

CONDITIONS OF PURCHASE

PART A – GENERAL CONDITIONS

1. DEFINITIONS

In these Conditions:

- 1.1 **Conditions** means these General Conditions of Purchase;
- 1.2 **Contract** means the contract constituted pursuant to clause 2 of these Conditions;
- 1.3 **Franchise Agreement** means the agreement entitled Franchise Agreement - Train, dated 31 August 2009, between Metro and PTV;
- 1.4 **Goods** means the goods (if any) identified in the Purchase Order and includes any goods or materials supplied by the Supplier to Metro as part of the Services;
- 1.5 **Intellectual Property Rights** means any intellectual or industrial property whether protected by statute, at common law or in equity, including any patent, invention, copyright, design (whether or not registrable), trade secret, circuit layout design or right in relation to circuit layouts, right to confidential information, technical information, processes, techniques and know how;
- 1.6 **Materials** means patterns, designs, specifications, drawings, artwork, transparencies, proofs, technical information, documents, samples, dies, tools, jigs, equipment and other materials;
- 1.7 **Metro** means Metro Trains Melbourne Pty Ltd ABN 43 136 429 948;
- 1.8 **MTM Standards** means the technical standards and specifications published by Metro from time to time relevant to the work to be performed under this Contract;
- 1.9 **Nominated Address** means the address identified in the Purchase Order for delivery of the Goods and/or the performance of Services;
- 1.10 **Price** means the price stipulated in the Purchase Order for the Goods and/or Services;
- 1.11 **PTV** means Public Transport Development Authority (trading as Public Transport Victoria), a body corporate established under the *Transport Integration Act 2010* (Vic);
- 1.12 **Purchase Order** means a purchase order issued by Metro to the Supplier for the Goods and Services (as applicable);
- 1.13 **Services** means the services (if any) identified in the Purchase Order;
- 1.14 **Supplier** means the supplier named in the Purchase Order; and
- 1.15 **VRIOGS** means the Victorian Rail Industry Operators Group Standards.

2. CONTRACT

- 2.1 The acceptance by the Supplier of the Purchase Order constitutes a binding contract between the Supplier and Metro consisting of the Purchase Order, Part A General Conditions, any Franchise Business Special Conditions and Part B Special Conditions.
- 2.2 No document, representation or statement except in the above documents, form part of this Contract unless Metro expressly agrees in writing. In the event of any inconsistency between the documents comprising this Contract, the following order of precedence will apply:
 - 2.2.1 an agreed formal contract and other documents directly referencing that contract (including but not limited to variations, directions, notices etc);
 - 2.2.2 the Purchase Order;
 - 2.2.3 the Part B Special Conditions;
 - 2.2.4 any Franchise Business Special Conditions;
 - 2.2.5 the Part A General Conditions; and
 - 2.2.6 any other agreed document, representation or statement.

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- 2.3** Any variation of the Contract will be of no effect unless in writing and signed by both Metro and the Supplier. In particular, the Supplier may not vary the Price, including due to exchange rate changes or other increases in the Supplier's costs of supplying the Goods or Services, without Metro's express written agreement.
- 2.4** For the avoidance of doubt, the Supplier must ensure that all personnel (officers, employees, contractors, consultants, representatives, agents or advisers) engaged by the Supplier in delivery of the Goods and/or Services demonstrate compliance with Metro's applicable competency requirements.
- 2.5** For the avoidance of doubt, except to the extent that the Contract otherwise provides, the Supplier must ensure that the materials used in the provision of the Goods and/or Services are of a quality consistent with the quality of materials which would be used by a prudent, efficient and experienced contractor and which meet, as a minimum, the design life of the comparable parts of the existing infrastructure, and that do not contain any asbestos or asbestos containing materials.
- 2.6** Where the Supplier enters into this Contract as trustee of a trust ('Trust'), the Supplier enters into this Contract in its personal capacity and as trustee of the Trust and the Supplier:
- 2.6.1** acknowledges its personal liability for the performance and observance of the Supplier's obligations under the Contract;
 - 2.6.2** will take any steps and proceedings necessary to ensure the assets of the Trust are available to rectify any unremedied default by the Supplier;
 - 2.6.3** on demand by Metro, will assign to Metro any right of indemnity the Supplier has against the assets of the Trust; and
 - 2.6.4** warrants that:
 - 2.6.4.1** the Supplier has the power and authority under the terms of the Trust to enter into this Contract; and
 - 2.6.4.2** entry into this Contract by the Supplier is in the due administration of the Trust.

3. PRICE

- 3.1** The Price is exclusive of GST, unless otherwise stated, but includes all other taxes, duties and charges, as well as insurance, packing costs and any other costs associated with producing or supplying the Goods or Services.
- 3.2** Metro may set off any amount payable to Metro by the Supplier under the Contract against any amount payable by Metro to the Supplier under this Contract.

4. GST

- 4.1** If GST is payable in respect of the supply of the Goods or Services or any other supply made under or in connection with the Purchase Order, Metro must reimburse the Supplier for the amount of that GST, provided that the Supplier must first be registered for GST and issue a valid tax invoice to Metro.
- 4.2** If the amount payable for the Goods or Services or any other supply made under or in connection with the Purchase Order is calculated by reference to any cost or expense incurred by the Supplier, the amount payable is to be calculated using the GST-exclusive amount of that cost or expense.
- 4.3** If there is an adjustment event in relation to the supply of the Goods or Services or any other supply made under or in connection with the Purchase Order:
- 4.3.1** the Supplier must refund to Metro the amount by which the GST reimbursed pursuant to clause 4.1 exceeds the adjusted GST; or
 - 4.3.2** Metro must pay to the Supplier the amount by which the adjusted GST exceeds the GST reimbursed pursuant to clause 4.1.

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- 4.4** GST, supply, tax invoice and adjustment event have the same meanings as in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

5. DELIVERY

- 5.1** The Supplier must deliver the Goods and/or supply the Services to/at the Nominated Address.
- 5.2** The Supplier will be deemed not to have delivered the Goods to and/or supplied the Services at the Nominated Address unless it obtains a receipt or signed delivery docket from an authorised agent or employee of Metro.
- 5.3** Where the delivery of the Goods and/or Services requires the Supplier to have access to or carry out works or services on Metro's land or premises, the Supplier must comply with all applicable policies, protocols and procedures of Metro in relation to site access, occupational health and safety, rail safety and environmental compliance including without limitation Metro's site access procedures and, where relevant, the documents entitled "Safety and Environmental Requirements for Third Parties Working on MTM Premises", "MTM Site Access Procedures" and "Works Readiness Procedure".

6. TIME

- 6.1** If a time or times for delivery of the Goods and/or supply of the Services is stipulated in the Purchase Order, the Supplier must deliver the Goods and/or supply the Services by no later than the stipulated time or times (as varied pursuant to this clause 6).
- 6.2** Time is of the essence in the performance of the Supplier's obligations under the Contract.
- 6.3** If the delivery of the Goods and/or the supply of the Services is or may be delayed for reasons beyond the reasonable control of the Supplier, the Supplier must immediately give notice of such delay to Metro identified as a notice under this clause 6.3 and identifying in reasonable detail the extent of such delay. Following receipt of such notice, Metro will notify the Supplier of the period by which the stipulated date for delivery or supply will be extended.
- 6.4** Metro may, at Metro's discretion, extend the time for delivery or supply by notice in writing to the Supplier given at any time prior to actual delivery or supply by the Supplier.
- 6.5** If the Goods are not delivered and/or the Services are not supplied by the time stipulated in the Purchase Order (in either case as varied pursuant to this clause 6), Metro may, without prejudice to any of its other rights and remedies, terminate the Contract by notice in writing to the Supplier with immediate effect, unless the delay is caused by factors outside the Supplier's reasonable control.
- 6.6** Metro will not be liable to the Supplier in respect of any cost, expense, loss or damage whatsoever incurred or suffered by the Supplier as a direct or indirect result of the termination of the Contract pursuant to clause 6.5.

7. ACCEPTANCE

- 7.1** Without limiting any of Metro's other rights, the Goods and/or Services must comply with all specifications and technical requirements and other requirements of Metro stated in the Purchase Order or notified in writing by Metro to the Supplier. The Supplier must also comply with applicable MTM Standards, applicable VRIOGS and (where applicable) provide compliant Data Management System drawings to Metro's satisfaction.
- 7.2** Without limiting Metro's rights under clause 11, Metro may reject any Goods or Services which do not comply with the Contract, including where:
- 7.2.1** such Goods or Services do not comply with clause 7.1;
 - 7.2.2** such Goods or Services are in excess of the stipulated quantity; or
 - 7.2.3** the Goods or Services have been produced in bulk but have not been approved before production by Metro (including where they do not comply with an approved sample).

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- 7.3** Without limiting Metro's rights under clause 11, Metro may return any Goods rejected by it at the expense and risk of the Supplier. The Supplier must replace any rejected Goods or Services with Goods or Services that comply with the requirements of the Contract, or pay to Metro the cost of replacing the Goods or Services with functionally equivalent goods or services from an alternative source.
- 7.4** Without limiting Metro's rights under this clause 7 or clause 11, any material changes in product design, material composition or specification that are made during the course of supply must be submitted to Metro for approval (including where relevant, approval under Metro's type approval process).
- 7.5** If the change to the supply does not meet the requirements of the approval process referred to in clause 7.4, Metro may in its discretion:
- 7.5.1** reject future supplies of goods; and
 - 7.5.2** any costs incurred by Metro as a result will be a debt due and payable by the Supplier.
- 7.6** Title in any Goods will pass to Metro upon payment of the Price (or part thereof) to the Supplier or delivery to Metro whichever occurs earlier.
- 7.7** The Goods are at the Supplier's risk until they have been delivered to Metro in accordance with the Contract notwithstanding that payment may have already been made and title passed to Metro.
- 7.8** The Supplier must take all measures necessary to protect people and property, including but not limited to Metro's land or premises, in the provision of the Goods and/or Services.
- 7.9** This clause 7 is without prejudice to any of Metro's rights and remedies and, without limiting the foregoing, will not release the Supplier from its obligations under clauses 10 and 11.

8. PAYMENT

- 8.1** Metro must pay the Price to the Supplier within 30 days after the end of the month in which Metro receives an invoice from the Supplier which complies with clause 8.2.
- 8.2** The Supplier's invoice must:
- 8.2.1** include the Supplier's full trading name, address and ABN;
 - 8.2.2** quote Metro's Purchase Order number;
 - 8.2.3** be clearly addressed to 'Metro Trains Melbourne Pty Ltd ABN 43 136 429 948';
 - 8.2.4** be sent to Metro's address for invoices as indicated on the Purchase Order;
 - 8.2.5** contain such information as is reasonably necessary for Metro to verify the amount invoiced; and
 - 8.2.6** where GST is applicable, be a valid tax invoice in accordance with clause 4.
- 8.3** Metro may reject without payment any invoice issued by the Supplier which does not comply with clause 8.2.

9. INSURANCE

- 9.1** From the date of the Purchase Order until acceptance of the Goods by Metro and/or completion of the performance of the Services, the Supplier must, at its own cost and in a form acceptable to Metro, insure for any loss of or damage to the Goods and any Materials provided by Metro to the Supplier pursuant to clause 12.
- 9.2** Where the Purchase Order relates to the provision of Services, the Supplier must for the duration of the Services effect and maintain:
- 9.2.1** if the Supplier is a natural person, insurance for accidental injury (including sickness) to the Supplier;

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- 9.2.2** public liability insurance, for at least \$20 million per claim (or such other amount as is specified in the Purchase Order);
 - 9.2.3** where specified in the Purchase Order, professional indemnity insurance for at least \$10 million per claim (or such other amount as is specified in the Purchase Order);
 - 9.2.4** workers' compensation insurance as required by law and unlimited common law liability insurance for injury to or death of the Supplier's employees, agents or sub-contractors; and
 - 9.2.5** all other insurances required by law.
- 9.3** The insurance referred to above must be with reputable and solvent insurers.
- 9.4** The Supplier must:
- 9.4.1** punctually pay all premiums for that insurance; and
 - 9.4.2** on demand, produce to Metro a certificate of currency for that insurance.

10. WARRANTY

The Supplier hereby warrants to Metro that:

- 10.1** the Goods and/or Services correspond to the description in the Contract and conform to all specifications, drawings, samples and/or descriptions provided by Metro to the Supplier;
- 10.2** the Goods and/or Services are fit and sufficient for the purpose for which they are intended;
- 10.3** the Goods and/or Services are of the quality specified (or, if no quality is specified, the best merchantable quality);
- 10.4** except to the extent that the Contract otherwise provides, the Goods and/or Services do not contain any asbestos or asbestos containing materials;
- 10.5** the Goods are free of all defects and will operate satisfactorily and reliably under all conditions;
- 10.6** the Goods are free of all liens and encumbrances and the Supplier has good title to them;
- 10.7** the supply of the Goods and/or Services by the Supplier to Metro and the use of such Goods and/or Services by Metro in accordance with this Contract does not infringe the Intellectual Property Rights of any third party;
- 10.8** the Supplier must strictly comply with all applicable laws and all notices, directions and requirements of Metro from time to time; and
- 10.9** the Services will be performed with due skill, care and diligence having regard to the nature of the Services.

11. DEFECTS LIABILITY

- 11.1** If, during the period beginning on delivery of the Goods and/or completion of the Services and ending on the date which is 18 months after the date on which the Goods and/or Services are put into commercial use (or such other period as is stated in the Purchase Order) (the **Defects Liability Period**) any defect or other failure occurs in the Goods and/or Services arising in whole or in part from faulty design, materials or workmanship, or any other omissions, defects or failures which render them unsuitable for Metro's requirements, the Supplier must, at the option of Metro:

- 11.1.1** refund the Price;
- 11.1.2** repair, modify or replace, at the Supplier's expense, the affected Goods; or
- 11.1.3** supply again the affected Services,

and the Supplier will be liable for all resulting costs and expenses incurred by Metro, including, where appropriate, those costs and expenses incurred by Metro in returning any goods to the Supplier, or re- installing or recommissioning any goods.

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- 11.2 Metro may, at its option, have the repair, modification or replacement of the Goods or resupply of the Services referred to in clause 11.1 undertaken by a third party or undertake the repair, modification, replacement or resupply itself, and all resulting costs and expenses will be a debt due and payable by the Supplier to Metro.
- 11.3 The Supplier remains responsible for supplying Goods and Services which comply with the warranties, notwithstanding that:
 - 11.3.1 Metro has accepted the Goods; or
 - 11.3.2 Metro has reviewed design drawings, specifications, construction drawings or workshop drawings or any other documents prepared by or on behalf of the Supplier; given any approval, direction, or instruction to the Supplier; or provided any information to the Supplier.

12. MATERIALS

- 12.1 Where specified in the Contract or otherwise agreed in writing, Metro may provide to the Supplier materials to assist or enable the Supplier to produce the Goods and/or supply the Services (**Metro Materials**).
- 12.2 Metro will retain ownership of Metro Materials and any Intellectual Property Rights subsisting in the Metro Materials.
- 12.3 The Supplier must return all Metro Materials to Metro within 7 days after delivery of the Goods and/or completion of supply of the Services or otherwise on request from Metro.
- 12.4 The Supplier must not use Metro Materials for any purpose except the delivery of the Goods and/or supply of the Services to Metro.
- 12.5 Except where agreed otherwise in writing as part of the Contract:
 - 12.5.1 any Materials that are acquired or developed by the Supplier solely for the purpose of fulfilling its obligations under the Contract or otherwise at the expense of Metro (**Contract Materials**) will be the property of Metro and must be delivered to Metro on request; and
 - 12.5.2 the Supplier assigns to Metro all of its rights to and interest in the Contract Materials, including its rights, title and interest in any Intellectual Property Rights subsisting in the Contract Materials.

13. CONFIDENTIALITY

The Supplier shall keep confidential the terms of the Contract, the Metro Materials and the Contract Materials (as defined in clause 12), and any other information relating to the business or operations of Metro, and must only disclose them as required by law and to those of its officers, employees, contractors, agents or advisers as may be necessary to enable the Supplier to perform the Contract (provided that those employees, contractors, agents or advisers undertake to keep them confidential).

14. AUDIT

The Supplier must provide to Metro, within 24 hours of Metro's request:

- 14.1 all records, documents and other information which may be requested by Metro to undertake audits of the Supplier's compliance with the Contract (including to verify details, including but not limited to the amount, of any invoice issued by the Supplier under the Contract);
- 14.2 access to documents and premises under the Supplier's control for the purpose of undertaking audits of the Supplier's compliance with the Contract (including to verify details, including but not limited to the amount, of any invoice issued by the Supplier under the Contract); and
- 14.3 signed statutory declarations by the Supplier certifying that all monies owed to its employees and subcontractors in connection with the Contract have been paid in full.

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15. BREACH AND TERMINATION

- 15.1** Without limiting any of Metro's other rights, Metro may terminate the Contract by written notice to the Supplier with immediate effect:
- 15.1.1** for Metro's convenience and in Metro's absolute and sole discretion by giving 20 days notice in writing to the Supplier;
 - 15.1.2** if the Supplier is in breach of a term of the Contract and fails to remedy the breach within 14 days of the receipt by the Supplier of a notice in writing from Metro specifying the breach and requiring the Supplier to remedy the breach;
 - 15.1.3** if Metro is of the reasonable opinion that the Supplier is unable or unwilling to comply with its obligations (including the Supplier's obligations regarding the time for delivery or supply) under the Contract with due diligence or in a competent manner;
 - 15.1.4** if the Supplier becomes bankrupt or makes an assignment of its estate for the benefit of its creditors or makes a composition or other arrangement with its creditors; or
 - 15.1.5** if a receiver, liquidator, provisional liquidator or administrator is appointed over any of the Supplier's assets or undertakings or the Supplier enters into any arrangement with any creditors or any class of creditors or the Supplier otherwise becomes unable to pay its debts as and when they fall due.
- 15.2** Termination of the Contract pursuant to this clause 15 will be without prejudice to the rights of either party accruing prior to termination.
- 15.3** If the Supplier breaches a term of the Contract and Metro does not terminate the Contract pursuant to this clause 15, Metro will not be bound to perform its obligations under the Contract until the breach is remedied by the Supplier.

16. TERMINATION OF THE FRANCHISE AGREEMENT

- 16.1** If the Franchise Agreement expires or is terminated for any reason then, subject to clause 16.2, Metro may terminate the Contract by giving written notice to the Supplier.
- 16.2** If Metro becomes aware that the Franchise Agreement may expire or terminate during the term of the Contract, Metro will use its reasonable endeavours to procure that PTV (or PTV's nominee) enters into an assignment or novation of the Contract with effect from termination of the Franchise Agreement. If Metro procures the assignment of the Contract to PTV (or PTV's nominee) or execution of a deed of novation by PTV (or PTV's nominee) and the Supplier then Metro will not terminate the Contract.

17. LIABILITY ON TERMINATION

- 17.1** If the Contract is terminated by reason of clause 15.1.1, Metro will only be liable for payment for the Goods supplied and/or Services properly carried out to the date of termination and for extra costs necessarily and reasonably incurred by the Supplier as a result of termination subject to Metro's rights of set off (without any profit or mark-up on such costs).
- 17.2** If the Contract is terminated by reason of clause 15.1 (other than clause 15.1.1) or where Metro is unable to procure an assignment or novation pursuant to clause 16.2, Metro will not be liable to pay the Supplier any compensation, damages, losses or any other amount whatsoever in respect of such termination.

18. LIMITATION OF LIABILITY

- 18.1** Subject to clause 18.3 of the Contract, the Supplier's total aggregate liability howsoever arising under or in connection with the Contract will not exceed the amount of:
- 18.1.1** 5 times the Price; or
 - 18.1.2** such other limitation amount as may be specified in the Purchase Order,

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provided that such limitation will not apply to any liability if and to the extent that all or part of the amount of such liability is recoverable by the Supplier under a policy of insurance maintained by the Supplier (or which it should have maintained) in accordance with the minimum requirements of the Contract. The Supplier's liability to indemnify Metro under this clause 18.1 is reduced proportionally to the extent that a negligent or unlawful act or omission of Metro contributed to the liability.

- 18.2** The limitation of the Supplier's liability in clause 18.1 applies regardless of whether such liability arises in contract, tort (including negligence), breach of statutory duty or otherwise at law.
- 18.3** Nothing in this clause 18 is intended to exclude or limit the Supplier's liability in any manner or to any extent prohibited by law or for any liability in respect of:
- 18.3.1** death or injury of any person;
 - 18.3.2** damage to property of any person;
 - 18.3.3** any claim made against Metro that goods or services supplied under the Contract infringe the intellectual property or other similar rights of a third party; or
 - 18.3.4** any breach of an obligation of confidentiality under the Contract.
- 18.4** Neither party is liable to the other for any indirect or consequential losses, being those losses falling within the second limb in the decision of Hadley v Baxendale, save that for the purposes of this clause it is agreed that the following losses are not included in the term "indirect or consequential loss":
- 18.4.1** amounts payable by Metro to PTV under the Operational Performance Regime contained in the Franchise Agreement. For the avoidance of doubt, the Supplier's liability for such amounts is subject to clause 18.1; or
 - 18.4.2** damage or losses arising from third party claims in respect of property damage, personal injury, nervous shock or death, or infringement of intellectual property rights or other similar rights.

19. ASSIGNMENT OR NOVATION

- 19.1** The Supplier must not assign, sub-license, sub-contract or transfer in whole or in part any of its interest or obligations under the Contract without Metro's prior written consent, which consent may be granted, withheld or granted subject to conditions in Metro's absolute discretion.
- 19.2** Metro may assign or novate all or any of its rights and obligations under the Contract to PTV or to any third party nominated by PTV (**PTV Nominee**) but only if Metro determines (acting reasonably) that the PTV Nominee is capable of performing the obligations of Metro under the Contract. The Supplier further acknowledges that, in the event of such assignment or novation, PTV or PTV Nominee, as applicable, will obtain the benefit and the burden (as the case may be) of the Contract. Without limiting the foregoing, immediately, upon demand from Metro, the Supplier must execute an assignment or novation deed (in a form submitted to the Supplier by Metro) to confirm that Metro's assignee or novatee is a party to the Contract in place of Metro.

20. STATUTORY COMPLIANCE

- 20.1** The Supplier must in all matters arising in the performance of the Contract comply with all applicable laws, regulations, by-laws and codes of practice (including in relation to rail safety, occupational health and safety, product safety and product labelling).
- 20.2** The Supplier indemnifies Metro against any loss suffered by Metro as a result of the Supplier's failure to comply with clause 19.1 (Assignment), clause 20 (Statutory Compliance), and clause 21 (Commonwealth Building Code).

21. BUILDING CODE 2013

- 21.1** This clause 21 applies where the Contract relates to any construction activities undertaken

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by the Supplier for Metro to which the *Building Code 2013 (Cth)* applies.

21.2 In this clause 21:

21.2.1 'Code' means the Building Code 2013 (Cth); and

21.2.2 'Guidelines' means the Building Code 2013 – Supporting Guidelines for Commonwealth Funding Entities.

21.3 All expressions used in this clause 21 which are defined in the Code or the Guidelines have the meanings given to them in the Code or the Guidelines.

21.4 The Supplier must comply with the Code and the Guidelines. Copies of the Code and the Guidelines are available at <http://www.comlaw.gov.au>. Compliance with the Code and the Guidelines does not relieve the Supplier from responsibility to perform the Contract, or from liability for any defect arising from compliance with the Code or the Guidelines.

21.5 Where a change in the Contract is proposed and that change would affect compliance with the Code or the Guidelines, the Supplier must submit a report to Metro specifying the extent to which the Supplier's compliance with the Code or the Guidelines will be affected.

21.6 The Supplier must maintain adequate records of compliance with the Code and the Guidelines by:

21.6.1 the Supplier;

21.6.2 its subcontractors and consultants; and

21.6.3 any Related Entity (as defined in the Corporations Act 2001 (Cth)) of the Supplier.

21.7 If the Supplier does not comply with the requirements of the Code or Guidelines in the performance of the Contract such that a sanction is applied by the Minister for Employment and Workplace Relations, the Code Monitoring Group or the Commonwealth, without prejudice to any rights that would otherwise accrue, those parties will be entitled to record that non-compliance and take it, or require it to be taken, into account in the evaluation of any future tenders that may be lodged by the Supplier or a Related Entity of the Supplier in respect of work funded by the Commonwealth or its agencies.

21.8 The Supplier must not appoint a subcontractor or consultant in relation to the works where:

21.8.1 the appointment would breach a sanction imposed by the Minister for Employment and Workplace Relations; or

21.8.2 the subcontractor or consultant has had a judicial decision against them relating to employee entitlements, not including decisions under appeal, and has not paid the claim.

21.9 The Supplier agrees that it, its subcontractors and consultants and its Related Entities will provide the Commonwealth or any person authorised by the Commonwealth, including a person occupying a position in the Office of the Australian Building and Construction Commissioner, with access to:

21.9.1 inspect any work, material, machinery, appliance, article or facility;

21.9.2 inspect and copy any record relevant to the Works; and

21.9.3 interview any person,

as is necessary to demonstrate its compliance with the Code and Guidelines.

21.10 The Supplier agrees that the Supplier and its Related Entities will agree to a request from the Commonwealth or any person authorised by the Commonwealth, including a person occupying a position in the Office of the Australian Building and Construction Commissioner, to produce a specified document within a specified period, in person, by fax or by post.

21.11 The Supplier must ensure that all subcontracts impose obligations on the subcontractors and consultants equivalent to the obligations under this clause.

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22. VICTORIAN INDUSTRY PARTICIPATION POLICY

- 22.1 In this clause 22, VIPP means the Victorian Industry Participation Policy, including any policy or requirement, including any Local Industry Development Plan, developed pursuant to the *Victorian Industry Participation Policy Act 2003 (Vic)*.
- 22.2 The Supplier must, if requested by Metro, complete and submit to Metro a Victorian Industry Participation Policy Plan (**VIPP Plan**) and must comply with any VIPP Plan submitted as part of the Supplier's tender or otherwise provided by the Supplier to Metro.
- 22.3 The Supplier acknowledges and agrees that information contained in the VIPP Plan and the measures of the Supplier's compliance with the VIPP Plan may be provided to the Department of Economic Development, Jobs, Transport and Resources (for the purposes of this Clause 22 the "Department") and to the Industry Capability Network Victoria (ICN) to be included in a register of VIPP performance.
- 22.4 Metro will monitor the Supplier's performance in accordance with any monitoring provisions in the VIPP Plan and measure the Supplier against the VIPP outcomes set out in VIPP Plan.
- 22.5 The Supplier must allow an auditor or other nominated representative of Metro (including from the Department) to have access to and to obtain information from the Supplier's records and officers, employees, consultants and advisers for this purpose.
- 22.6 The Supplier authorises Metro or its nominated representative to obtain information from the persons, firms or corporations nominated in the VIPP Plan as to compliance with the VIPP Plan.
- 22.7 Metro will exercise its reasonable discretion in assessing the Supplier's performance under this clause and may take into account any issue raised by the Supplier which fairly represents a cause of failure to comply beyond the Supplier's reasonable control.
- 22.8 The Supplier acknowledges and agrees that it must liaise with the Department and ICN in relation to the VIPP Plan.
- 22.9 This Clause shall survive termination of this Contract.

23. DISPUTE RESOLUTION

- 23.1 If any party considers that a dispute has arisen in relation to the Contract (**Dispute**) it may give written notice to the other party setting out the reasonable details of the Dispute (**Dispute Notice**).
- 23.2 Within 14 days after service of a Dispute Notice, the parties must confer and attempt to resolve the Dispute and failing resolution of the Dispute explore and if possible agree on methods of resolving the Dispute by other means. At any such conference each party must be represented by a person having authority to agree to a resolution of the Dispute.
- 23.3 If such representatives do not resolve the Dispute in accordance with the above paragraph, then the Dispute must be referred to the appropriate senior executives of each party who will endeavour to resolve the Dispute and failing resolution of the Dispute explore and if possible agree on methods of resolving the Dispute by other means within a further 14 days.
- 23.4 In the event that the Dispute cannot be so resolved or methods of resolution agreed on, or if at any time either party considers that the other party is not making reasonable efforts to resolve the Dispute, either party may commence court proceedings.
- 23.5 No party may commence or maintain any action or proceeding in any court, tribunal or otherwise regarding a Dispute without first complying with this clause 23. This clause 23 does not affect the right of any party to at any time commence proceedings where the party is seeking urgent interlocutory or declaratory relief or to take any action open to it in relation to a dispute which is not a Dispute.

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- 24.1** If any provision or part of any provision of the Contract is unenforceable, such unenforceability will not affect any other part of such provision or any other provision of the Contract.
- 24.2** Any waiver by Metro of compliance with any provision of the Contract will not be effective unless in writing and signed by an authorised officer of Metro.
- 24.3** The Contract will be governed by the law of Victoria and the parties agree to submit to the jurisdiction of the courts of Victoria and any courts having appellate jurisdiction from them.
- 24.4** No provision of these Conditions will be construed adversely against one party solely on the basis that that party was responsible for the drafting of that provision.
- 24.5** The rights of Metro under these Conditions are in addition to any other rights Metro may have under legislation or at common law.
- 24.6** A reference to 'includes' or 'including' should be construed without limitation.

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PART B – SPECIAL CONDITIONS - Level Crossing Removal Project: Mountain Highway, Bayswater and Scoresby Road, Bayswater

SC1. DEFINITIONS AND INTERPRETATION

SC1.1 Definitions

In these Part B - Special Conditions, unless otherwise defined, capitalised terms defined in the Part A - General Conditions have the same meaning in these Special Conditions and:

Aboriginal Heritage means a place, object, remain or any other thing that is of significance to Aboriginal persons in accordance with their practices, observances, customs, traditions, beliefs or history and includes any place or object or thing that is subject to protection under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) or the *Aboriginal Heritage Act 2006* (Vic).

Acts of Parliament means all Acts of the Parliament of the Commonwealth, and of the State of Victoria and includes any ordinance, rule, regulation, by-law, local law, order, code of practice, guideline, instruction and proclamation made or issued under any such Act now in existence or which comes into existence during the term of this Contract.

Alliance means the Mountain Highway, Bayswater and Scoresby Road, Bayswater Level Crossing Removal Project Alliance which the Participants have entered to perform the Alliance Works.

Alliance Manager means the person so notified to the Supplier by the Purchaser from time to time (and if no person is so notified, means the Purchaser).

Alliance Works means the works and services to be performed and delivered by the Participants from time to time under the PAA.

Associate means in relation to a Person, any Related Entity of that Person or any officer, employee, agent, contractor, consultant, nominee, secondee, licensee or advisor of that Person or that Related Entity.

Authorisation means any consent, registration, filing, agreement, notarisation, certificate, licence, approval, permit, authority or exemption from, by or with a Government Agency or a third party.

Authority means any Commonwealth, State or municipal statutory or government body or organisation or any non-government body or organisation (and their respective departments, agencies, authorities or officers or representatives) that supply utilities or services to, or which have authority or jurisdiction over:

- (1) all or part of the Alliance Works;
- (2) a Participant;
- (3) the Supplier;
- (4) the Site; or
- (5) any land external to the Site on which the Alliance Works may be carried out.

Code Monitoring Group has the meaning given in the National Guidelines.

Construction Plant means apparatus, facilities, plant, equipment, materials, products, processes, temporary works, machinery and other things used in performing the Subcontract Works but not forming part of the completed Subcontract Works.

Environment has the same meaning as in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

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Franchise Business in relation to MTM, has the meaning in the MTM Franchise Agreement.

Government Agency means any government, parliament or governmental, semi-governmental, administrative, monetary, fiscal or judicial body, department, commission, authority, tribunal, government minister, agency or entity.

Intellectual Property means all intellectual property rights existing worldwide and the subject matter of those rights including any patent, design (whether registered or not), copyright, trade mark, protected circuit layout (or similar right), trade secret or other right whether existing under a Statutory Requirement, at common law or in equity.

Local Industry Development Plan or LID Plan means the local industry development plan for the purposes of the VIPP.

Materials means materials, plant, machinery, equipment and products for incorporation into the Subcontract Works and Alliance Works.

MTM Franchise Agreement means the Franchise Agreement -Train between PTV and MTM for the provision of metropolitan passenger rail services and maintenance services.

MTM Infrastructure Lease means the Infrastructure Lease - Train between PTV, VicTrack and MTM which governs the operation, maintenance and future development of the metropolitan Rail Infrastructure.

National Code means the Building Code 2013, issued pursuant to the *Fair Work (Building Industry) Act 2012* (Cth).

National Guidelines means the document entitled 'Building Code 2013 – Supporting Guidelines for Commonwealth Funding Entities' issued by the Commonwealth Department of Employment.

Native Title Laws means the *Native Title Act 1993* (Cth), the *Land Titles Validation Act 1994* (Vic) and the *Aboriginal & Torres Strait Islander Heritage Protection Act 1984* (Cth) and any secondary legislation under those Acts.

PAA means the Project Alliance Agreement between the Roads Corporation (VicRoads), the Public Transport Development Authority (ABN 37 509 050 593), Metro Trains Melbourne Pty Ltd (ACN 136 429 948) (MTM), Laing O'Rourke Australia Construction Pty Limited (ACN 112 099 000) (Laing O'Rourke), Fulton Hogan Construction Pty Limited (ACN 010 240 758) (Fulton Hogan), Aecom Australia Pty Ltd (ACN 093 846 925) (Aecom), dated 21 January 2016.

Participants means the participants in the Alliance relating to the Project, as notified to the Supplier from time to time.

Person includes an individual, a body corporate, company, firm, joint venture, partnership, trust, association or unincorporated body.

Personal Information means information or an opinion (including information or an opinion forming part of a database) that is recorded in any form and whether true or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

Privacy Laws means the *Privacy Act 1988* (Cth), the *Privacy and Data Protection Act 2014* (Vic) and any other legislation, principles, industry codes and policies relating to the collection, use, disclosure, storage or granting of access rights to Personal Information.

Project means the level crossing removals at:

- (1) Mountain Highway, Bayswater; and
- (2) Scoresby Road, Bayswater,

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being carried out under the PAA.

Project Owner means VicRoads, being the client for the performance of the Alliance Works.

PTV means the Public Transport Development Authority (ABN 37 509 050 593), a body corporate established under the *Transport Integration Act 2010* (Vic) trading as Public Transport Victoria of 750 Collins Street, Docklands VIC 3008.

Purchaser means Metro Trains Melbourne Pty Ltd (or **MTM**).

Rail Infrastructure means the infrastructure required to maintain and operate the Melbourne metropolitan rail network.

Rail Operations means the:

- (1) provision, maintenance, movement, shunting, storage, fuelling, loading and unloading of rolling stock for rail services;
- (2) provision of Rail Infrastructure to enable rail services;
- (3) maintenance, storage, building, rebuilding, servicing, replacing and repairing of Rail Infrastructure and rolling stock; and
- (4) conduct of the business of providing rail services.

Rail Safety National Law has the meaning given in the *Rail Safety National Law Application Act 2013* (Vic).

Related Body Corporate has the meaning given to that term in the *Corporations Act 2001* (Cth).

Related Entity means a related entity of a Participant as that term is defined under section 9 of the *Corporations Act 2001* (Cth) and includes a subsidiary and a related party as those terms are defined in the *Corporations Act 2001* (Cth).

Related Works means any works or services performed or undertaken or to be performed or undertaken by:

- (1) the Project Owner or PTV;
- (2) MTM;
- (3) contractors, consultants or suppliers (other than a Participant) to the Project Owner, PTV or MTM;
- (4) a public or private utility or statutory or other relevant Authority including any utility companies or Authority engaged by the Alliance as part of the Alliance Works; or
- (5) persons arising out of or in connection with Rail Operations,

either concurrently or sequentially with the Alliance Works:

- (1) at, on, over, under, in or adjacent to the Site; or
- (2) which may be connected to, associated with, ancillary to or otherwise related or relevant to the Alliance Works,

and may include:

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- (1) sidings works adjacent to the Alliance Works;
- (2) procurement of long lead time items (such as signalling conduits); and
- (3) relocation of utility services including rail related utility services.

Safety Legislation means:

- (1) any legislation applicable to health and safety, environment protection, electrical safety and dangerous goods, including the *Occupational Health and Safety Act 2004* (Vic), the *Occupational Health and Safety Regulations 2007* (Vic) and the Rail Safety National Law; and
- (2) any directions on safety or notices issued by any relevant authority or any code of practice or compliance code appropriate or relevant to the performance of the Subcontract Works,

as amended from time to time.

Site means any land, or any part of land, where the Alliance Works are to be performed.

Standards means the various standards with which the Subcontract Works must comply as specified in this Contract, including:

- (1) the Purchaser's (and/or the Project Owner's) standards; and
- (2) standards in respect of Rail Infrastructure (including the VRIOGS and the MTM standards listed in L1-CHE- GDL-005, MTM Chief Engineer Guideline Engineering Standards listing, Version 4, dated 9 April 2015).

State means the State of Victoria.

Stated Purpose means the intended purpose of the Subcontract Works and the Alliance Works:

- (1) stated by the Purchaser and the Project Owner (including performance, design and functional requirements) or those purposes necessarily inferred from the contents of this Contract; and
- (2) includes any purpose which, having regard to the nature of the Subcontract Works and the Alliance Works and what is stated in this Contract, could be reasonably inferred by a person experienced and competent in the performance of or implementation of works or rail infrastructure similar to the Subcontract Works and the Alliance Works.

Statutory Requirements means

- (1) Acts of Parliament;
- (2) Authorisations;
- (3) directions given under a statute that affect the performance of the Alliance Works; and
- (4) all other laws, regulations, conventions, orders, directions, codes, guidelines and policies given by or on behalf of any Government Agency which may apply to the Alliance Works and Subcontract Works including the National Code and National Guidelines.

Subcontract Works means the Goods and/or Services and/or works to be supplied by the Supplier under this Contract, forming part of the Alliance Works. For the avoidance of doubt, the **Supplier** includes that person's employees, agents and consultants.

VicTrack means Victorian Rail Track, a body corporate established under the *Transport Integration Act 2010* (Vic).

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VIPP means the Victorian Industry Participation Policy established under section 4 of the *Victorian Industry Participation Policy Act 2003* (Vic).

SC2. GENERAL

- (a) The Supplier acknowledges and accepts that the Purchaser is contracting in both its own right as principal and:
- (i) as agent for and on behalf of the Participants; and
 - (ii) where the Subcontract Works relates to Rail Infrastructure, as agent for VicTrack,
- such that all rights, obligations and indemnities of the Purchaser under this Contract are able to be exercised by the other Participants and, where the work relates to Rail Infrastructure, VicTrack.
- (b) The Supplier must ensure that all persons employed in connection with the performance of the Subcontract Works:
- (i) are skilled, qualified and experienced in their respective trades and professions and suitably qualified and experienced in the type and nature of work they are undertaking to perform the Subcontract Works;
 - (ii) are registered and licensed as necessary under any Statutory Requirements for the purposes of, or incidental to, the performance of the Subcontract Works;
 - (iii) are competent to carry out the work for which they are engaged for the purposes of the Safety Legislation;
 - (iv) have been inducted in accordance with the Alliance (or Purchaser's) induction program; and
 - (v) comply with this Contract.
- (c) The Supplier acknowledges and accepts that the Purchaser (or the Alliance Manager) may immediately require that any person engaged by the Supplier be removed from the Site and/or the Subcontract Works for any reason.
- (d) The Supplier has reviewed and has allowed for all things necessary to comply with relevant requirements of certain management plans as may be notified by the Purchaser to the Supplier such as:
- (i) asbestos management plan;
 - (ii) construction management plan;
 - (iii) design and engineering management plan;
 - (iv) document control and documentation management plan;
 - (v) emergency response and incident management plan;
 - (vi) environmental management plan;
 - (vii) health and safety management plan;
 - (viii) IT management plan;

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- (ix) mobilisation and interface plan;
- (x) quality management plan;
- (xi) rail access management plan;
- (xii) risk management plan;
- (xiii) services management plan;
- (xiv) site safety strategy and site safety management plan;
- (xv) testing and commissioning management plan;
- (xvi) traffic management plan; and
- (xvii) workplace relations management plan.

SC3. WARRANTIES AND STANDARD OF WORK

- (a) The Supplier warrants and ensures for the benefit of both the Purchaser and VicRoads that:
 - (i) all Materials are new and of merchantable quality, of correct design and workmanship as specified in this Contract, or if not so specified, suitable for the Stated Purpose;
 - (ii) suitable guarantees and warranties are provided in the name of MTM, PTV or VicTrack as the case may be, to the satisfaction of the Purchaser;
 - (iii) unencumbered title in the Materials will pass to the Purchaser, or the Purchaser as agent for VicTrack or for the relevant road authority as the case may be, upon payment (or part thereof) for the Materials to the Supplier or delivery to the Purchaser whichever occurs earlier;
 - (iv) it maintains an up to date register of all assets including a register of all express and implied warranties pertaining to those Materials provided by its suppliers, or prescribed by a Statutory Requirement.
- (b) The Supplier must:
 - (i) in performing the Subcontract Works exercise the degree of skill, care, expertise, diligence and foresight which would from time to time be expected of skilled and experienced professional persons engaged in undertakings of a similar type as the Subcontract Works;
 - (ii) construct the Subcontract Works to meet the requirements set out in:
 - a. the Standards; and
 - b. this Contract;
 - (iii) perform the Subcontract Works such that rectification work necessary to make good any defects in the Subcontract Works arising before and during the defects correction period are promptly rectified to the satisfaction of the Purchaser before the end of the defects correction period; and
 - (iv) exercise the degree of skill, care, expertise, diligence and foresight which would from time to time be expected of skilled and experienced professional persons engaged in undertakings of a similar type as the Subcontract Works in the management and execution of all design work, design development, design review, documentation,

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superintendence, administration, manufacture, fabrication, supply, installation, erection, construction and testing of the Subcontract Works so as to ensure that the Subcontract Works are fit for the Stated Purpose, and of the quality and standard of work that is stated in the Standards and this Contract.

SC4. AUDIT

- (a) The Supplier acknowledges and agrees that the Purchaser, the Participants, the Project Owner, the State, the Victorian Auditor-General, or any person appointed by any one of them, may at any time inspect, audit or investigate any existing records, documentation or information prepared or maintained in any form by the Supplier that relate to the Subcontract Works.
- (b) The obligation to make records, documentation or information available does not apply to records or documentation that may be the subject of legal professional privilege or are confidential lawyer/client communications.

SC5. INDUSTRIAL RELATIONS

- (a) The Supplier acknowledges and agrees that it is, and will ensure that any subcontractors engaged in respect of the performance of the Subcontract Works under this Contract are, accredited under the Australian Government Building and Construction OHS Accreditation Scheme established by section 35 of the *Fair Work (Building Industry) Act 2012* (Cth), at all times that the Supplier or its subcontractors (as applicable) are performing the Subcontract Works under this Contract.
- (b) In performing the Subcontract Works, the Supplier must implement and comply with any 'Workplace Relations Management Plan' as notified by the Purchaser to the Supplier, which must comply with relevant Statutory Requirements, codes of practice and guidelines (including the National Code and the National Guidelines), and upon request, provide the Purchaser with evidence of such compliance.
- (c) The Supplier must cooperate with parties carrying out any Related Works, stakeholders or other persons on the Site in order to maintain a stable industrial relations environment.

SC6. STAKEHOLDER AND COMMUNITY RELATIONS

- (a) The Supplier must:
 - (i) be committed to developing sensitive and responsive stakeholder consultation and communication practices to any local and broader community issue which relates to the performance of the Subcontract Works; and
 - (ii) promptly follow any direction from the Purchaser in respect of that issue.
- (b) The Supplier must take all steps necessary to meet the Purchaser's obligations and commitments to the local community and stakeholders as they relate to the performance of the Subcontract Works.

SC7. OCCUPATIONAL HEALTH AND SAFETY

- (a) The Supplier and any person engaged in carrying out any part of the Subcontract Works for whom the Supplier is responsible for, or over whom the Supplier is capable of exercising control, must:
 - (i) comply with and implement:
 - a. the safety requirements, Site procedures, security requirements and health, safety and Environment conditions as notified by the Purchaser (including any

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- applicable requirements under the 'Health and Safety Management Plan' established under the PAA);
 - b. the State's occupational health, safety and rehabilitation management systems and guidelines; and
 - c. their respective obligations under any relevant occupational health and safety, and environmental laws; and
- (ii) attend any Project safety forums that are coordinated by VicRoads and held regularly throughout the performance of the Subcontract Works.

SC8. PROTECTION OF ABORIGINAL HERITAGE AND ABORIGINAL RIGHTS

- (a) The Supplier is committed to the protection of Aboriginal Heritage and Aboriginal rights and must ensure that the Supplier, its employees, agents, subcontractors, consultants and suppliers comply with:
- (i) all applicable Statutory Requirements relating to Aboriginal Heritage and Native Title Laws;
 - (ii) any agreements or arrangements between the Purchaser or the Project Owner and Aboriginal people in relation to Aboriginal Heritage;
 - (iii) the Purchaser or the Project Owner's instructions reasonably required to enable the Purchaser or the Project Owner to comply with any Statutory Requirements, agreements, arrangements or requirements of any other Authorisation relating to Aboriginal Heritage and Native Title Laws; and
 - (iv) the cultural heritage management plan as notified by the Purchaser to the Supplier in performing the Subcontract Works, and upon request, provide the Purchaser with evidence of such compliance.
- (b) In the performance of the Subcontract Works the Supplier will ensure that:
- (i) those for whom it is responsible for not enter indigenous and cultural heritage sites or disturb, interfere with or remove anything from such sites or their vicinity except in accordance with the cultural heritage management plan as notified by the Purchaser to the Supplier, or with the prior written approval of the Project Owner; and
 - (ii) if any indigenous or cultural heritage site is identified on the Site, the Supplier will immediately cease all activities which could impact on such site.
- (c) The Supplier must immediately inform the Purchaser of any claim received under the *Native Title Act 1993* (Cth) in connection with the Subcontract Works and then promptly follow any directions from the Purchaser.

SC9. SECURITY OF PAYMENT

The Supplier agrees to immediately provide the Purchaser with a copy of any notice that the Supplier receives from any other person under any section of the *Building and Construction Industry Security of Payment Act 2002* (Vic) in relation to the Subcontract Works.

SC10. CONFIDENTIALITY

SC10.1 Confidentiality

- (a) Subject to clause SC10.1(b), the Supplier agrees that this Contract, and any information relating to or arising from the Contract, is confidential, and that the Supplier will not disclose the

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Contract, or any information relating to or arising from the Contract, to any person, unless that disclosure or that information:

- (i) is at the material time in the public domain;
 - (ii) is required by any Statutory Requirement to be communicated to a person who is authorised by any Statutory Requirement to receive it;
 - (iii) is necessarily made to a court, or to an arbitrator or administrative tribunal or to legal counsel in the course of proceedings provided that, in the case of any arbitration proceedings, the Supplier concerned first obtains from each other party to those proceedings an undertaking, enforceable by any party, that each party must similarly not divulge or communicate, without the Purchaser's written consent, any information referred to in this clause;
 - (iv) is required to be disclosed to any Government Minister, Parliament or Government Agency whether in connection with the granting of any licence or otherwise (including VicTrack in its role as custodian of strategic rail assets);
 - (v) is to a servant, employee, agent or contractor of the parties, when that disclosure is reasonably necessary for the conduct of this Contract;
 - (vi) is to a Related Body Corporate of the parties;
 - (vii) the Purchaser releases, or release in order to comply with a decision or request by the Freedom of Information Commissioner or a decision or order of the Victorian Civil and Administrative Tribunal under the *Freedom of Information Act 1982* (Vic);
 - (viii) the Purchaser releases information to the IBAC Commissioner or the Victorian Inspector;
 - (ix) is to any successor operator, or potential successor operator as determined or nominated by PTV, of metropolitan rail services, or any bidder participating in a tender process for the engagement of an operator of metropolitan rail services;
 - (x) is necessary to comply with any approved policy guidelines of the State (including the VIPP);
 - (xi) was consented to in writing by each of the parties; or
 - (xii) is required to be disclosed to the Australian Stock Exchange Limited (ABN 98 008 624 691).
- (b) The Purchaser may determine to publish or disclose (on the internet or otherwise):
- (i) a brief description of the Subcontract Works;
 - (ii) the names of the parties;
 - (iii) the terms of the Contract;
 - (iv) any documentation arising out of or in connection with the Contract; and
 - (v) any other information that the Purchaser determines to publish or disclose,

except to the extent that the Purchaser determines, after consultation with the Supplier, any such documentation is commercial-in-confidence or financially sensitive.

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- (c) A failure by the Supplier to comply with the requirements of this clause confers on the Purchaser an enforceable right at law or in equity to seek any one of or a combination of specific performance, injunction or damages and, to the extent that any right under a Statutory Requirement may be excluded by this Contract, under that Statutory Requirement.

SC11. INTELLECTUAL PROPERTY

SC11.1 Licence of Intellectual Property Rights

- (a) To the extent that any Intellectual Property Rights of the Supplier in relation to any:
- (i) materials which existed as at the date this Contract was executed (“**Pre-existing Intellectual Property Materials**”); or
 - (ii) enhancements of those Pre-existing Intellectual Property Materials; or
 - (iii) Contract Materials or other idea, policy, procedure, method, process, materials or other tangible or intangible thing first discovered or developed during the course of performing the Subcontract Works,

(together, “**Intellectual Property Assets**”)

are not vested in, assigned to or otherwise become the property of the Purchaser under this Contract, the Supplier hereby grants to the Purchaser and each other Participant an irrevocable, non-exclusive, world-wide, perpetual, transferable, sub-licensable, royalty free licence to use those Intellectual Property Assets for:

- (iv) the performance of the Alliance Works or the Subcontract Works and for any operation, maintenance, upgrade, augmentation, selling or decommissioning of the Project;
 - (v) the purposes of Rail Operations and the operation of the Franchise Business; and
 - (vi) the purposes of road operations as that term is defined in the *Road Management Act 2004* (Vic).
- (b) The Supplier warrants to the Purchaser and each other Participant that:
- (i) the Supplier owns, or has a licence to use and a right to licence as required by this Contract all Intellectual Property Rights in relation to all aspects of the Subcontract Works; and
 - (ii) the Subcontract Works (and the performance of the Subcontract Works) do not infringe any other person’s Intellectual Property Rights.
- (c) The Supplier must immediately notify the Purchaser if the Supplier becomes aware of any claim that any aspect of the Subcontract Works infringes any other person’s Intellectual Property Rights.

SC11.2 Moral Rights

The Supplier must procure that each individual involved in the creation of any work or subject matter delivered by the Supplier as part of the Subcontract Works (**Grantor**) provides his or her irrevocable and unconditional consent to the use, disclosure, reproduction or publication of such work or subject matter by the Purchaser, a Participant or their representatives anywhere in the world in whatever form the Purchaser thinks fit and without making any identification of the Grantor in relation to that work or subject matter.

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SC12. INFORMATION PRIVACY

The Supplier must, in performing the Subcontract Works:

- (i) comply with all Privacy Laws in relation to Personal Information, whether or not the Supplier is an organisation bound by the *Privacy Act 1988* (Cth); and
- (ii) immediately notify the Purchaser if it becomes aware of a breach of clause SC12 by any personnel or subcontractors engaged by the Supplier.

SC13. INSURANCE

(a) The Supplier must:

- (i) insure its liability, as required under any Statutory Requirement, to its employees engaged in doing anything for the purpose of exercising or performing the Supplier's rights or obligations under this Contract; and
- (ii) ensure that each subcontractor engaged by the Supplier insures its liability as required under any Statutory Requirement to its employees engaged in doing anything for the purpose of executing the Subcontract Works.

(b) The Supplier must insure Construction Plant, equipment, tools, facilities, hutments, services, construction aids and the like, belonging to it or under its physical or legal care, custody or control and including its employees' effects whilst on a Site or being mobilised to the Site or being demobilised from a Site, supplied, leased or hired by the Supplier for use in connection with the performance of the Subcontract Works. The insurance effected and maintained pursuant to this SC13(b) must be:

- (i) for the insured property's market value;
- (ii) extended to include the interest, if any, of the Purchaser and the Owner Participant;
- (iii) against all risks and physical loss or damage arising from any cause which:
 - a. occurs during the period commencing on the date of commencement of the Subcontract Works and ending on the date the Participants have completed demobilisation from every Site; or
 - b. becomes apparent after the Date of Practical Completion (as specified in the Certificate of Practical Completion) and before the date notified to the Supplier as the date on which Final Completion has occurred under the PAA, provided that the cause has occurred prior to or on the Date of Practical Completion,

and in either case arises out of or in the course of or by reason of the performance or purported performance of the Subcontract Works.

- (c) The Supplier must effect motor vehicle third party liability insurance against property damage and injury to and death of persons, arising from the use of motor vehicles belonging to or in the care, custody or control of the Supplier and used in connection with the Subcontract Works, for any obligation under a Statutory Requirement for insurance relating to motor vehicles.
- (d) The Supplier must effect the insurances referred to in SC13(a), (b) and (c) on or prior to commencement of the Subcontract Works and in each case the Supplier must maintain the relevant insurance for the period for which a claim could be made.
- (e) The Supplier must make available for inspection by the Purchaser and other Participants certificates of currency for insurance required by this Contract to be taken out by the Supplier and any subcontractors engaged by the Supplier.

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- (f) The Supplier must ensure that every insurance policy taken out by it and its subcontractors under this Contract includes a provision that requires the Supplier, whenever the insurer gives to or serves upon the Supplier or subcontractor a notice of cancellation or any other notice under or in relation to the policy of insurance, as soon as possible, to inform the Purchaser in writing that the notice has been given to or served upon that Supplier or subcontractor.
- (g) The Purchaser may provide, when reasonably requested by the Supplier, evidence of any insurance applicable to the Subcontract Works which is effected and maintained under the PAA.
- (h) The Supplier acknowledges that:
 - (i) it has satisfied itself as to the nature and extent of the Purchaser's insurance (including any exclusions, conditions and excesses noted on the policies);
 - (ii) may if it requires, take out insurance to insure any risks not insured by the Purchaser's insurance or to cover any exclusions, conditions or excesses in that insurance; and
 - (iii) must bear the cost of any excesses in the Purchaser's insurance;
 - a. to the extent the Supplier makes a claim against the Purchaser's insurance; or
 - b. where the Purchaser makes a claim against the Purchaser's insurance as a result of an act or omission by the Supplier or the Subcontract Works; and
 - (iv) the cost of any excess for any such claim against the Purchaser's insurance shall be a debt due from the Supplier to the Purchaser and the Purchaser may deduct such a debt from moneys otherwise due to the Supplier under this Contract.
- (i) The Supplier must:
 - (i) as soon as possible inform the Purchaser in writing of any occurrence that may give rise to a claim under either:
 - a. any insurance policy required by this Contract; or
 - b. any insurance policy which must be provided and maintained by the Purchaser under the PAA;
 - (ii) keep the Purchaser informed of subsequent developments concerning the claim; and
 - (iii) ensure that its subcontractors similarly inform the Supplier and the Purchaser in respect of occurrences which may give rise to a claim by them.

SC14. NOVATION

The Supplier acknowledges and agrees that under the PAA the Project Owner may, at any time, novate all of its rights, benefits and obligations under this Contract.

SC15. STATUTORY COMPLIANCE

- (a) The Supplier shall in all matters arising in the performance of the Contract comply with all applicable Statutory Requirements, laws, regulations, by-laws and codes of practice (including in relation to rail safety, occupational health and safety, product safety and product labelling) that affect or relate to the performance of the Subcontract Works, including obtaining and complying with all Authorisations necessary to perform each particular portion of the Subcontract Works, prior to undertaking that particular portion of the Subcontract Works.
- (b) A failure by a Supplier to comply with the requirements of clause SC15(a) confers on the Purchaser an enforceable right at law or in equity to seek any one of or a combination of

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specific performance, injunction or damages and, to the extent that any right under an Act of Parliament otherwise may be excluded by this Contract, under that Act of Parliament.

- (c) The Supplier indemnifies the Purchaser against any loss suffered by the Purchaser as a result of the Supplier's failure to comply with clauses SC15(a), SC16 (Compliance with the National Code and the National Guidelines) or SC17 (VIPP).

SC16. COMPLIANCE WITH THE NATIONAL CODE AND THE NATIONAL GUIDELINES

- (a) Where applicable, the Supplier must, and must ensure that all of its subcontractors and Related Bodies Corporate, comply with the National Code and the National Guidelines.
- (b) The Supplier acknowledges and agrees that compliance with the National Code and the National Guidelines does not relieve it from responsibility to perform its obligations under this Contract or from any liability for any defect in the Subcontract Works arising from compliance with the National Code and the National Guidelines.
- (c) Where any amendment to this Contract is proposed and that amendment would affect compliance with the National Code or the National Guidelines, the Supplier must submit a report to the Purchaser specifying the extent to which the Suppliers compliance with the National Code and the National Guidelines will be affected.
- (d) The Supplier must maintain adequate records of compliance with the National Code and the National Guidelines by:
 - (i) the Supplier;
 - (ii) the Supplier's subcontractors; and
 - (iii) its Related Bodies Corporate.
- (e) The Supplier warrants that at the time of entering into this Contract, neither it, nor any of its Related Bodies Corporate, are subject to a sanction in connection with the National Code or the National Guidelines that would have precluded it from tendering for work to which the National Code and the National Guidelines apply.
- (f) The Supplier acknowledges that if it does not comply with, or fails to meet any obligation imposed by, the National Code or National Guidelines, a sanction may be imposed against it in connection with the National Code or National Guidelines.
- (g) The Supplier must notify the Purchaser of any alleged breaches of the National Code and National Guidelines, and of voluntary remedial action taken, within 24 hours of becoming aware of the alleged breach.
- (h) If the Supplier is sanctioned for breach of the requirements of the National Code or the National Guidelines in the performance of this Contract, without prejudice to any rights that would otherwise accrue, a record of that non-compliance may be kept and taken, or required to be taken, into account in the evaluation of any future tenders that may be lodged by the Purchaser or a Related Body Corporate of the Purchaser in respect of work funded by the Government of the Commonwealth of Australia or any Government Agency.
- (i) While acknowledging that value for money is the core principle underpinning decisions on Government procurement, when assessing tenders, the Supplier may give preference to subcontractors that have demonstrated commitment to:
 - (i) adding and/or retaining trainees and apprentices;
 - (ii) increasing the participation of women in all aspects of the industry; or

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- (iii) promoting employment and training opportunities for indigenous Australians in regions where significant indigenous populations exist.
- (j) A subcontractor in relation to the Project must not be engaged where:
 - (i) the appointment would breach a sanction imposed as consequence of breach of the requirements of the National Code or the National Guidelines; or
 - (ii) the subcontractor has had a judicial decision against them relating to employee entitlements (not including decisions under appeal) and has not paid the claim.
- (k) The Supplier must and must ensure that its subcontractors and its Related Bodies Corporate, provide any person or entity authorised under or in connection with the National Code or the National Guidelines , including personnel of the Code Monitoring Group, with access to:
 - (i) inspect the Subcontract Works and the Construction Plant;
 - (ii) inspect and copy any record relevant to the Project and Subcontract Works the subject of this Contract; and
 - (iii) interview any person,as is necessary to demonstrate their compliance with the National Code or the National Guidelines.
- (l) The Supplier and its Related Bodies Corporate must comply with a request from any person or entity authorised under or in connection with the National Code or the National Guidelines, including personnel of the Code Monitoring Group, to produce a specified document within a specified period, in person, by fax, by post or by electronic means.
- (m) For the avoidance of doubt, clause SC16(k) applies in relation to the new privately funded construction projects (in accordance with section 4.1.5 of the National Guidelines).
- (n) The Supplier acknowledges and agrees that:
 - (i) it will not (nor will it seek to) enter or take any steps towards entering any project agreements, nor will any such project agreements apply in relation to, the whole or any part of the Subcontract Works;
 - (ii) the bargaining for and making of "unregistered written agreements" is not permitted unless the agreement falls within one of the exemptions specified in section 10(3) of the National Code;
 - (iii) the Commonwealth will not be requested or required to approve the negotiation or the application of any project agreement or unregistered written agreements; and
 - (iv) it will not (nor will it seek to) have any subcontractor or consultant comply with, or apply the terms of any project agreements entered into by the Supplier that are inconsistent with the National Code or unregistered written agreements entered into by the Supplier unless the unregistered written agreement falls within one of the exceptions specified in section 10(3) of the National Code.
- (o) The Supplier must ensure that all subcontracts impose obligations on the subcontractors equivalent to the obligations set out under clauses SC16(a) to SC16(n) (inclusive).
- (p) The Supplier agrees that it will bear the cost of ensuring its compliance with this clause SC16, the National Code and National Guidelines, including in respect of any positive steps it is obliged to take to meet its obligations under the National Guidelines.

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SC17. Victorian Industry Participation Policy

- (a) The Project is a strategic project for the purposes of the VIPP.
- (b) The Supplier must, if requested by the Purchaser, complete and submit to the Purchaser a VIPP Plan, and any LID Plan, and must comply with any VIPP Plan submitted as part of the Supplier's tender or otherwise provided by the Supplier to the Purchaser.
- (c) The Supplier acknowledges and agrees that information contained in the VIPP Plan and the measures of the Supplier's compliance with the VIPP Plan shall be provided to the Department of Economic Development, Jobs, Transport and Resources to be included in a register of VIPP performance.
- (d) The Purchaser will monitor the Supplier's performance in accordance with any monitoring provisions in the VIPP Plan and measure the Supplier against the VIPP outcomes set out in VIPP Plan.
- (e) The Supplier must allow an auditor or other nominated representative of the Purchaser to have access to and to obtain information from the Supplier's records and officers, employees, consultants and advisers for this purpose.
- (f) The Supplier authorises the Purchaser or its nominated representative to obtain information from the persons, firms or corporations nominated in the VIPP Plan as to compliance with the VIPP Plan.
- (g) The Purchaser will exercise its reasonable discretion in assessing the Supplier's performance under this clause and shall take into account any issue raised by the Supplier which fairly represents a cause of failure to comply beyond the Supplier's reasonable control.

SC18. PERSONAL PROPERTY SECURITIES ACT

SC18.1 Definitions

In this clause SC18:

- (a) **PPS Act** means the *Personal Property Securities Act 2009* (Cth);
- (b) **PPS Law** means:
 - (i) the PPS Act and any regulations made at any time under the PPS Act, as amended from time to time;
 - (ii) any relevant amendment made at any time to any other legislation as a consequence of paragraph (i);
 - (iii) any provision of the PPS Act or regulations referred to in (i);
 - (iv) any amendment to any of the above, made at any time; or
 - (v) any amendment made at any time to the *Corporations Act 2001* (Cth) or any other legislation in connection with the implementation or as a consequence of the PPS Act,
- (a) **Security Interest** has the meaning given to it in the PPS Law; and
- (b) **Transaction Document** means:
 - (i) this Contract;

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- (ii) any guarantee by which any person guarantees the Supplier's compliance with its obligations under any of the Transaction Documents;
- (iii) agreements between the Supplier and any subcontractors or;
- (iv) any agreement which the parties agree is a Transaction Document for the purposes of the Contract;
- (v) any agreement or instrument created under any of the above documents; and
- (vi) each document entered into for the purpose of amending, novating, restating or replacing any of the above documents.

SC18.2 Enforcement of liquid assets

The parties agree that sections 120 and 121(4) of the PPS Act do not apply to this Contract or the transactions contemplated under this Contract.

SC18.3 Application of PPS Law

- (a) If:
 - (i) the Purchaser determines that a PPS Law applies, or will at a future date apply, to any of the Transaction Documents or any of the transactions contemplated by them; and
 - (ii) in the reasonable opinion of the Purchaser, the PPS Law:
 - (A) adversely affects or would or may adversely affect the Purchaser's security position or the rights or obligations of the Purchaser under or in connection with the Transaction Documents or any of the transactions contemplated by them; or
 - (B) enables or would enable the Purchaser's security position to be improved without adversely affecting the Supplier in a material respect,

the Purchaser may give notice to the Supplier requiring the Supplier to do anything (including amending any Transaction Document or executing any new Transaction Document) that in the Purchaser's reasonable opinion is necessary to ensure that, to the maximum possible extent, the Purchaser's security position, and rights and obligations, are not adversely affected as contemplated by clause SC18.3(a)(ii)(A) (or that any such adverse effect is overcome), or that the Purchaser's security position is improved as contemplated by clause SC18.3(a)(ii)(B).

- (b) The Supplier must comply with the requirements of a notice given by the Purchaser under clause SC18.3(a) within the time stipulated in the notice.

SC18.4 Supplier's obligations

- (a) In respect of any Security Interest with a value in excess of \$100,000 which the Supplier acquires under or in respect of the Transaction Documents or any of the transactions contemplated by them, the Supplier must:
 - (i) identify, protect and perfect with the highest priority available that Security Interest;
 - (ii) register that Security Interest in its name immediately upon title in the Subcontract Works passing to it;
- (b) For any payment claim which relates to any of the Subcontract Works, Rail Infrastructure or Road Infrastructure, which has:

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- (i) been paid for by the Supplier prior to the submission of that payment claim, the Supplier must ensure that prior to submitting that payment claim no subcontractor or any other person engaged by it arising out of or in connection with the Contract has a Security Interest in respect of the relevant Subcontract Works, Rail Infrastructure or Road Infrastructure in respect of which that payment claim is being made, other than a Security Interest which will be extinguished upon payment to the Supplier; and
- (ii) not been paid for by the Supplier, the Supplier must ensure that it pays the relevant subcontractor for those subcontract works, Rail Infrastructure or Road Infrastructure on or before the due date for payment and in accordance with the terms under which payments are to be made under the relevant subcontract and, upon payment ensure that any Security Interest that the relevant subcontractor has in respect of those subcontract works, Rail Infrastructure or Road Infrastructure to which the relevant payment relates is extinguished.

SC18.5 Supplier to extinguish Security Interests

The Supplier must remove any Security Interest from the PPS Register it previously had in the relevant Subcontract Works, Rail Infrastructure or Road Infrastructure.

SC19 TERMINATION OF THE CONTRACT - PAA

In addition to and without limiting any of the Purchaser's rights set out in the General Conditions, if the PAA is terminated or suspended for any reason, the Purchaser may terminate this Contract and any amount payable to the Supplier under this Contract will be limited to the Supplier's reasonable direct costs arising out of or in connection with that termination or suspension.

SC20 TITLE AND SECURITY

- (a) Title to all unfixed Materials and equipment on Site supplied by the Supplier and that will form part of the Subcontract Works, shall upon payment immediately pass to:
 - (i) the Purchaser as agent on behalf of VicTrack, if the unfixed Materials and equipment forms part of the Rail Infrastructure; and
 - (ii) the Project Owner or the relevant road authority, as the case may be, if the unfixed Materials and equipment forms part of Road Infrastructure, as that term is defined in the *Road Management Act 2004* (Vic),

unencumbered and free of any security interests held or claimed by any third parties.
- (b) Despite anything else in this Contract the Supplier must not invoice the Purchaser for any Materials and equipment under this Contract until those Materials and equipment are delivered or supplied in accordance with the Contract, unless:
 - (i) the Purchaser has first agreed in writing; and
 - (ii) the Supplier provides to the Purchaser security in the form of an unconditional bank undertaking in favour of the Purchaser (from a financial institution and in a form acceptable to the Purchaser) equal to the amount claimed for the Materials and equipment.
- (c) A bank guarantee provided by the Supplier under this SC20(b) will be returned by the Purchaser following delivery of the relevant Materials and equipment in accordance with this Contract.
- (d) In respect of any Subcontract Works with a value in excess of \$5,000,000, the Supplier acknowledges that:

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- (i) if the Purchaser receives or retains from the Supplier security in cash, or converts security to cash; or
- (ii) if the Purchaser receives payment under the PAA for, or on account of, work done or materials, plant, equipment or other goods supplied by the Supplier and does not pay the Supplier the whole amount the Purchaser received or to which the Supplier is entitled,

the Purchaser must hold the cash under clause SC20(d)(i) or the difference under clause SC20(d)(ii) in a joint account in the name of the Purchaser and the Project Owner in a bank determined by the Project Owner.