

Purchase Order General Conditions

Purchase Order General Conditions

Contents

1	Definitions	2
2	Agreement	5
3	Supplier's obligations	6
4	Price	8
5	Taxes	8
6	Time	9
7	Acceptance	10
8	Payment	10
9	Insurance	11
10	Defects liability	12
11	Intellectual Property	13
12	Confidentiality	13
13	Liability & Indemnity	13
14	Termination	15
15	Assignment, subcontracting and Supplier's responsibility	16
16	Victorian Industry Participation Policy	17
17	Dispute resolution	18
18	Entire agreement	18
19	Availability of information	18
20	General	19
21	Poaching of Metro's Staff	20
22	Survival	20

1 Definitions

In this Agreement, unless the contrary intention appears:

Agreement means this agreement including these General Conditions (or, to the extent applicable, any Separate Contract), the Alliance Special Conditions (if any) and the corresponding Purchase Order.

Alliance Special Conditions means the special conditions in Schedule 1, if any.

Business Day means Monday to Friday inclusive, but excludes public holidays in the State of Victoria.

Change of Law means the enactment, adoption, promulgation, modification or repeal (including any change in interpretation or application by competent authorities), of any Law applicable or enforceable in relation to the supply of the Goods and/or the Services which:

- (a) in respect of any Goods or Services, occurs after the date of the relevant Purchase Order;
- (b) establishes or modifies requirements materially affecting the supply of the Goods and/or the Services that will make completion of the supply of the Goods and/or the Services materially more burdensome than the requirements specified in this Agreement; and
- (c) a competent supplier in the position of the Supplier could not reasonably have foreseen as at the date of this Agreement,

but excludes any change in or the introduction of any new Tax.

Date for Completion means the date specified in the Purchase Order for completion of the Services.

Date for Delivery means the date set out in a Purchase Order by which the Goods must be delivered.

Developed IP means Intellectual Property Rights discovered or coming into existence as a result of, for the purposes of or in connection with the supply of the Goods and the provision of Services but does not include Supplier Background IP or Metro Background IP.

Dispute has the meaning given to in in clause 17.1.

DR Meeting has the meaning given to in in clause 17.2(b).

Employment Laws means all applicable Laws relating to employment or the engagement of independent contractors, including those related to wages, superannuation, hours, compensation, terms and conditions of employment, workplace health and safety, discrimination or harassment, retaliation, human rights, pay equity, termination of employment or engagement, classification of workers (including as employees versus independent contractors), immigration, enterprise bargaining and the payment and withholding of taxes and other sums as required by the appropriate government agency.

Force Majeure Event means any one or a combination of:

- (a) lightning strike, earthquake, cyclone, flood (which might at the date of the Purchase Order be expected to occur less frequently than once in every 50 years), drought, storm, tempest, explosion and fire; or

- (b) an act of war, invasion, act of public or foreign enemies, hostilities between nations (whether war be declared or not), revolution, martial law or a "terrorist act" (as defined in section 5 of the *Terrorism Insurance Act 2003* (Cth) as at the date of the Purchase Order),

which is beyond the reasonable control of, and without the fault or negligence of a party and/or its personnel, and which results in a party being unable to observe or perform on time an obligation under the Agreement.

General Conditions means these Purchase Order General Conditions.

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.

GST has the meaning given to it in the GST Legislation.

GST Legislation means the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and any related Act imposing such tax or legislation that is enacted to validate, recapture or recoup such tax.

Insurance Policies has the meaning given to it in clause 9.1(a).

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, patterns, designs, specifications, drawings, artwork, transparencies, proofs, documents, samples, dies, tools, jigs, equipment and other materials.

Law means:

- (a) any statute, regulation or subordinate legislation of the Commonwealth of Australia, the State of Victoria or local or other government in force in the State of Victoria and any code of practice enforceable under any rail or safety statute, irrespective of where enacted; and
- (b) the common law and principles of equity as applied from time to time in the State of Victoria.

Liability Limitation has the meaning given to it in clause 13.3(a).

Metro Background IP has the meaning given to it in clause 11.1.

Metro means Metro Trains Melbourne Pty Ltd ABN 43 136 429 948.

Metro Standards means the technical standards and specifications published by Metro from time to time relevant to the work to be performed under this Agreement.

Price means the price stipulated in the Purchase Order for the Goods and/or Services.

Procurement Code of Conduct means the "*Procurement – Supplier Code of Conduct*" published by the State of Victoria, as amended from time to time, which is available at www.procurement.vic.gov.au/Suppliers/Supplier-Code-of-Conduct.

PTV means Public Transport Development Authority (trading as Public Transport Victoria), a body corporate established under the *Transport Integration Act 2010* (Vic).

Purchase Order means the purchase order issued by Metro to the Supplier for the Goods and or Services (as applicable) in accordance with clause 2.

Qualifying Cause of Delay means:

- (a) any act, default or omission of Metro, or of Metro's consultants, agents or other suppliers (not being employed by the Supplier) that is not caused by or contributed to by the Supplier;
- (b) a variation agreed to by the parties;
- (c) a Change of Law; or
- (d) a Force Majeure Event,

and does not include any delay to the supply of the Goods and/or the Services which may be caused by or materially contributed to by an inadequate Supplier labour force, the failure of the Supplier to place orders for equipment or materials sufficiently in advance to ensure delivery when required, deficiencies or delays in the performance of the Supplier's suppliers or delays in shipment (except to the extent caused by a Force Majeure Event where the Supplier has complied with clause 6.2(a)).

Rail Operations means the:

- (a) provision, maintenance, movement, shunting, storage, fuelling, loading and unloading of rolling stock to transport freight or passengers by rail;
- (b) provision of infrastructure to enable the transport of freight or passengers by rail;
- (c) maintenance, storage, building, rebuilding, servicing, replacing and repairing of infrastructure and rolling stock; and
- (d) conduct of the business of handling, storing and transporting freight or passengers by rail.

Separate Contract means the separate contract or agreement referred to in clause 2(f).

Services means the services (if any) identified in the Purchase Order.

Site means the location specified in the Purchase Order for the provision of the Services or the delivery of the Goods.

Standards means all Australian standards published by Standards Australia, rail industry standards and government regulations applicable to the supply of the Goods and the provision of the Services.

Supplier means the supplier named in the Purchase Order.

Supplier Background IP means the Intellectual Property Rights owned by or licensed to the Supplier which exist prior to the date of the Purchase Order but does not include Metro Background IP or Developed IP.

Taxes means any and all present and future sales, use, personal, property, real property, turnover, stamp, documentary, interest equalisation, business, occupation, excise, income, corporation, profits, gains, gross receipts, or other taxes, fees, withholdings, imposts, levies, duties or other charges of any nature whatsoever or whensoever imposed (other than taxes on Metro's net income) by any government, governmental, semi-governmental or other relevant authority (including, for the avoidance of doubt, any carbon tax or price whatsoever described), together with any penalties, fines or interest thereon or similar additions, imposed, levied or assessed or otherwise payable, other than GST.

2 Agreement

- (a) These General Conditions shall apply to any Purchase Order where no alternative contract is specified in that Purchase Order's notes.
- (b) The acceptance by the Supplier of the Purchase Order constitutes a binding contract between the Supplier and Metro comprising the Agreement.
- (c) The Supplier is deemed to accept a Purchase Order unless it notifies Metro that it rejects the Purchase Order within 1 Business Day of receipt.
- (d) A valid Purchase Order must:
 - (i) include the Metro purchase order number;
 - (ii) in the case of Goods, identify the Goods for delivery, specify quantities, the delivery location, any quality specifications and any key personnel requirements, and may include any specifications or other requirements that the Supplier or the Goods must comply with; and
 - (iii) in the case of Services, describe the Services to be provided, specify the location at which the Services are to be provided and any key personnel requirements, and may include any other relevant matters such as the hours during which Services are to be provided, applicable service levels and service level rebates.
- (e) To the extent of any inconsistency between the documents forming this Agreement and notwithstanding anything to the contrary in those documents, the following order of precedence will apply:
 - (i) the Alliance Special Conditions (if any);
 - (ii) these General Conditions (or, to the extent applicable, any Separate Contract);
 - (iii) the Purchase Order;
 - (iv) any other schedule (excluding the Alliance Special Conditions);
 - (v) any annexures.
- (f) Notwithstanding anything to the contrary in these General Conditions, if a Purchase Order specifies or states that it has been issued in accordance with a separate contract or agreement between Metro and the Supplier, then the terms and conditions of that contract or agreement shall apply to the Purchase Order to the exclusion of these General Conditions.
- (g) No other terms and conditions can be incorporated into this Agreement other than by express written agreement.
- (h) Any variation of the Agreement will be of no effect unless in writing and signed by both Metro and the Supplier.

3 Supplier's obligations

3.1 Minimum Standards

- (a) The Supplier must supply the Goods and/or Services identified in the Purchase Order in accordance with this Agreement.
- (b) The Supplier must supply the Goods and/or Services (as applicable):
 - (i) exercising due care, skill and judgment;
 - (ii) that are fit and sufficient for the purpose for which they are intended, including being free of any defects;
 - (iii) in an efficient, professional and cost effective manner;
 - (iv) in accordance with all applicable Standards and good industry practices;
 - (v) free of all liens and cumbrances;
 - (vi) in accordance with this Agreement, Metro's Standards and all guidelines and procedures provided to the Supplier by Metro and all directions made by Metro under this Agreement; and
 - (vii) conducting itself so as to cause the minimum disruption to Rail Operations while on Site.
- (c) 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.

3.2 Compliance with laws and other requirements

- (a) The Supplier must comply with:
 - (i) all applicable Laws (including all applicable occupational health and safety, environmental and building laws), Approvals, guidelines and requirements of any relevant authority, including possessing and maintaining any relevant Approvals, authorisations, permits and authorisations for the term of this Agreement;
 - (ii) the Procurement Code of Conduct and must allow Metro (or any persons appointed or approved by Metro) to have access to and to obtain information from the Supplier's records and employees, officers, contractors or agents for the purposes of auditing the Supplier's compliance with the Procurement Code of Conduct;
 - (iii) the requirements of applicable AS 4292 series Rail Safety Standard;
 - (iv) the requirements relating to safety and environmental management of the Site notified by Metro to the Supplier from time to time; and
 - (v) all directions given by Metro in relation to rail safety and

occupational health and safety.

- (b) The Supplier must ensure that 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 Agreement does not infringe the intellectual property rights of any third party.
- (c) The Supplier must supply to Metro any documents, drawings and information required as part of the Goods and/or Services (and such other documents, drawings and information as may be reasonably required by Metro) in a form satisfactory to Metro at the completion of the supply of Goods and/or Services (including a complete set of final documents, drawings or information).
- (d) Metro has no responsibility to the Supplier, a contractor or any other person engaged by the Supplier, in respect of remuneration, annual leave, sick leave, long service leave, public holidays, redundancy payments or any other similar benefits under any industrial agreement or Law.
- (e) Without limiting any other obligations under this Agreement, the Supplier:
 - (i) must comply with all applicable Employment Laws in the performance of its obligations under this Agreement;
 - (ii) must ensure that any person involved in the performance of its obligations under this Agreement is entitled to work in Australia;
 - (iii) must assume sole responsibility for and manage all industrial relations issues associated with its employees, contractors and any other person engaged by the Supplier;
 - (iv) must comply with all workers compensation or similar legislation, must ensure that payment of superannuation and any other entitlements are made in accordance with any applicable industrial agreement or Law, and must obtain and maintain all insurances under, and pay all premiums, excesses and other amounts required by, that legislation or otherwise, on a timely basis in respect of contractors or any other person engaged by the Supplier;
 - (v) indemnifies Metro, and all of its directors, officers, employees, agents and contractors against any claim, judgment, order, liability, loss, damage, cost or expense any of them suffers or incurs as a direct or indirect consequence of any workers' compensation or other claim in respect of this clause 3.2(e), made against any of them by any person in relation to the performance of work by the person under this Agreement;
 - (vi) must ensure that its subcontractors (of any level) comply with the requirements of this clause 3.2(e); and
 - (vii) must allow Metro (or any persons appointed or approved by Metro) to have access to and to obtain information from the Supplier's records and employees, officers, contractors or agents for the purposes of auditing the Supplier's compliance with this clause 3.2(e).

3.3 Suspension

Metro may, at any time and for any reason, suspend the supply of Goods and/or

Services or any part of the Goods and/or Services by giving the Supplier written notice of the suspension and the Supplier must suspend the services as notified until such time as Metro directs that the services are no longer suspended. At such time, the Supplier, must promptly recommence the supply of the relevant Goods and/or Services.

3.4 Metro's name and reputation

The Supplier must ensure that the Supplier and any officers, employees, contractors, or agents of the Supplier provide the Services to Metro in a manner which will not bring Metro's name into disrepute or otherwise damage Metro's reputation, or threaten to do either of these.

3.5 Warranty

The Supplier warrants that it will supply the Goods and Services in accordance with this clause 3.

4 Price

4.1 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.

4.2 The Price is a fixed price not subject to escalation or any alteration whatsoever, except as may be agreed in accordance with clause 10 or where provided in the Purchase Order.

5 Taxes

5.1 Supplier's liability for Taxes

The Supplier is solely liable, unless specifically stated elsewhere in this Agreement, for payment of, and warrants that it will pay, or ensure the payment of all Taxes imposed and assessments made in relation to the Goods and/or the Services.

5.2 Tax invoice

A party will not be obliged to pay any amount in respect of GST on a supply to the other party unless and until a tax invoice that complies with the GST Legislation has been issued in respect of that supply.

5.3 Withholding tax

The Supplier acknowledges and agrees that, if a legislative requirement requires Metro to deduct an amount in respect of withholding tax from a payment under this Agreement such that the Supplier would not actually receive on the due date the full amount provided for under this Agreement, then on the due date:

- (a) Metro must deduct the amount for the withholding tax;
- (b) Metro must pay an amount equal to the amount deducted to the relevant authority in accordance with applicable Law and give the original receipt to the Supplier; and
- (c) Metro must pay the Supplier an amount equal to the difference between the full amount of the payment which would otherwise have been due under this Agreement and the amount deducted.

6 Time

6.1 Delivery

- (a) The Supplier must deliver the Goods and/or supply the Services in accordance with this Agreement.
- (b) The Supplier will be deemed not to have delivered the Goods to and/or supplied the Services at the Site unless it obtains and can produce to Metro on request a receipt or signed delivery docket from an authorised agent or employee of Metro.

6.2 Delay

- (a) If the delivery of the Goods and/or the supply of the Services is or may be delayed for any reason, including reasons that constitute a Qualifying Cause of Delay, the Supplier must immediately give notice of such delay to Metro as a notice under this clause 6.2(a) and identifying in reasonable detail the extent of such delay.
- (b) Following receipt of such notice, at any time prior to actual delivery or supply by the Supplier, Metro may, in its discretion, notify the Supplier in writing of any period by which the stipulated date for delivery or supply will be extended.
- (c) If the Goods are not delivered and/or the Services are not supplied by the applicable Date for Completion/Date for Delivery (or such later date as is notified pursuant to this clause 6), Metro may terminate this Agreement by notice in writing to the Supplier with immediate effect, unless the delay is caused by factors that constitute a Qualifying Cause of Delay.
- (d) If a notice is issued under clause 6.2(a) in respect of a Qualifying Cause of Delay, and the Qualifying Cause of Delay is a Force Majeure Event, and it persists 5 Business Days after the date the Supplier notified (or should have notified) Metro in accordance with clause 6.2(a) (**Persisting FME Date**), the parties will meet in good faith to attempt to achieve a resolution to the impact of the Force Majeure Event. If the parties are unable to agree a mutually satisfactory resolution within 5 Business Days of the Persisting FME Date then Metro may terminate this Agreement immediately by written notice to the Supplier.
- (e) 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 this Agreement pursuant to clause 6.2(c) or clause 6.2(d).

6.3 Liquidated damages for late delivery of Goods or the delay of Services

- (a) If the Supplier fails to meet an applicable Date for Completion/Date for Delivery for Goods and/or Services (or such later date notified by Metro under clause 6.2), then liquidated damages will be applied, calculated from the Date for Completion/Date for Delivery until the date the Supplier delivers the Goods/provides the Services, at the rate specified in the Purchase Order, capped at the limit of liquidated damages amount stated in the Purchase Order.
- (b) Metro may without prejudice to any of its other rights under this Agreement recover the amount of any liquidated damages as a debt due

to Metro by the Supplier.

6.4 Other remedies

The Supplier agrees that payment of liquidated damages is without prejudice to any other rights of Metro under this Agreement or at Law or in equity, including the right to obtain further damages as a result of delay by the Supplier.

7 Acceptance

- (a) Without limiting Metro's rights under clause 10, Metro may reject any Goods or Services which do not comply with this Agreement, including where:
 - (i) such Goods or Services do not comply with clause 2(c);
 - (ii) such Goods or Services are in excess of the stipulated quantity;
or
 - (iii) 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).
- (b) Without limiting Metro's rights under clause 10, 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 this Agreement, or pay to Metro the cost of replacing the Goods or Services with functionally equivalent Goods or services from an alternative source.
- (c) Without limiting Metro's rights under this clause 7 or clause 10, 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).
- (d) If the change to the supply does not meet the requirements of the approval process referred to in clause 7(c), Metro may in its discretion reject future supplies of goods, and any costs incurred by Metro as a result will be a debt due and payable by the Supplier.
- (e) Title in any Goods will pass to Metro free of encumbrances upon payment of the Price (or part thereof) to the Supplier or delivery to Metro whichever occurs earlier.
- (f) The Goods are at the Supplier's risk until they have been delivered to Metro in accordance with this Agreement notwithstanding that payment may have already been made and title passed to Metro.
- (g) 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 3.5 and 10.

8 Payment

- 8.1** The Supplier may issue an invoice for Goods delivered or Services supplied in accordance with the Purchase Order and other terms of the Agreement.

- 8.2** Metro must pay all undisputed invoices 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 8.3.
- 8.3** The Supplier's invoice must:
- (a) include the Supplier's full trading name, address, ABN, and where GST is applicable, be a valid tax invoice in accordance with clause 5.
 - (b) quote Metro's Purchase Order number;
 - (c) be clearly addressed to 'Metro Trains Melbourne Pty Ltd ABN 43 136 429 948';
 - (d) be sent to Metro's address for invoices as indicated on the Purchase Order;
 - (e) contain such information as is reasonably necessary for Metro to verify the amount invoiced; and
- 8.4** Metro may reject without payment any invoice issued by the Supplier which does not comply with clause 8.3 or not issued within 3 months of provision of Goods and Services.
- 8.5** Metro may set off any amount payable to Metro by the Supplier under the Agreement against any amount payable by Metro to the Supplier under this Agreement.

9 Insurance

9.1 Insurance Policies

- (a) The Supplier must have or, before any work can commence, must take out, the following insurances:
 - (i) public and third party liability insurance to \$20 million;
 - (ii) professional indemnity insurance to \$10 million;
 - (iii) workers' compensation insurance in accordance with the requirements of relevant laws; and
 - (iv) if the Supplier is providing goods, Goods insurance covering the Goods for their full replacement value against all loss or damage, including loss or damage in transit to the Site and, if this Agreement requires the Supplier to unload the Goods, also such unloading, of which policy or policies under this clause shall;
 - (A) be maintained until risk in the Goods passes to Metro;
 - (B) cover the parties' respective rights, interests and liabilities; and
 - (C) if required by Metro, be in the joint names of the parties.

covering liability arising out of or in connection with the Supplier's provision of the Goods and/or the Services and the Supplier's performance of its other obligations under this Agreement

(Insurance Policies).

9.2 Insurance requirements

The Supplier must:

- (a) where the Insurance Policies are taken out on a claims made basis, maintain the Insurance Policies until completion of the Supplier's obligations under this Agreement and for a period of 6 years thereafter;
- (b) ensure that the public and product liability insurance policy states that it covers the respective rights and interests of Metro, PTV, VicTrack and the Supplier, and cover their liabilities to third parties; and
- (c) before and on each anniversary of the date the Supplier entered into this Agreement and at all other times as requested by Metro, provide to Metro satisfactory evidence that has complied with the requirements of clauses 9.1 and this clause 9.2.

9.3 Metro may effect insurance

If the Supplier fails to effect or maintain an insurance policy required under this clause 9. Metro may effect and maintain the insurance policy and recover from the Supplier, as a debt due and payable, all costs and expenses incurred. The Supplier is not relieved of any liability under this Agreement due to, or as a result of, Metro effecting or maintaining any insurance policy referred to in this clause 9.

9.4 Indemnities not affected

The requirements of this clause 9 are without prejudice to and do not affect the Supplier's liability under or in connection with this Agreement, including its obligations to indemnify Metro under this Agreement.

10 Defects liability

- (a) If 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:
 - (i) refund the Price of the relevant Goods and/or Services;
 - (ii) repair, modify or replace, at the Supplier's expense, the affected Goods within a time agreed or specified by Metro; or
 - (iii) 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.
- (b) If the Supplier fails to rectify the defects within the time agreed or under clause 10(a)(ii) then, without prejudice to any other rights and remedies Metro may have, Metro may have the rectification carried out by others. The cost thereby incurred by Metro shall be moneys due and payable by the Supplier to Metro.
- (c) The Supplier remains responsible for supplying Goods and Services which comply with the warranties, notwithstanding that Metro has:

- (i) accepted the Goods or Services; or
- (ii) reviewed design drawings, specifications, construction drawings or workshop drawings or any other documents prepared by or on behalf of the Supplier;
- (iii) given any approval, direction, or instruction to the Supplier; or
- (iv) provided any information to the Supplier.

11 Intellectual Property

- 11.1 Where specified in the Agreement 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 Background IP**).
- 11.2 Metro will retain ownership of Metro Background IP and any Intellectual Property Rights subsisting in the Metro Background IP.
- 11.3 The Supplier must return all Metro Background IP to Metro within 7 days after delivery of the Goods and/or completion of supply of the Services or otherwise on request from Metro.
- 11.4 The Supplier must not use Metro Background IP for any purpose except the delivery of the Goods and/or supply of the Services to Metro.
- 11.5 Except where agreed otherwise in writing as part of the Agreement:
- (a) all Developed IP will be vested in and owned by Metro, and must be delivered to Metro on request; and
 - (b) the Supplier gives Metro a perpetual, irrevocable and royalty free licence (including the right to sublicense) to reproduce, use, modify or adapt the Supplier Background IP to enable Metro:
 - (i) to use any Developed IP or other documents, information or things brought into existence by the performance of the Services; and/or
 - (ii) to own, operate, repair, modify and maintain the Goods.

12 Confidentiality

The Supplier shall keep confidential the terms of the Agreement, the Metro Background IP and the Developed IP, 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 Agreement (provided that those employees, contractors, agents or advisers undertake to keep them confidential).

13 Liability & Indemnity

13.1 Indemnity

- (a) The Supplier indemnifies and must keep indemnified on demand Metro from and against all losses, damages, liabilities, actions, suits, claims, demands, costs and expenses of every kind that may be incurred or sustained by Metro in respect of, or arising from, any act, omission or neglect on the part of the Supplier or its employees, agents or

subcontractors arising out of or in connection with the performance of its obligations under this Agreement.

- (b) The indemnity in clause 13.1(a) will not apply to the extent that the loss, damage, liability, action, suit, claim, demand, cost or expense is caused or contributed to by fraud, wilful default, a breach of this Agreement or a negligent act or omission on the part of Metro.
- (c) It is not necessary for Metro to incur any expense or make any payment before enforcing a right of indemnity conferred by this clause 13.1.

13.2 Indemnities continuing

Each indemnity in this Agreement is a continuing obligation separate and independent from the Supplier's other obligations and survives termination of this Agreement.

13.3 Limitation of liability

- (a) The aggregate liability of the Supplier to Metro arising out of or in connection with this Agreement will not exceed five times the total price paid or payable under this Agreement (**Liability Limitation**).
- (b) The Liability Limitation does not apply to any liability of the Supplier for or in respect of:
 - (i) claims by any person against the Metro in respect of personal injury, death, loss or damage to any property or any other third party liability (including the liability of the Supplier under the indemnities set out in this clause 13.3(b);
 - (ii) a breach of the Supplier's obligations under clause 12;
 - (iii) a breach of the Supplier's obligations under clause 11; or
 - (iv) the wilful misconduct, wilful default, wilful neglect, illegal or unlawful conduct, or fraud of the Supplier.
- (c) Notwithstanding any other provision of this Agreement any liability of the Supplier for or in respect of:
 - (i) events or circumstances in respect of which insurance proceeds are available; or
 - (ii) events or circumstances in respect of which insurance proceeds would have been available under any insurance policy required to be effected (or arranged to be effected) and maintained under this Agreement by either party in relation to those events or circumstances but for:
 - (A) in respect of an insurance policy required to be effected and maintained by the Supplier, a failure of the Supplier to effect and maintain the relevant insurance policy;
 - (B) a failure by the Supplier to claim under the relevant insurance policy (or comply with the claim procedures under the relevant insurance policy); or
 - (C) the Supplier not complying with any provision, obligation or duty owed under the relevant insurance policy (including the Supplier's duty to disclose);

will not be limited or otherwise affected by the Liability Limitation.

- (d) In determining the amount of insurance proceeds which are available (or which would have been available) for the purposes of this clause 13 any limitations on liability or exclusions of liability in this clause shall be disregarded.

13.4 Exceptions to liability

Neither party will be liable to the other for damages that comprise any loss of profits or loss of opportunities regardless of whether or not such loss or damage may be regarded as arising naturally or in the usual course of things, from the relevant breach of contract giving rise to such damage.

14 Termination

14.1 Termination for Convenience

Metro may terminate this Agreement in whole or in part in its sole discretion:

- (a) by giving 30 days written notice to the Supplier anytime; or
- (b) with immediate effect by giving written notice to the Supplier at any time if PTV or any regulatory authority or government agency requires Metro to terminate this Agreement in whole or in part.

14.2 Termination for Cause

- (a) Metro may, without prejudice to any other rights or remedies it may possess, immediately terminate this Agreement by giving a notice of termination to the Supplier referring to this clause 14.2 if:
 - (i) the Supplier is in breach of clause 15;
 - (ii) the Supplier is in breach of clause 3.2;
 - (iii) the Supplier is in breach of a provision of this Agreement (other than a breach referred to in clause 14.2(i) or 14.2(ii)) that:
 - (A) in Metro's reasonable opinion, is incapable of remedy; or
 - (B) is capable of remedy and does not rectify that breach within 10 Business Days of Metro issuing a notice of the breach to the Supplier;
 - (iv) the Supplier regularly or habitually commits breaches of the same provision of this Agreement whether or not they are remedied, or commits a significant number of breaches which are not remedied and collectively constitute a material breach;
 - (v) the Supplier is insolvent or comes under any form of insolvency administration;
 - (vi) Metro is entitled to do so, in accordance with 6.2(d); or
 - (i) Metro has an express right to do so under any other provision of this Agreement.
- (b) The Supplier may terminate this Agreement immediately by giving notice

to Metro if Metro is insolvent or comes under any form of insolvency administration.

14.3 Supplier action

If the Supplier receives a notice of termination from Metro, or the Supplier terminates by notice to Metro, the Supplier must:

- (a) stop work (except, if Metro has terminated, to the extent specified in the notice from Metro);
- (b) take such action as necessary or as Metro directs, for the transfer, protection and preservation of Metro's property;
- (c) minimise the costs of termination to Metro; and
- (d) deliver to Metro all documents prepared by or on behalf of the Supplier in connection with the supply of Goods and/or the Services under this Agreement as at the date of termination.

14.4 Consequence of termination

- (a) If this Agreement is terminated by Metro:
 - (i) Metro will only be liable for payment for the Goods supplied and/or the Services properly carried out to the date of termination and for extra direct-out-of-pocket costs necessarily and reasonably incurred by the Supplier as a result of termination subject to Metro's rights of set off (but without any profit or mark-up on such costs) and will not be liable to pay the Supplier any compensation for loss of prospective revenue or profit suffered in connection with such termination;
 - (ii) Metro may employ other persons to complete or provide the Goods and/or the Services;
 - (iii) the rights of the parties will be otherwise as though Metro had terminated this Agreement as a result of the Supplier's repudiation; and
 - (iv) Metro will be entitled to a refund of any Price paid in advance for Goods and/or Services not delivered.

14.5 Accrued rights

The termination of this Agreement does not affect any rights of the parties which accrued before the date of expiry or termination.

15 Assignment, subcontracting and Supplier's responsibility

15.1 Supplier may not assign or novate

The Supplier may not assign or novate its rights and obligations under this Agreement without Metro's prior written consent, which consent may be withheld or be given subject to conditions.

15.2 Metro may assign or novate

Metro has the right to assign or novate any or all of its rights and obligations under this Agreement.

15.3 Subcontracting

- (a) The Supplier must not subcontract or delegate the performance of any of its obligations under this Agreement without the prior written consent of Metro (such consent not to be unreasonably withheld or delayed).
- (b) Subcontracting consented to by Metro does not relieve the Supplier from any of its liabilities or obligations under this Agreement.
- (c) The Supplier is liable to Metro for the acts and omissions of subcontractors and employees, officers and agents of subcontractors as if they were acts or omissions of the Supplier.
- (d) The Supplier must ensure that subcontractors and employees, officers and agents of subcontractors comply with all relevant terms of this Agreement as though it was the Supplier, including obligations described in clauses 3, 19 and this clause 15.

16 Victorian Industry Participation Policy

- 16.1** In this clause 16, 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).
- 16.2** 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.
- 16.3** 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 16 the "Department") and to the Industry Capability Network Victoria (ICN) to be included in a register of VIPP performance.
- 16.4** 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.
- 16.5** 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, Suppliers and advisers for this purpose.
- 16.6** 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.
- 16.7** 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.
- 16.8** The Agreement acknowledges and agrees that it must liaise with the Department and ICN in relation to the VIPP Plan.

17 Dispute resolution

17.1 Negotiations

Neither party may commence legal proceedings in relation to a dispute arising in connection this Agreement (**Dispute**) (other than seeking urgent or interlocutory relief) unless:

- (a) the process set out in this clause 17 has been followed and has failed to resolve the Dispute; or
- (b) it has attempted to follow the process in this clause 17 and the other party has failed to comply with those processes.

17.2 Procedure for resolution

- (a) If a party considers that a Dispute has arisen, it must provide written notice to the other party of the Dispute, specifying that it is a notice given under this clause 17 and giving full particulars of the nature and extent of the Dispute.
- (b) Each party must procure that its representative with authority to resolve the Dispute is available to meet the other party's representative within 10 days of a notice being issued under clause 17.2(a), and that its representative attends and participates in such meeting (**Panel**), and acts in good faith to reach a reasonable and equitable resolution of the Dispute in the Panel.
- (c) Decisions made at the Panel that are reached by agreement, recorded in writing and signed by each representative that participated in the Panel are binding on the parties.
- (d) Unless otherwise agreed by the parties, all Panels will be conducted on a without prejudice basis.

17.3 Performance of obligations

Despite the existence of a dispute, the parties must continue to perform their respective obligations under this Agreement except where this Agreement has been terminated.

18 Entire agreement

This Agreement constitutes the entire agreement between the parties about its subject matter and supersedes all previous agreements, understandings and negotiations on that subject matter.

19 Availability of information

During the period of this Agreement, and for a further 2 years, Metro's authorised representatives are entitled to access and make copies of any relevant personnel, accounts, records (including data stored in computer files), vouchers, receipts and documents of any description which belong to the Supplier, or any of its employees, agents, officers and/or contractors, for the purposes of ensuring that this Agreement has been complied with and that all applications for payment have been and are being made in accordance with this Agreement.

20 General

20.1 Metro's waiver

Any of Metro's rights under this Agreement may only be waived by Metro in writing signed by a duly authorised representative of Metro.

20.2 Independent contractor

- (a) The Supplier is an independent contractor performing this Agreement. This Agreement does not create any agency, partnership, joint venture or other joint relationship between the parties.
- (b) Subject to the provisions of this Agreement, the Supplier is solely responsible for the manner in which the Goods and/or the Services are supplied. All employees, officers, contractors or agents engaged by the Supplier in connection with the performance of this Agreement are under the complete control of the Supplier and are not deemed to be employees of Metro and nothing contained in this Agreement or in any subcontract awarded by the Supplier is to be construed to create any contractual relationship between any such employees, officers, contractors or agents and Metro.

20.3 Exercise of powers

- (a) Metro may exercise a right, remedy or power in any way Metro considers appropriate.
- (b) If Metro does not exercise a right, remedy or power at any time, this does not mean that it cannot exercise it later.

20.4 Rights at Law

The rights, remedies and powers of the parties under this Agreement are in addition to any rights, remedies and powers provided by Law.

20.5 Governing Law

- (a) This Agreement is governed by the Laws of the State of Victoria.
- (b) The parties agree to submit to the non-exclusive jurisdiction of the courts of the State of Victoria.

20.6 Other

- (a) If any provision or part of any provision of the Agreement is unenforceable, such unenforceability will not affect any other part of such provision or any other provision of the Agreement.
- (b) The rights of Metro under this Agreement are in addition to any other rights Metro may have under legislation or at common law.
- (c) A reference to includes or including should be construed without limitation.

21 Poaching of Metro's Staff

- (a) The Supplier must not make any offer of employment, or assist any other person to make an offer of employment to Metro's staff without the written consent of Metro, except if the employee of Metro responds to a generally advertised position not specifically directed to employees of Metro.
- (b) The restrictions in this clause operate during the term of this Agreement and thereafter for a period of:
 - (i) 12 months, or failing that
 - (ii) 6 months, or failing that
 - (iii) 3 months.
- (c) The Supplier acknowledges that damages may be inadequate to protect Metro's interests and Metro is entitled to seek and obtain injunctive relief, or any other remedy, in any court; and the restrictions in this clause are reasonable and necessary for the protection of Metro's goodwill.
- (d) If the restrictions in this clause:
 - (i) are void as unreasonable for the protection of Metro's interests; and
 - (ii) would be valid if part of the wording was deleted or the period or area was reduced,the restrictions will apply with the modifications necessary to make them effective.

22 Survival

Clauses 3, 9, 10, 11, 12, 13,14, 16, 17, 19, 20.1, 20.5, 21 and this clause 22 survive the expiry or termination (for whatever reason) of this agreement, together with any other clauses that by necessary implication survive such expiry or termination.

Schedule 1

Alliance Special Conditions