

Terms and Conditions of Purchase

PARTIES

These Terms and Conditions of Purchase are made between the following parties:

- A. Newcastle Port Corporation trading as the Port Authority of New South Wales (ABN 50 825 884 846) (**Port Authority**); and
- B. The person, body corporate or entity that sells the Goods or provides the Services to Port Authority (**Supplier**)

BACKGROUND

Supplier has agreed to supply the Goods and/or Services to Port Authority on the terms and conditions set out in the Agreement.

TERMS AND CONDITIONS

1 DEFINITIONS

In this document, unless the context otherwise requires:

Agreement means an agreement between Port Authority and Supplier for the supply of Services formed under and constituted by the documents referred to in clause 2(a).

Business Day means any day other than a Saturday, Sunday, gazetted public holiday in Sydney, New South Wales and 27, 28, 29, 30 and 31 December.

Conditions means these Terms and Conditions of Purchase.

Confidential Information means information which is by its nature confidential, that a party has designated as confidential, or is capable of protection at common law or equity as confidential information, but does not include information that is or becomes public knowledge other than through a breach of the Agreement, or that a party receiving the information independently knows or develops. For the avoidance of doubt, Port Authority will not be required to treat any deliverable produced by the Contractor as part of the Services as being Confidential Information.

Construction Work means "building and construction work" as defined in the New South Wales Industrial Relations Guidelines: Building and Construction Procurement.

Contract Price means the amounts for Services as set out in the Order, excluding any GST component payable, as adjusted under these Conditions.

Deliver means deliver, and unload, the Goods at the Delivery Place and performance of the whole of the

Services, in accordance with clauses 3 and 6. **Delivery, Delivering and Delivered** have a corresponding meaning.

Delivery Date means, in relation to a Good or Service, the date specified in the Order on which the Good or Service is to be Delivered, as adjusted under the Agreement or as otherwise agreed in writing by the parties.

Delivery Place means the location(s) for Delivery stated in the Order for that Good or Service, or as otherwise agreed in writing by the parties.

Good means a good described in the Order and **Goods** means all of them, as varied under these Conditions or by the parties in writing.

GST means the tax payable on taxable supplies under the GST Law.

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

IPR means any and all intellectual or industrial property rights throughout the world in relation to (without limitation) inventions, ideas, patents, applications for patents, copyright (including an author's moral rights under the *Copyright Act 1968* (Cth)), registered and unregistered designs, registered and unregistered trademarks, rights in relation to circuit layouts and circuit layout designs, rights in relation to technologies in development, trade secrets, know-how and all other intellectual property as defined in article 2 of the Convention Establishing the World Intellectual Property Organization of July 1967, whether registered or unregistered and whether or not now existing and in all cases for the duration of those rights; and any licence, consent, application or right to use or grant the use of any the foregoing rights, including all renewals and

extensions.

Law means any legally binding law, legislation, statute, act, regulation, subordinate legislation, rule, by law, order, proclamation, decree, ordinance, directive or code which is enacted, issued or promulgated by the Commonwealth, or any State or Territory government, or any licence, permit, registration, consent, approval, determination, certificate, administrative decision, permission or other requirement of any authority having any jurisdiction in connection with the Good or Services.

Network means Port Authority's ICT (information and communications technology) systems, devices and environments, including software, hardware and other infrastructure.

Port Authority Equipment means any item stated in the Order to be made available by or on behalf of Port Authority to Supplier for the purpose of Supplier performing Services in accordance with the Agreement. For example, Port Authority Equipment may be provided to Supplier so that Supplier can perform Services in the nature of repairs and maintenance to the Port Authority Equipment.

Order means any purchase order or written instruction by Port Authority setting out the required Goods or Services to be procured from Supplier.

Service means the work or service described in the Order and **Services** means all of them, as varied under these Conditions or by the parties in writing.

Supplier Code of Conduct means the document of that name available for download at the Port Authority website (as updated, amended or replaced from time to time).

WHS Law means the *Work Health and Safety Act 2011* (NSW), including regulations and other instruments under the Act, any Codes of Practice and consolidations, amendments, re-enactments or replacements of the Act, and any corresponding WHS law as defined in section 4 of the *Work Health and Safety Act 2011* (NSW).

2 APPLICATION OF CONDITIONS AND FORMATION OF AGREEMENT

- (a) Subject to clause 2(b), where Port Authority issues an Order for the purchase of Goods and/or Services from Supplier and Supplier accepts the Order as described in clause 2(d), an agreement (**Agreement**) is formed in respect of those Goods and/or Services comprising:
 - (i) the Order; and
 - (ii) these Conditions.
- (b) These Conditions shall only apply to Orders for the purchase of Goods and/or Services by Port Authority from Supplier where there is no separately signed (whether electronic or by hand) written contract which applies between Supplier and Port Authority in respect of the Goods and/or Services (**Separate Contract**). Where a Separate Contract applies, that Separate Contract prevails over these Conditions and no Agreement (as defined in these Conditions) will be created by these Conditions.
- (c) These Conditions shall apply to the exclusion of any terms and conditions which Supplier may purport to apply to, or which are endorsed upon any

correspondence or documents issued by Supplier to Port Authority in connection with, the Order or the Services the subject thereof, irrespective of their date of communication to Port Authority. There may be additional terms and conditions specified by Port Authority in an Order for the purchase of Goods and/or Services. In such circumstances, the terms of the Order will prevail if there is any inconsistency between the terms of the Order and these Conditions.

- (d) The earlier of the Supplier's confirmation of acceptance of the Order or the commencement provision of any Goods or Services, constitutes Supplier's acceptance and its agreement to be bound by these Conditions and the Agreement.

3 OBLIGATIONS

- (a) Supplier must:
 - (i) deliver the Goods or perform Services using due care, skill and diligence;
 - (ii) ensure the Goods or Services meet the specifications specified in the Order or (where applicable) pursuant to any variation under clause 10 of these Conditions;
 - (iii) ensure the Goods or Services are fit for the purposes for which goods, Services of a similar nature to the Goods or Services are commonly supplied and for any other purposes notified by Port Authority;
 - (iv) ensure that the Services supplied, if software or data, do not contain any harmful code (such as viruses or other malicious code);
 - (v) in providing any Services:
 - (A) ensure that it is suitably qualified and experienced in the performance of Services similar to the Services; and
 - (B) provide the Services in accordance with any requirements specified in the Order;
 - (vi) do and perform all such other acts, matters and things as may be necessary or convenient to give effect to the intentions of the parties as expressed in the Agreement;
 - (vii) comply with Port Authority's reasonable directions, instructions, procedures and policies, whether such procedures and policies are specifically drawn to the attention of Supplier or as might reasonably be inferred from the circumstances, including the Supplier Code of Conduct. Port Authority will endeavour to provide reasonable notice of changes in policies or procedures which will impact the Supplier's delivery of the Goods or performance of the Services and otherwise make the policies and procedures available to the Supplier;
 - (viii) maintain at Supplier's own expense all equipment and supplies necessary to enable Supplier to discharge Supplier's responsibilities under the Agreement;

- (ix) as soon as practicable after becoming aware of any matter or circumstances which may adversely affect the Delivery of the Goods or Services, give written notice to Port Authority detailing the matter or circumstances and its anticipated effect on the Goods or Services;
 - (x) obtain all licenses, approvals and consents necessary to perform its obligations under the Agreement;
 - (xi) comply with all applicable Laws and standards (including relating to the environment and, where the Goods are being delivered by road, all Laws relating to fatigue management, speed and mass, dimension and load restraint compliance requirements (generally referred to as “Chain of Responsibility” laws or “Heavy Vehicle” laws));
 - (xii) If the Services involve Construction Works, at all times comply with and meet (and ensure any subcontractors associated with the Services comply with and meet) any obligations imposed by, the New South Wales Industrial Relations Guidelines: Building and Construction Procurement and notify the Construction Compliance Unit (CCU) and Port Authority of any possible non-compliance with the NSW Guidelines, and of remedial action taken, within 24 hours of becoming aware of the possible non-compliance. The Contractor must maintain adequate records of compliance with the NSW Guidelines by it, its subcontractors, consultants and related entities;
 - (xiii) not sell or otherwise part with possession, custody or control of, nor encumber with any registered or unregistered charge, lien, mortgage, security (including a security interest under the *Personal Property Securities Act 2009* (Cth)):
 - (A) the Goods upon title passing to Port Authority in accordance with the Agreement; or
 - (B) Port Authority Equipment at any time except in accordance with the prior written consent of Port Authority;
 - (xiv) carry out all tests necessary to ensure the Goods or Services (as applicable) comply with the requirements of the Agreement;
 - (xv) only use Port Authority Equipment:
 - (A) for the sole purpose of performing the Services;
 - (B) in accordance with any directions of Port Authority; and
 - (C) in the manner in which and for the purpose that it was designed;
 - (xvi) take all reasonable care of Port Authority Equipment in its possession, custody or control;
 - (xvii) keep all Port Authority Equipment in its possession, custody or control secure and in good order and condition;
 - (xviii) return any Port Authority Equipment in its possession, custody or control to Port Authority on the earliest of:
 - (A) Delivery of all Services the subject of the Order;
 - (B) termination of the Agreement in accordance with its terms; and
 - (C) within 7 days of a request by Port Authority (or any later time agreed by Port Authority); and
 - (xix) not alter any Goods, any Port Authority Equipment or Services in any way, unless otherwise approved by Port Authority.
- (b) Subject to clause 16, if Supplier engages any person to perform any part of the Delivery of the Goods or Services, Supplier:
 - (i) must ensure such person is competent, experienced, appropriately accredited, qualified, licensed and trained; and
 - (ii) agrees it is vicariously liable for the acts and omissions of that person.

4 CONTRACT PRICE

- (a) The Contract Price is firm (unless expressly stated in the Order that a schedule of rates shall apply or the parties mutually agree otherwise in writing) and includes the cost of any packaging, marking, handling, freight and delivery, insurance and any other costs and charges, including costs associated with the return of goods wrongly supplied or defective Goods and any customs or import duties, taxes and any other imposts associated with the Goods or Services.
- (b) The price at which the Goods or Services are provided by Supplier to Port Authority does not (unless otherwise stated or agreed in writing) include GST, which must be added to the Contract Price and paid by Port Authority.

5 PAYMENT

- (a) Port Authority will pay Supplier the Contract Price (or the relevant part thereof) for Goods and/or Services the subject of the Order if:
 - (i) those Goods and/or Services have been Delivered in accordance with the Order;
 - (ii) Port Authority has accepted those Goods and/or Services; and
 - (iii) Supplier has submitted an invoice:
 - (A) in the form of a valid tax invoice in accordance with the GST Law;
 - (B) that includes sufficiently detailed information and documentary evidence to enable Port Authority to verify its accuracy; and
 - (C) which attaches any other information as may reasonably be requested or advised by Port Authority, including a written subcontractor’s statement evidencing payment of any

- subcontractors and workers, and payment of workers compensation insurance premiums and payroll tax relating to such persons, in a form which complies with the requirements of Schedule 2 Part 5 of the Payroll Tax Act 2007 (NSW), section 175B(7) of the Workers Compensation Act 1987 (NSW) and section 127(5) of the Industrial Relations Act 1996 (NSW).
- (b) Without prejudice to its rights under this Agreement or at law, within 10 Business Days of receipt of an invoice that complies with clause 5(a) Port Authority will assess the invoice and, if it disagree with the amount stated, issue a written payment schedule to Supplier certifying the amount it deems payable and basis for why it considers any amounts are not payable as claimed by the Supplier.
- (c) After receipt of an invoice, Port Authority will:
- (i) if a payment schedule has been issued by Port Authority in accordance with clause 5(b) in respect of the invoice, pay Supplier the amount certified as payable in the payment schedule; or
- (ii) if no payment schedule has been issued by Port Authority in accordance with clause 5(b) in respect of the invoice, pay the amount stated in the invoice.
- The payments referred to this clause will be made within:
- (iii) 15 Business Days if the Good or Services the subject of this Agreement is Construction Works; or
- (iv) 30 Business Days if the Good or Service the subject of this Agreement is not Construction Works.
- (d) Port Authority is not required to pay any amount to Supplier under the Agreement unless Supplier has complied with clause 5(a).
- (e) Port Authority may reduce or set-off against the Contract Price or any other amount payable by Port Authority to Supplier from time to time, whether under the Agreement or otherwise, any claim, charge, credit, rebate or other amount which should be reimbursed to or is otherwise payable to Port Authority by Supplier.
- (f) Notwithstanding this clause 5, Port Authority may elect to pay Supplier the Contract Price in accordance with the NSW Government Faster Payment Terms Policy, provided Supplier can demonstrate to Port Authority its eligibility to be paid for the Goods and/or Services in accordance with that policy.
- (g) Any payment made by Port Authority under or in connection with the Agreement is not an:
- (i) approval by Port Authority of Supplier's performance of or compliance with the Agreement; nor
- (ii) admission of liability.
- (a) Supplier, at its expense, must Deliver each Good or Service (as applicable):
- (i) in accordance with the relevant Delivery Date (time is of the essence);
- (ii) to or at the relevant Delivery Place(s), and in the relevant sequence (if applicable);
- (iii) in the relevant quantity; and
- (iv) between the hours (or otherwise between such other hours as may be reasonably determined by Port Authority and notified as such to Supplier), specified in the Order.
- (b) Supplier will promptly unload the Goods or perform the Services at the Delivery Place(s) in accordance with any reasonable directions given by Port Authority.
- (c) If Supplier is a foreign registered entity, then Delivery of the Goods must be in accordance with DDP (Delivered Duty Paid) (Sydney, Australia) (INCOTERMS 2010).
- (d) Supplier acknowledges and agrees that an Order may require Goods or Services to be Delivered:
- (i) at or to multiple Delivery Places; and
- (ii) in a specified sequence.
- ### 7 REJECTION OF GOODS OR SERVICES
- (a) If the Good or Service (or any part thereof) is not provided in accordance with this Agreement, Port Authority may provide a notice of rejection, stating that Port Authority elects to either:
- (i) require Supplier within 10 Business Days (or such other period as Port Authority sees fit, acting reasonably in the circumstances when considering of the impact of the failure on Port Authority and the required time to rectify the failure) to remedy the failure and rectify or replace the relevant Good or Service at no cost to Port Authority such that it fully complies with the Agreement; or
- (ii) accept the Good or Service, in which case the Port Authority may still elect to recover:
- (A) damages against Supplier or set-off against the Contract Price, or any other amount payable to Supplier by Port Authority whether under the Agreement or otherwise, an amount reasonably determined by Port Authority to represent the reduction in the value of the Good or Service; and/or
- (B) the reasonable costs of Port Authority having others (including third parties) rectify the defective Good or provide a replacement Service, which will be a debt due and immediately payable by Supplier to Port Authority upon demand.
- (b) If Supplier receives a notice of rejection under clause 7(a)(i), Supplier must, within 10 Business Days (or

6 DELIVERY AND PERFORMANCE

such other time period notified by Port Authority under the notice), remedy the failure and rectify or replace the relevant Good or Service at no cost to Port Authority such that it fully complies with the Agreement.

- (c) If Supplier fails to remedy the failure to the reasonable satisfaction of Port Authority in accordance with clause 7(b), Port Authority may, without limiting its other rights, immediately terminate the Agreement in accordance with clause 17.1 and/or have others (including third parties) rectify the defective Good or provide a replacement Service at Supplier's cost as a debt due and immediately payable by Supplier to Port Authority.
- (d) Signed delivery dockets are not evidence that a Good has been accepted or rejected by Port Authority.
- (e) The rights and remedies of Port Authority pursuant to this clause 7 are in addition to any other rights and remedies of Port Authority at law. Neither acceptance of a Good or Service, nor any payment made under the Agreement, will be construed as:
 - (i) in any way limiting Supplier's responsibility to provide all Goods or Services in accordance with the requirements of the Agreement;
 - (ii) an acknowledgement by Port Authority that Supplier has complied with its obligations under the Agreement; or
 - (iii) a waiver by Port Authority of any right under the Agreement or any cause of action arising out of any act or omission of Supplier.
- (f) Supplier is not entitled to payment for any Goods or Services rejected in accordance with this clause 7, and the price of any Goods or Services rejected will be deducted from the Contract Price.

8 TITLE AND RISK IN THE GOODS

- (a) Port Authority retains ownership of and title in Port Authority Equipment at all times and nothing in the Agreement confers on Supplier any property right of any kind in any Port Authority Equipment.
- (b) Risk of any loss or damage to Port Authority Equipment will pass:
 - (i) from Port Authority to Supplier when Supplier takes possession, custody or control of the Port Authority Equipment; and
 - (ii) from Supplier back to Port Authority on relinquishment by the Supplier of possession, custody or control of the Port Authority Equipment to Port Authority in accordance with the Agreement.
- (c) Risk of any loss or damage to a Good will pass from Supplier to Port Authority on the later of Delivery or completion of installation (where the Supplier is responsible for installation) of the Good in accordance with the Agreement.
- (d) Ownership of, and unencumbered title in, the Goods or any part of them will vest in Port Authority upon the earlier of payment for or Delivery of a Good.

Where ownership in title of a Good occurs before Delivery and the Good is subsequently rejected under clause 7, title in the rejected Good will re-vest in Supplier from the time of rejection until the Good is accepted by Port Authority.

9 DELIVERY PLACE

- (a) Where required, Port Authority will provide Supplier access to the Delivery Place to enable Supplier to comply with its obligations under the Agreement.
- (b) In accessing a Delivery Place to which access has been granted under clause 9(a), Supplier must:
 - (i) act in accordance with the reasonable instructions and directions of Port Authority;
 - (ii) attend any inductions relating to work health and safety as may be relevant to the Delivery Place; and
 - (iii) at all times, minimise nuisance, inconvenience and interference with the conduct of Port Authority's business and any of its other contractors at, or any other persons having a right of access to, or any area in the vicinity of, the Delivery Place.
- (c) Supplier is responsible for and assumes the risk of any cost, expense, loss, liability, damage or delay it suffers or incurs arising out of or connected with the physical conditions of any Delivery Place (and its surroundings) and any other premises where any Services are to be performed. The Supplier's responsibility under this clause is reduced proportionally to the extent that any cost, expense, loss, liability, damage or delay suffered by the Supplier arising out of or connected with the physical conditions of any Delivery Place is directly caused by Port Authority's negligence or willful misconduct.
- (d) Supplier must:
 - (i) undertake its own identification and analysis of work health and safety risks associated with the Goods or Services;
 - (ii) ensure that the Goods or Services conducted by or on its behalf comply with WHS Law and ensure that in providing the Good or Service, it does not do anything or fail to do anything that would cause Port Authority to be in breach of the WHS Law;
 - (iii) take all necessary measures to assess and eliminate or control risks arising from any hazards associated with the Goods or Services;
 - (iv) promptly provide to Port Authority, upon request, any information, documentation or evidence reasonably necessary to assist Port Authority to comply with its duties under WHS Law; and
 - (v) co-operate fully with, and promptly notify Port Authority of any investigation by, any government agency, Parliamentary inquiry, board of inquiry or coronial inquiry with respect to a 'notifiable incident' under section 35 of the *Work Health and Safety Act 2011* (NSW); and

retain management and control over the part(s) of the Delivery Place and manage all work health and safety matters at such part(s) of the Delivery Place that are affected by any physical works undertaken by or on behalf of the Supplier for the purposes of this Contract. This clause applies regardless of whether or not the Supplier is a 'principal contractor' for the purposes of the WHS Law and unless otherwise directed in writing by Port Authority,

- (e) Supplier must:
- (i) provide to Port Authority (by assignment or otherwise) all manufacturer's warranties provided with respect to the Goods or Services (if any); and
 - (ii) not take any action that will void or impair any third-party warranty unless authorised by Port Authority in writing.

10 VARIATIONS TO GOODS AND SERVICES

Port Authority may by written notice to Supplier:

- (a) increase or decrease the quantity of or omit any of the Goods or Services;
- (b) change the specification of any of the Goods or Services; or
- (c) vary the requirements of the Goods or Services,

and Supplier must comply with such direction unless it is unfeasible or unreasonable for Supplier to comply. If such direction causes Supplier to incur more or less cost than it would have otherwise incurred, Port Authority will, acting reasonably, assess the difference (including by reference to agreed rates, if any) and the Contract Price will be adjusted accordingly.

11 WARRANTIES

Supplier warrants that:

- (a) the Goods are new and unused (unless otherwise specified in the Order), free from deficiencies in design, manufacture and workmanship and that the Goods or Services are fit for the purposes for which goods or services of a similar nature to the Goods or Services are commonly supplied and for any other purposes notified by Port Authority;
- (b) the Goods or Services are in accordance with all applicable laws and recognised industry standards and will comply with all the requirements of the Agreement;
- (c) the Goods are free of any registered or unregistered charge, lien, mortgage, security (including a security interest under the *Personal Property Securities Act 2009* (Cth) or other encumbrance at the time title to the Goods passes to Port Authority;
- (d) the Goods or Services will be Delivered with proper diligence and care using best practices and professional skill;
- (e) in providing any Services, it is suitably qualified and experienced;

- (f) it has obtained all licences, authorisations, approvals and consents required for entering into and giving effect to the Agreement; and
- (g) to the best of its knowledge, as at the time of executing the Agreement, it does not have a conflict of interest, and no conflict of interest is likely to arise in the performance of the Agreement (please refer to the Supplier Code of Conduct for further information of when conflicts of interest may arise). Supplier must immediately notify Port Authority if it becomes aware of the existence or possibility of a conflict of interest.

12 INDEMNITY

- (a) Supplier bears the risk of and must indemnify and keep indemnified Port Authority and its employees, servants and agents (each an "**Indemnified Party**") from and against any liability, loss, damage, cost or expense incurred or suffered by any Indemnified Party arising out of or in connection with the Good or Service, including in respect of:
 - (i) personal injury, illness or death;
 - (ii) loss of or damage to any property;
 - (iii) infringement or alleged infringement of any person's IPRs;
 - (iv) Supplier's (or any of its employees', agents' or subcontractors') negligent, reckless or deliberate acts or omissions or non-compliance with any Law;
 - (v) Supplier's breach of clauses 15(d), (e) and (f) relating to privacy; or
- (b) The Supplier's liability to indemnify Port Authority under paragraph (a) will be reduced proportionally to the extent that any act or omission of Port Authority or any of its personnel caused or contributed to the liability, loss, damage, cost or expense incurred or suffered.

13 INSURANCE

- (a) Supplier must procure and maintain all insurances a prudent supplier providing goods, services similar to the Goods or Services would procure and maintain, including:
 - (i) transit insurance for the full cost of the replacement value of the Goods and/or any Port Authority Equipment in the possession, custody or control of Supplier;
 - (ii) public and product liability insurance to cover loss or damage to property or injury or death to persons arising out of or in connection with the supply of the Goods or Services (including loss or damage to Port Authority Equipment) for the insured amount of not less than \$20,000,000 per occurrence;
 - (iii) all insurances required by Law, including workers compensation insurance and, if motor

- (iv) vehicles are used in providing the Goods or Services, compulsory third party (CTP) insurance;
 - (v) if the Services are in the nature of professional services, professional indemnity insurance for the insured amount of not less than \$5,000,000 in the aggregate and which is maintained for a period of 5 years following Delivery or earlier termination of the Agreement; and
 - (vi) if the performance of the Services requires or involves the use of watercraft:
 - (A) marine hull and machinery insurance, including collision liability, on all watercraft so used, with a limit of cover not less than the market value of the watercraft; and
 - (B) protection and indemnity insurance including coverage for injuries or death of masters, mates and crews. Such insurance must provide cover to an amount of not less than \$10,000,000 for each and every claim.
 - (b) The insurances required by this clause 13 must be on commercially acceptable terms and with a reputable insurer that is the holder of a current licence issued by the Australian Prudential Regulation Authority and which is acceptable to Port Authority (acting reasonably).
 - (c) At the date of execution of the Agreement and any time at Port Authority's request thereafter, Supplier must provide satisfactory evidence of the insurances procured and maintained in accordance with this clause 13. Such evidence may include certificates of currency (no more than 20 days old).
 - (d) Notwithstanding any other provision of the Agreement, any obligation of Supplier under the Agreement to procure policies of insurance (including those policies under clause 13(a)) do not apply while Supplier is a member agency of the NSW Government's risk management self-insurance scheme known as the Treasury Managed Fund.
- (iv) agrees that it has no right, title or interest (including any IPR) in, and must not use, any documentation, data, drawings, specifications or any other records or documentation provided to Supplier by Port Authority under or in connection with the Agreement (**Port Authority Documents**), otherwise than in accordance with clause 14(b);
 - (v) without limiting any other sub-clause of this clause 14 or clause 8(a), agrees that the provision of any Port Authority Equipment to Supplier under the Agreement does not create in favour of or confer on Supplier any right, title or interest in any IPR associated with the Port Authority Equipment; and
 - (vi) other than strictly in accordance with the Agreement, must not, whether directly or indirectly, modify, vary, improve, adapt, copy, create works derived from, analyse, remove components from, decompile, reverse engineer, or attempt to derive source code, techniques, algorithms or processes from, any Port Authority Equipment or part thereof, or permit or encourage any other person to do so.
- (b) Port Authority grants Supplier a non-transferable, royalty-free and non-exclusive licence to use the Port Authority Documents for the sole purpose of performing its obligations under the Agreement. The licence granted to Supplier by Port Authority in this clause 14(b) will terminate upon the earlier of completion of Supplier's obligations under the Agreement and termination of the Agreement for whatever reason.
 - (c) In this clause 14, the words "use" or "using" includes reproducing, making adaptations of, modifying, or incorporating into other work.

15 CONFIDENTIALITY AND PRIVACY

- (a) Each party must ensure that Confidential Information provided by the other party is not disclosed, except to the extent the disclosure is:
 - (i) authorised by the prior written approval of the other party;
 - (ii) required by law (including the *Government Information (Public Access) Act 2009* (NSW) (**GIPA Act**)), due to statutory or portfolio duties, or for public accountability reasons, including following a request by Parliament or Parliamentary Committee;
 - (iii) to a professional adviser, insurer, financier or auditor of a party to the extent necessary for the purposes of the Agreement, or in the case of Port Authority to NSW government departments or agencies any information relating to the Contractor's performance under this Contract;
 - (iv) necessary for the conduct of any legal proceedings arising in relation to the Agreement; or

14 INTELLECTUAL PROPERTY

- (a) Supplier:
 - (i) warrants that it has all IPRs necessary to provide the Goods to Port Authority and perform any Services;
 - (ii) grants (or will procure for) Port Authority an irrevocable, non-exclusive, transferable, perpetual and royalty-free licence (including a right of sub-licence) to use all IPR necessary for Port Authority (and any of its successors) to have the full benefit of the Goods or Services for any purpose;
 - (iii) warrants that:
 - (A) the provision of the Goods and Port Authority's use of the Goods; and
 - (B) its performance of any Services, will not infringe any person's IPR;

- (v) necessary for a party to fulfil its obligations under the Agreement.
- (b) Supplier must, at its expense and within the time reasonably requested by Port Authority, provide Port Authority with access to and copies of (if required by Port Authority) such information reasonably requested by Port Authority in Supplier's possession relating to the Agreement for the purposes of Port Authority's compliance with the GIPA Act, including information supplied by or on behalf of Port Authority to Supplier.
- (c) If in the performance of any Services Supplier requires access to the Network or any sensitive Port Authority information or data, including Confidential Information, Port Authority may require Supplier to execute additional data security and confidentiality terms prior to granting Supplier such access.
- (d) To the extent Supplier acquires Personal information in connection with the Agreement, Supplier must at all times:
 - (i) comply with all applicable laws relating to privacy (including the *Health Records and Information Privacy Act 2002* (NSW) and the *Privacy and Personal Information Protection Act 1998* (NSW) as though those Acts applied to Supplier); and
 - (ii) not collect, store, handle or use any Personal Information other than as required for the sole purpose of performing its obligations to Port Authority and on Port Authority instructions.
- (e) The Supplier must:
 - (i) take all reasonable steps to protect all Personal Information it may come in contact with against misuse and loss and from unauthorised access, modification or disclosure;
 - (ii) only allow its employees, officers, contractors and agents to access any Personal Information where necessary to perform the services for Port Authority;
 - (iii) on the earlier of the termination or expiry of our agreement, and whenever requested by the Port Authority return copies of all Personal Information in its possession or control. Supplier may only otherwise deal with the Personal Information in accordance with Port Authority written instructions;
 - (iv) immediately notify the Port Authority if the Supplier becomes aware of:
 - (A) any unauthorised access, modification or disclosure or any misuse, interference or loss of any Personal Information in the possession or control of the Supplier; and
 - (B) a breach or possible breach of its obligations in relation to the collection, use, disclosure, storage or handling of Personal Information under the Agreement.

- (f) For the purposes of this clause 15, the term "Personal Information" has the meaning given in the *Privacy and Personal Information Protection Act 1998* (NSW).

16 SUBCONTRACTING, ASSIGNMENT & ADVERTISING

- (a) Supplier must not:
 - (i) assign the benefit of or novate the Agreement, nor subcontract any part of the Delivery of any of the Goods or Services; or
 - (ii) advertise or publish anything concerning the Agreement,
without the prior written consent of Port Authority.
- (b) An approval given by Port Authority permitting Supplier to subcontract any portion of the Delivery of the Goods or Services does not relieve Supplier from its obligations and liabilities pursuant to the Agreement, and Supplier will be liable for the acts and omissions of its subcontractors.
- (c) Port Authority must only assign the benefit of or novate the Agreement to parties who, acting reasonably. It considers able to fulfil the financial obligations to make payment of any unpaid balance of the Contract Price to the Supplier.

17 TERMINATION

17.1 TERMINATION FOR CAUSE

- (a) Port Authority may terminate the Agreement if:
 - (i) Supplier:
 - (A) does not Deliver a Good or Service by the relevant Delivery Date or to the relevant Delivery Place; or
 - (B) notifies Port Authority that it will be unable to Deliver a Good or Service by the relevant Delivery Date or to the relevant Delivery Place; and
the Supplier's failure is incapable of being remedied to meet the reasonable requirements of Port Authority.
 - (ii) Port Authority does not accept a Good or Service for the reasons specified in clause 7(e);
 - (iii) Supplier experiences a material adverse change in its circumstances, its legal structure or its identity which in the reasonable opinion of Port Authority adversely impacts Supplier's ability to perform its obligations under the Agreement;
 - (iv) Supplier has been wound up or is deemed to be insolvent under any provision of the *Corporations Act* or any statute or any other Law;
 - (v) Supplier breaches the Agreement and the breach is not capable of remedy; or
 - (vi) Supplier does not remedy a breach of the Agreement which is capable of remedy within 10 Business Days or such other period as is reasonably specified by Port Authority (taking

(vii) into account the impact of the breach on Port Authority and the reasonable time required for its rectification) in a notice of default issued by Port Authority to Supplier.

(b) If the Agreement is terminated by Port Authority in accordance with this clause 17, Port Authority is liable only for payments due and payable under clause 4 for Goods or Services accepted before the effective date of termination.

17.2 TERMINATION FOR CONVENIENCE

(a) In addition to any other rights or remedies it has under the Agreement, Port Authority may at any time terminate the Agreement for convenience by notifying Supplier in writing.

(b) Subject to paragraph 17.2(c), in the event Port Authority terminates this Agreement, in accordance with paragraph 17.2(a), Port Authority will pay the Supplier:

(i) for all any accepted Goods Delivered and Services or Construction Works physically performed (with reference to the portion of the Contract Price applicable to those Services or Construction Works, where applicable) in accordance with the Agreement up until the date of termination; and

(ii) the direct and substantiated expenses unavoidably incurred by the Supplier as a direct result of the early termination (excluding any loss of profit, loss of opportunity, loss of contract or loss of wages), up to a maximum amount equal to the value of one month of the Services, provided that the Supplier has taken all reasonable steps to mitigate such expenses.

(c) The amounts to which the Supplier is entitled under paragraph 17.2(b) will be a limitation upon Port Authority's liability to the Supplier arising out of, or in any way in connection with, the termination of this Agreement by Port Authority under paragraph 17.2(a) and the Supplier may not make any claim against Port Authority arising out of, or in any way in connection with, the termination of this Agreement under paragraph 17.2(a) other than for the amounts payable under paragraph 17.2(b).

17.3 CONSEQUENCES OF TERMINATION

(a) On termination or expiry of the Agreement, without limiting any other rights or remedies Port Authority may have, Supplier must:

(i) immediately cease Delivering the Goods or Services; and

(ii) within 7 days, at Port Authority's election, return to Port Authority or destroy (or in the case of machine readable records, erase) all property, Port Authority Equipment, documents and other materials provided by Port Authority to Supplier, including any Confidential Information.

(b) Without limiting clauses 17.1 and 17.2, termination of the Agreement for any reason will not affect any rights or remedies accrued by either party, whether under the Agreement or at law, prior to the date of termination.

18 MODERN SLAVERY

(a) Supplier warrants that:

(i) it will not supply any Goods or Services it knows (or ought to know through the making of reasonable inquiries) are the product of; and

(ii) it does not use any labour practices involving, Modern Slavery.

(b) If Supplier is a 'reporting entity' for the purposes of any state or federal Modern Slavery legislation, including the *Modern Slavery Act 2018* (Cth), it must provide Port Authority with a copy of any report it is required to prepare under that legislation at Port Authority's request.

(c) For the purposes of this clause 18, "**Modern Slavery**" has the meaning given in section 4 of the *Modern Slavery Act 2018* (Cth), and includes any form of slavery, servitude, debt bondage, deceptive recruitment practices, or forced labour to exploit children or other persons.

19 NO EXCLUSIVITY

Entering into the Agreement with Port Authority does not:

(a) give Supplier the right to be the sole deliverer or supplier of any Goods or Services to Port Authority;

(b) oblige Port Authority to acquire any particular quantity of any goods from Supplier; or

(c) prevent Port Authority from obtaining goods, Services that are the same as, or similar to, the Goods or Services from other suppliers.

20 PUBLICITY

Supplier must not use Port Authority's name in any publication, press statement, press conference or other form of publicity or media without first obtaining the written consent of Port Authority (which may be withheld in Port Authority's sole discretion).

21 ANTI-CORRUPTION

(a) In this clause 21:

(i) "**Advantage**" means any financial or other advantage, payment, gift, promise or transfer of anything of value;

(ii) "**Applicable Corruption Law**" means all of the laws, rules, regulations and other legally binding measures imposed in the State of New South Wales relating to bribery, corruption, money laundering, fraud or similar activities;

(iii) "**Corrupt Conduct**" has the meaning given in the *Independent Commission Against Corruption Act 1988* (NSW);

- (iv) “ICAC” means the Independent Commission Against Corruption; and
 - (v) “Public Official” includes any person representing or employed by a government department or enterprise.
 - (b) Supplier must always comply with all Applicable Corruption Law and not offer, promise or give (either directly or indirectly) any financial or other Advantage:
 - (i) to any person with the intention of inducing that person to breach a position of trust or duty of good faith or impartiality; or
 - (ii) to any Public Official intending to influence that official with the aim that either party should benefit as a result.
 - (c) Supplier warrants to Port Authority that:
 - (vi) it has not been found by the ICAC to have engaged in Corrupt Conduct; and
 - (vii) performing its obligations under the Agreement it will not employ or continue to employ any personnel (including any subcontractor) found by the ICAC to have engaged in Corrupt Conduct
- Security Interest over the Collateral;
 - (ii) register any other document on the PPS Register which is necessary to perfect Port Authority’s Security Interest over the Collateral; or
 - (iii) correct a defect in this Agreement.
 - (e) The Supplier undertakes to:
 - (i) not register, or permit to be registered by any third party including a subcontractor, a Financing Statement or a Financing Change Statement in respect of the Collateral without the prior consent of Port Authority; and
 - (ii) keep full and complete records of the Collateral.
 - (f) Port Authority and the Supplier agree that:
 - (i) the following provisions of the PPSA do not apply to this Contract: section 95; section 121(4); section 125; section 129; section 130; section 132(3)(d); section 132(4); section 135; section 142; and section 143;
 - (ii) unless otherwise agreed by Port Authority, the Supplier waives its right to receive a Verification Statement in accordance with section 157 of the PPSA; and
 - (iii) neither Port Authority nor the Supplier will disclose information of the kind mentioned in section 275(1) of the PPSA and the Supplier will not authorise, and will ensure that no party authorises, the disclosure of such information, except where required by section 275(7) of the PPSA.

22 PPSA

- (a) In this clause 22:
 - (i) “PPSA” means the *Personal Property Securities Act 2009* (Cth);
 - (ii) “PPS Register” means the Personal Property Securities Register established under section 147 of the PPSA; and
 - (iii) all capitalised terms not otherwise defined in this clause 21 have the same meaning as is attributed to them in the PPSA.
- (b) The Contractor acknowledges and agrees that:
 - (i) this Agreement constitutes a Security Agreement; and
 - (ii) this Agreement creates a Security Interest of Port Authority, including in relation to the deliverables produced as part of the Services (“Collateral”).
- (c) The Supplier consents to Port Authority registering Port Authority’s Security Interest over the Collateral and must ensure that each subcontractor consents to Port Authority registering Port Authority’s Security Interest in the Collateral, where applicable.
- (d) The Supplier undertakes to promptly sign any further documents and provide any further information (such information to be complete, accurate and up-to date in all respects) which Port Authority may reasonably require to:
 - (i) register a Financing Statement or Financing Change Statement on the PPS Register in relation to a

23 GENERAL

- (a) The Agreement records the entire agreement between the parties and supersedes all previous negotiations, understandings, representations and arrangements, in relation to its subject matter.
- (b) Supplier must ensure its employees, servants and agents comply with Supplier’s obligations under the Agreement as if they are party to it.
- (c) Nothing in the Agreement will be construed or interpreted as creating or constituting a relationship of employer and employee or principal and agent, or that of partners, joint venturers or any other fiduciary relationship, between the parties. The relationship between the parties is one of principal and independent contractor.
- (d) Unless expressly stated otherwise, no party has the authority to bind any other party by any representation, declaration or admission, or to make any contract or commitment on behalf of any other party or to pledge any other party’s credit.

- (e) A right or remedy created by the Agreement cannot be waived except in writing signed by the party entitled to that right.
- (f) Delay by a party in exercising a right or remedy does not constitute a waiver of that right or remedy, nor does a waiver (either wholly or in part) by a party of a right operate as a subsequent waiver of the same right or of any other right of that party.
- (g) If any part of the Agreement is or becomes illegal, invalid or unenforceable, the legality, validity or enforceability of the remainder of the Agreement shall not be affected and shall be read as if that part had been severed.
- (h) No provision of the Agreement or a right conferred by it can be varied except in writing signed by the parties.
- (i) The operation of Part 4 of the *Civil Liability Act 2002* (NSW) is excluded in relation to all and any rights, obligations and liabilities of the parties with respect to any matter to which Part 4 of that Act would apply but for this clause 23(i).
- (j) The rights and remedies under the Agreement are in addition to, and do not limit, any other rights of Port Authority at law.
- (k) In the Agreement, a reference to:
 - (i) legislation or a legislative provision includes any statutory modification, amendment or substitution of that legislation or legislative provision and any subordinate legislation issued under that legislation or legislative provision; and
 - (ii) a document is to that document as varied, novated, ratified or replaced from time to time.
- (l) A provision of the Agreement must not be construed to the disadvantage of a party merely because that party was responsible for the preparation of the Agreement or the inclusion of that provision in the Agreement.
- (m) The Agreement is governed by the laws of the State of New South Wales and the parties submit to the exclusive jurisdiction of the courts of such State and any courts competent to hear appeals from those courts.
- (n) The Agreement will not in any way unlawfully restrict or otherwise unlawfully affect the unfettered discretion of Port Authority to exercise any of its rights, functions or powers pursuant to any Law.
- (o) Nothing in this Agreement in any way limits any warranty implied by statute or at law that Port Authority has the benefit of, including statutory warranties in respect of merchantability or fitness for purpose.

24 RESOLUTION OF DISPUTES

- (a) Any dispute which arises out of or in connection with the Agreement must be the subject of at least

3 weeks' of bona fide negotiations at the appropriate authority level before either party commences legal proceedings. All aspects of the negotiations must be kept confidential, except the fact of their occurrence, and all communications between the parties during the negotiations are without prejudice.

- (b) Nothing in this clause 24 will prejudice the right of a party to seek urgent injunctive or declaratory relief from a court in respect of a dispute.
- (c) Notwithstanding the existence of a dispute, the parties must continue to perform their obligations under the Agreement.

25 RECORDS AND AUDIT

- (a) Supplier must keep and maintain financial, operational and other records to enable its compliance with this Agreement to be verified, including information relating to the Goods or Services and any other records required by Law (**Records**).
- (b) The Records must be maintained in an accessible and secure form for a period of at least 7 years' from the date of their creation, or longer if required by Law.
- (c) Supplier must:
 - (i) retain and provide such records and reports as may reasonably be required by Port Authority; and
 - (ii) comply with such reasonable directions given by Port Authority,

for the purposes of compliance with the *Security of Critical Infrastructure Act 2018* (Cth) and any rules or regulations enacted in connection with that Act, and, notwithstanding any other provision of this Agreement. Supplier will have no claim (whether for damages, expenses or otherwise) against Port Authority in connection with its compliance with this clause 25(c) (including its compliance with any reasonable direction given to it by Port Authority arising out of Part 3 of the Act).

- (d) Port Authority or a representative may conduct audits relevant to the Goods or the performance of the Services with reasonable notice in a manner which minimises (where practical) any disruption or interference to the Supplier's operations and personnel.

26 WORK HEALTH AND SAFETY

- (a) Where the Supplier is required by Port Authority to retain management and control over the part(s) of the Delivery Place in accordance with clause 9(d)(vi) in order to comply with its obligations under the Agreement, the Supplier must:
 - (i) prepare and maintain a work health and safety management plan that meets the requirements of the WHS Regulation and AS/NZS 4801:2001 (WHS Plan);
 - (ii) provide Port Authority with a copy of the

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- (iii) WHS Plan and any other Site specific work health and safety management plan and other registers, records and documents which the Supplier is required to prepare and maintain in connection with its obligations under the WHS Laws;
 - (iv) warrant that compliance with its WHS Plan will enable the **Supplier** to discharge its obligations under the WHS Laws; and
 - (v) acknowledge that any review by or on behalf of Port Authority of its WHS Plan does not constitute verification or approval by Port Authority of the content of the WHS Plan.
- (b) The Supplier must ensure that, before commencing any work, and so far as is reasonably practicable, each person who is to carry out work in respect of this Contract is made aware of:
- (i) the contents of the WHS Plan, to the extent it relates to the work carried out by the person; and
 - (ii) the person's right to inspect the WHS Plan under the WHS Regulation; and
 - (iii) made aware of any changes to the WHS Plan which are relevant to the work that person is carrying out.
- (c) The Supplier must immediately notify Port Authority upon becoming aware of:
- (i) any accident, notifiable incident (being an incident which is notifiable under any work health and safety legislation (including the WHS Laws)), injury or property damage which occurs during the performance of its obligations under the Agreement and within 24 hours of any such accident, incident or damage, provide a written report to Port Authority giving complete details of the accident, incident or damage, including the results of investigations into its cause and any recommendations or strategies for prevention of a recurrence; and
 - (ii) any order, direction, dispute, complaint or Claim being made by any person or entity against the **Supplier** or any of its Personnel in relation to any such accident, incident or damage
- (d) If requested by Port Authority, the Supplier must conduct an audit of its work health and safety practices in the manner and within the time specified by Port Authority. The Supplier may be required to comply with this clause more than once.
- (e) The Supplier must, upon Port Authority's request, provide Port Authority with:
- (i) a written report on all work health, safety and rehabilitation matters or any other relevant matters as Port Authority may require from time to time, including a summary of the Supplier's compliance with the WHS Laws and information regarding
- the Contractor's work health and safety system and the work health and safety systems of its subcontractors; and/or
- (ii) evidence of any approvals, certificates, authorisations, licences, prescribed qualifications or experience, or any other information relevant to work health and safety matters.
- (f) If during the performance of its obligations under the Agreement, the physical works required under this Contract form part of a 'construction project' for which a 'principal contractor' is required under the WHS Regulation, the Supplier must comply with all instructions and directions given by the 'principal contractor' (whether the 'principal contractor' is Port Authority or another party engaged by Port Authority as the 'principal contractor') in exercising its authority in that role pursuant to clause 293 of the WHS Regulation.