-in-confidence]