

# ROADS AND MARITIME SERVICES (RMS)

## CONTRACT DOCUMENT C93

### DESIGN AND CONSTRUCT REGISTRATION OF INTEREST

#### REVISION REGISTER

Ed/Rev Number	Clause Number	Description of Revision	Authorised By	Date
Ed 1/Rev 0		First issue	GM, IC	01.07.10
Ed 1/Rev 1	10.2(a)  Attachment to Schedule ES – Invitation Form	Schedule ES - Executive Summary-Mandatory Selection Requirements – paragraph (xiv) added  “Binding Agreement” section added	GM, IC	01.09.10
Ed 1/Rev 2	7.1  8.3  8.5  8.11  9.3  10.2(a)(iii)  10.2(a) Schedule ES - Executive Summary-Mandatory Selection Requirements – paragraph (xiv)  Attachment to Schedule ES – Invitation Form (c)	Deleted words “...as amended to reflect RMS’ specific Project objectives and requirements” in the 1 <sup>st</sup> paragraph.  “will” replaced with “may” in the 2 <sup>nd</sup> paragraph.  “Tenderer” replaced with “Applicant” in the 2 <sup>nd</sup> paragraph.  Last paragraph deleted  Evaluation criteria re-formatted and additional words included for Criterion No 2  “B20” replaced with “B10”  Paragraph (xiv) modified as given below: a) Words “...the issue of Information Documents” replaced with “...proceeding to Stage 2” b) New sub-paragraph added “Draft agreement must be submitted to RMS prior to proceeding to Stage 2 and must be acceptable to RMS.”  “B20” replaced with “B10”	GM, IC	15.09.10

Ed/Rev Number	Clause Number	Description of Revision	Authorised By	Date
Ed 1/Rev 2 (Cont.)	Attachment to Schedule ES – Invitation Form/Binding Agreement	Words “...the issue of Information Documents” replaced with “...proceeding to Stage 2”		
Ed 1/Rev 3	7.1  10.2 Schedule ES  Attachment to Schedule ES – Invitation Form	<p>Added new paragraphs: “Copies of the D&amp;C Deed (C92-1) and Schedules (C92-2) can be obtained from RMS website</p> <p><a href="http://whome.rta.nsw.gov.au/doingbusinesswithus/specifications/modellegaldocuments.html">http://whome.rta.nsw.gov.au/doingbusinesswithus/specifications/modellegaldocuments.html</a></p> <p>The Applicant must acknowledge and agree in its Application that, in the event that it is selected as the Recommended Tenderer, it is prepared to execute the Project Deed to undertake the design and construction of the Project, or specify any changes that it would require to the Project Deed.”</p> <p>New sub-clause added ie “(e) D&amp;C Deed”.  “D&amp;C Deed” section added.</p>	GM, IC	26.11.10
Ed 1/Rev 4	Appendix 4	New version of Parent Company Guarantee inserted	GM, IC	28.03.11
Ed 1/Rev 5	10.2(a)(i) to (vi)  10.2/Attachment to Schedule ES  Appendix 3/Clause 1(g)(iv)B	<p>Prequalification categories updated to reflect the National Prequalification Scheme</p> <p>Invitation Form modified - prequalification categories updated to reflect the National Prequalification Scheme</p> <p>Words “sections 52 and 53 (respectively) of the Trade Practices Act 1974” replaced with “in the <i>Competition and Consumer Act 2010 (Cth)</i>”</p>	GM, IC	20.07.11
Ed 1/Rev 6	10.2(a)(vi)  10.2/Attachment to Sch ES(f)  Appendix 5	<p>Steel fabrication prequalification category updated to “S”</p> <p>Steel fabrication prequalification category updated to “S”</p> <p>Modified to reflect National Prequalification Scheme</p>	GM, IC	12.08.11

Ed/Rev Number	Clause Number	Description of Revision	Authorised By	Date
Ed 1/Rev 7	Various	“RTA” replaced with “RMS”; “Roads and Traffic Authority of New South Wales” Replaced with “Roads and Maritime Services”; RTA’s ABN number replaced with RMS’ ABN number. “Probity Auditor” replaced with “Probity Adviser”.	GM, IC	11.07.12
	7	New clause; subsequent clauses re-numbered and cross-references corrected		
	8.1 (previously 7.1)	Deleted		
	8.4	Added words “including those relating to occupational health and safety and the environment” at the end of the paragraph		
	9.4	Added milestone “Completion of the Project”		
	10.1	Words “in clause 11.2 and clause 13.3(b)” added after “(“ES Schedule”)”		
	11.1	Added words “Schedule 4 – Project Deed proposed changes & Parent Company details”		
	11.2(a)(ix)	Removed reference to Section 9 of the Corporation Act 2001. Added paragraph to introduce RMS’ right to request an alternate entity to be the Parent Company		
	11.2(a)(xiv)	Deleted words related to RMS objective to maintain competitive industry and to spread benefits of the project		
	11.2(e)	Original clause deleted and replaced with words “The Applicant must provide the acknowledgement and agreement described in clause 7 if requested”		
	11.2/Attachment to Schedule ES	Modified to match changes made to Clause 11.2 as described above		
	11.2/Attachment to Schedule ES	Declaration of Compliance – reference to latest revision of the Australian Government Implementation Guidelines included (May 2012)		
	11.2/Schedule 4	New Schedule		
13.3(d)(i)	Added words “or the Contract” after words “Project Deed”			

<b>Ed/Rev Number</b>	<b>Clause Number</b>	<b>Description of Revision</b>	<b>Authorised By</b>	<b>Date</b>
Ed 1/Rev 7 (Cont.)	13.5	Added new bullet point “provide to a limited number of Applicants one or more Revised Project Deeds”		
	13.5/11 <sup>th</sup> bullet point/2 <sup>nd</sup> line	Added words “the Project Deed or Revised Project Deed” after words “to discuss”		
	13.10	Added words “(or a Parent Company of a Participant changes)” to 1 <sup>st</sup> sentence		
	14	Added definitions of “Non-approved Entity”, “Parent Company”, “Principal”, “Project Deed”, “RMS”, “RTA” and “Upgrade”		
	Appendix 4/Cls 1.1	Words “in the opinion of the Beneficiary” deleted from definition of “Material Adverse Effect”		
	Appendix 6	New Appendix		
Ed 1/Rev 8	9.10	New clause; subsequent clauses re-numbered	GM, IC	23.11.12
	Schedule 2	Re-written to match changes made in RFT (Ed 1/Rev 8 of the RFT)		
	14	Definition of the DAB inserted		
Ed 1/Rev 9	Schedule 2(b)(i)L	New sub-clause (General Superintendent)	GM, IC	11.12.12
	Schedule 2(b)(iii)C	“General superintendents” replaced with “Superintendents”		
	Appendix 4/Cls 3(c)	Words “or the Guarantor” included after words “unenforceable against the Contractor”		
Ed 1/Rev 10	9.5	Reference to legislation updated	GM, IC	24.07.13
	9.12	New clause; subsequent clauses re-numbered and cross-references corrected		
	9.13	Modified to reflect new requirements related to Building Code 2013.		
	11.2(a)(ix)	Clause split in two sub-clauses. Words “Holding Company Acknowledgement” inserted in sub-clause (i) after words “(or Non-approved Entity proposed by Participant)”. Words “acknowledgement and agreement” deleted in sub-clause (ii) and replaced with “Holding Company Acknowledgement”		
	11.2(a)(xi)	New clause – requirements related to the NSW Code added. Subsequent clauses re-numbered		
	11.2(a)(xii)	Modified to reflect new requirements related to Building Code 2013.		

<b>Ed/Rev Number</b>	<b>Clause Number</b>	<b>Description of Revision</b>	<b>Authorised By</b>	<b>Date</b>
Ed 1/Rev 10 (Cont.)	11.2(a)(xiv)	New paragraph inserted, starting with words “Where the Applicant or Participant proposed a Non-approved Entity...” to match words given in the Invitation Form. New financial assessment requirements inserted (paragraphs A to N)		
	11.2/Attachment to Schedule ES	Modified to match changes made to Clauses 9.12 and 9.13 as described above		
	11.2/Attachment to Schedule ES	Annexure 1 – new Schedule of Compliance with the NSW Code included		
	11.2/Attachment to Schedule ES	Annexure 2 - Declaration of Compliance – modified to reflect new requirements re Building Code 2013		
	13.2	Clause deleted. Subsequent clauses re-numbered and cross-references corrected		
	15	Definitions updated/ modified to reflect changes re NSW Code and Building Code		
	Appendix 3	Deed of Disclaimer modified to reflect changes re RMS Data. Schedules B (RMS Geotechnical Data) , C (RMS Flood Data) and D (RMS Noise Data) added, to match the Deed of Disclaimer given in RFT		
	Appendix 4/Cls 3A(a)(ii)	Words “respect of” deleted in the first line and replaced with words “connection with”		
	Appendix 4/Cls 4.2(f)	Inserted words “except only to the extent that RMS has, in writing, provided a release or discharge which has the effect of reducing the obligations of the Relevant Person” at the end of the clause		
	Appendix 4/Cls 4.7	Last two sentences deleted (RMS can no longer be appointed as the Guarantor’s attorney)		
	Appendix 4/Cls 8	Words “any Transaction Document” deleted and replaced with “this Deed to any party to whom it validly assigns the benefit of the Contract”		
Ed 1/Rev 11	Various	References to various NSW Government Guidelines and legislation updated	GM, CPS	11.08.14
	9.11	Content deleted. Clause retained as “Not Used”		
Ed 1/Rev 12	Whole document	“Minister for Employment and Workplace Relations” changed to “Minister for Employment”. “Planning and Infrastructure Minister” changed to “Planning Minister”	GM, CPS	09.01.15

<b>Ed/Rev Number</b>	<b>Clause Number</b>	<b>Description of Revision</b>	<b>Authorised By</b>	<b>Date</b>
Ed 1/Rev 12 (Cont.)	9.12.(d)(ii)	Requirement to submit WHS Management Plan relaxed in accordance with the NSW Industrial Relations Practice Direction 2013/2		
	11.2(a)(i) to (vi)	Hyperlinks to RMS Register of Prequalified Contractors deleted. Inserted requirement to be prequalified at a Closing Date and Time.		
	11.2(a)(xi)B.(ii)	Modified to reflect change to clause 9.12.(d)(ii)		
	11.2/Attachment to Schedule ES/(b) to (g)	Hyperlinks to RMS Register of Prequalified Contractors deleted. Inserted requirement to be prequalified at a Closing Date and Time.		
	11.2/Attachment to Schedule ES/(q)	Modified to reflect change to clause 9.12.(d)(ii)		
	11.2/Annexure 1/Clause 8 Schedule 2 Appendix 5	Modified to reflect change to clause 9.12.(d)(ii) Item (b)(i)K deleted to make it consistent with RFT, subsequent item re-numbered Deleted, including all cross-references		
Ed 1/Rev 13	9.6	New requirements inserted re apprenticeship targets	GM, CPS	30.01.15
	10.3	New evaluation criterion inserted		
	11.1	Reference to new Schedule 4 inserted		
	11.2	New Schedule 4 inserted (Referees); cross-referencing corrected		
Ed 1/Rev 14	9.7	Modified to reflect requirements of the new NSW Government Policy on Aboriginal Participation in Construction	GM, CPS	31.03.15
Ed 1/Rev 15	Schedule 4	Referees Level changed where Contractor has worked with Government	GM, CPS	05.05.15
Ed 1/Rev 16	9.5	Content related to Australian Government WHS Accreditation Scheme deleted and moved to Cls 9.13.2	GM, CPS	06.08.15
	9.13	Split in two parts, to separate Building Code 2013 clauses from Australian Government WHS Accreditation Scheme clauses		
	9.13.1(a)	New paragraph, to emphasise that Building Code 2013 only applies to projects fully or partially funded by the Commonwealth		

<b>Ed/Rev Number</b>	<b>Clause Number</b>	<b>Description of Revision</b>	<b>Authorised By</b>	<b>Date</b>
Ed 1/Rev 16 (Cont.)	9.13.2(a)	New paragraph, to emphasise that the requirements of the Australian Government WHS Accreditation Scheme only applies to projects fully or partially funded by the Commonwealth		
	9.13.2(d)	New paragraph - Reference to “Regulation 24(h) of the Fair Work (Building Industry – Accreditation Scheme) Regulations 2005” inserted		
	Annexure 2 to Invitation Form	Reference to “Regulation 24(h) of the Fair Work (Building Industry – Accreditation Scheme) Regulations 2005” inserted		
Ed 1/Rev 17	9.11	New clause – Heavy Vehicle National Law - Chain of Responsibility Provisions	GM, CPS	22.09.15
	9.14	New clause - Australian Industry Participation Plan		
	14	Inserted definitions of “Chain of Responsibility Provisions” and “Australian Industry Participation Plan”		
Ed 1/Rev 18	9.6	Inserted requirements re “ <i>Skills and Training in the Construction Industry</i> ”	GM, Commercial	20.06.16
	9.7	Clause revised to reflect mandatory implementation of the NSW Government Policy on Aboriginal Participation in Construction		
	9.11	Word ‘National’ deleted from all references to ‘Heavy Vehicle National Law’		
	9.13.1(h)(ii); 11.2(a)(xii)B (ii); Item (s) of Attachment to ES Schedule	Inserted requirement re FWBC letter of compliance		
	9.14	New paragraph inserted related to the AIP Plan prepared under the Australian Jobs Act 2013		
	12.1	Application lodgement requirements changed		
	14	Definition of “Certified AIP Plan” modified to reflect change made to clause 9.14. Definition of “Chain of Responsibility Provisions” modified to reflect change made to clause 9.11 Inserted new definition of “Heavy Vehicle Law”.		

<b>Ed/Rev Number</b>	<b>Clause Number</b>	<b>Description of Revision</b>	<b>Authorised By</b>	<b>Date</b>
Ed 1/Rev 19	9.13; 11.2(b)(xi), (xii)&(xiii) Attachment to ES Schedule (Invitation Form); Annexures 2A & 2B to Invitation Form; 14  9.6  9.12; Annexure 1 to Invitation Form	Updated as a result of the enactment of the <i>Building and Construction Industry (Improving Productivity) Act 2016</i> (Cth) and <i>the Code for the Tendering and Performance of Building Work 2016</i>  Amended reporting requirements  Minor edits	GM, Commercial Services	11.07.17
Ed 1/Rev 20	Schedule 4	Appendix 1 inserted, to make it consistent with C12	Director, Commercial Services	04.08.17
Ed 1/Rev 21	Annexure 2B to Invitation Form	Minor change re regulation 26(1)(f) requirement	Director, Commercial Services	16.08.17
Ed 1/Rev 22	Cl 8.3.2  Cls 9.13.1 (c)(iv) & (e)(i)A, Annexure 2A 6(a)(i), 6(b)(ii), 8(b), Attachment A Item 3	Removed reference to asbestos in Contractor Arranged Insurance  Revised to reflect the introduction of the Work Health and Safety Regulation 2017, replacing the 2011 Regulation	Director, Commercial Services	29.09.17





**Transport**  
Roads & Maritime  
Services

## Design and Construction of

*[insert Project Name]*

Invitation to submit a

# **Registration of Interest**

Contract Number:

*[insert Contract Number]*

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## 1. INTRODUCTION

*[insert short description of the Project and if desired, give a start date and a completion date.]*

The Project will require some approvals from regulatory agencies before construction can commence.

The location of the *[insert Project Name]* upgrade is shown in Appendix 1.

In this Invitation all words and expressions (unless the context otherwise requires) have the meanings assigned to them in clause 14.

## 2. SUBMISSION OF APPLICATIONS AND SELECTION PROCESS

The selection of the Contractor to carry out the Project will involve the following two-phase process: -

### **Phase I: *Registration of Interest***

This phase deals with the submission of Applications and the selection of Tenderers from the Applicants. The Applications will be evaluated and a shortlist of Applicants will be selected to submit Tenders to carry out the Project.

This document forms part of Phase I.

### **Phase II: *Submission of Tenders and awarding of the Contract***

This phase deals with the submission of Tenders from a shortlist of Applicants, the selection of a Contractor from the Tenderers and the award of the Contract.

This Invitation seeks the submission of Applications from Applicants to register their interest to submit a Tender for the Project as a part of Phase I of the Contractor selection process.

The Applicants are required to nominate their principal design organisations and significant personnel in their Applications. If an Applicant is shortlisted to proceed to Phase II, RMS expects that these principal design organisations and significant personnel will, within reason, be nominated and included for the same roles in the Applicant's Tender and, if the Applicant is the successful Tenderer, the Contract.

## 3. ROLE OF THE PROBITY ADVISER

A Probity Adviser has been appointed. The Probity Adviser's role in the selection process will include the following: -

- ensuring that the procedures adopted in receiving of Applications and the evaluation process of Applications are fair and equitable and that the probity of the process is independently validated;

- monitoring and reporting to RMS that the evaluation process and procedures have been followed and that the outcome is capable of being independently validated;
- providing confidence to all Applicants that appropriate processes were fully adhered to and that no Applicants were given an unfair advantage or were unfairly discriminated against;
- providing guidance to RMS in relation to the probity of Applications and the involvement of Related Companies in two or more Applications;
- providing guidance to RMS as to how unforeseen probity issues could be resolved;
- attending evaluation team and RMS meetings where relevant;
- attending any Applicant meetings and presentations;
- monitoring communication during the period between submission of Applications and final decisions;
- attending debriefing meetings of successful and unsuccessful Applicants, where applicable; and
- preparing a report outlining the work performed, any issues that arose during the process and confirming that the evaluation process and procedures have been followed.

The Probity Adviser is an independent observer of the selection process and will not be involved in the actual evaluation of any Application. Applicants who have any concerns about the conduct or probity of the selection process should promptly bring their concerns to the Probity Adviser's attention.

The Probity Adviser is *[insert name]* of *[insert company]*. In respect of probity issues, Applicants may contact *[insert name]* as follows: -

Mobile:                *[insert mobile number]*  
 Email:                 *[insert email address]*  
 Facsimile:            *[insert facsimile address]*

#### **4. DESCRIPTION OF THE PROJECT**

*[insert a more detailed description of the Project than that given in clause 1]*

The location of the *[insert Project Name]* upgrade is shown in Appendix 1.

## 5. INFORMATION AVAILABLE TO APPLICANTS

This document is supplemented by an “Information Package” that includes a compilation of environmental documents and approvals that are relevant to the Project. Appendix 2 contains a list of the documents and approvals included in the Information Package. The documents included in the Information Package are subject to the disclaimers in clause 13.7 Disclaimer and Appendix 2 – clause 1 General.

## 6. PROJECT OBJECTIVES

The objectives of the Project are described in section *[insert section number]* of the Environmental Assessment, which is included in the Information Package. These objectives take into account the broader *[insert program]* objectives. The Project specific objectives, as stated in the Environmental Assessment, include: -

*[insert objectives]*

## 7. PROJECT DEED

The Project is to be delivered via a Contract that is based on the D&C Deed. The D&C Deed encourages co-operative relations in the management of the Project. It includes processes aimed at facilitating proactive roles and participation by both parties to the D&C Deed in the resolution of issues at the early stages of their development.

The current draft of the *[insert Project name]* upgrade version of the D&C Deed is attached at Appendix 5 (the "**Project Deed**").

The Applicant should note that the Project Deed (including the Schedules) will be subject to changes by RMS during Phase I. One or more revised versions of the Project Deed will be issued prior to commencement of Phase II.

If the Applicant wishes to propose changes to the Project Deed attached at Appendix 5, the Applicant must detail those changes in its Application in the form of Schedule 5, including specifying the rationale for the requested changes. RMS, in its absolute discretion, may consider the Applicant’s proposed changes for inclusion in a revised version of the Project Deed.

As part of Phase I, Applicants that RMS is considering selecting for the shortlist to submit Tenders for the Project may be requested to provide acknowledgement and agreement:

- that the Applicant is prepared to execute the revised version of the Project Deed (subject to changes referred to in the following bullet point), if it is selected as the successful Tenderer;
- that finalising the form of the Project Deed will require completing the Project Deed Schedules with information submitted by the successful Tenderer, which may include details which RMS considers (in its absolute discretion) are necessary to capture the features of the successful Tenderer's Tender, and may include such other changes to the Project Deed as may be required by RMS; and
- from the Applicant's ultimate holding company (or other entity acceptable to RMS), that the ultimate holding company (or other entity acceptable to RMS) is willing to sign a Parent Company Guarantee in the form of Appendix 4, where RMS is not satisfied with the acknowledgement and agreement included in an Application pursuant to clause (l) of the Invitation Form.

## 8. PHASE II REQUIREMENTS

This clause 8 and parts of clause 9 following provide a high level indicative overview of how RMS is currently intending to proceed with Phase II of the selection process and its key anticipated requirements for the Contract. Without limiting clauses 13.4 and 13.5, RMS is not bound to proceed on the basis set out in clauses 8 and 9 and Applicants should note that the information is subject to change.

### 8.1 PHASE II PROCESS

The Phase II selection process will include the following key initiatives:-

- **Positive guidance meetings/workshops** which are convened separately with each Tenderer during the tender period to provide a forum in which the Tenderer can discuss with RMS technical, construction and design issues arising from the Request for Tender, and for RMS to provide positive guidance to the Tenderer in relation to those issues. The purpose of the workshops is to avoid unproductive work being carried out and to reduce the likelihood of a Tenderer submitting unacceptable solutions in its Tender; and
- **Project Verifier (“PV”) selection** –Tenderers will be required to provide proposals from two different organisations for the provision of the project verification services. RMS will choose the PV to be engaged to provide the project verification services for the successful Tenderer. The Applicant is not required to nominate the Project Verifiers in the Application.

### 8.2 SECURITY

It is anticipated that, in the event that RMS executes a Contract for this Project, the Contractor will be required to provide security in the amount of 5% of the Project contract sum until: -

- 28 days after the Date of Construction Completion for 50% of this amount;
- 28 days after the first anniversary of the Date of Construction Completion for 30% of this amount; and
- 28 days after the Date of Final Completion for 20% of this amount.



## **8.3 INSURANCE**

### **8.3.1 Principal Arranged Insurance**

The Contract will provide for RMS arranged public liability insurance and insurance of the Contract works. The anticipated levels of insurances are as follows: -

- contract works - Contract value; and
- third party liability - \$200 million.

RMS has a principal professional indemnity insurance policy for its own benefit, which does not relieve the Contractor, or any of its sub-contractors (including consultants), from any responsibility in relation to professional acts, errors or omissions. RMS will not set any requirements for professional indemnity insurance in the Contract, but the Contractor and its sub-contractors (including consultants) should make their own independent decision regarding their own requirements for professional indemnity insurance coverage.

### **8.3.2 Contractor Arranged Insurance**

The Contractor will be required to provide and maintain the following insurance policies related to the Project to the levels indicated: -

- motor vehicle/mobile plant/third party property - \$20 million (minimum);
- workers compensation – minimum amount as required by law; and
- other insurances as may be required by RMS, including, but not limited to, water borne craft.

## **8.4 PROJECT RISKS**

The Contractor will be expected to make adequate allowance for the Project risks arising during investigation, design and construction of the Project, including those associated with traffic conditions, site conditions (including terrain, existing structures, geology, hydrology and contamination), waterway conditions, services and services adjustments, approvals required from any agency or government authority, work in and or above rail corridors, property adjustments, local road works, weather, workplace relations and compliance with all applicable statutory and other legal requirements, including those relating to work health and safety and the environment.

## **8.5 RAIL INTERFACE AGREEMENT**

The Contractor will be required to assist RMS in exercising its functions and obligations as roads manager under the *Rail Safety National Law (NSW) 2014*.

## **9. REQUIREMENTS FOR THE PROJECT**

### **9.1 DESIGN REQUIREMENTS**

The Contractor will be required to undertake its own investigations and develop its design in accordance with RMS' requirements for the Project (to be issued in Phase II of the selection process) and in accordance with the environmental requirements.

For its own planning and approval purposes, RMS has prepared a concept design. The concept design does not fully accommodate RMS' requirements for the Project or the environmental requirements contained within the documents listed in Appendix 2.

RMS recognises that its concept design may be modified within constraints to be nominated by RMS in its requirements for the Project and that the Contractor's concept design included in the Contract may vary from RMS' concept design. The Contractor will be required to develop its own design for which it will be fully responsible and will be required to ensure compliance with the environmental, safety and technical requirements that will be set out in the Contract and all legal requirements. The Applicants are not required to provide a concept design with their Applications.

## **9.2 CONSTRUCTION REQUIREMENTS**

The Contractor will be required to provide all temporary and permanent works and all associated work to connect the Project with the road network and to adjust local roads as detailed in the final environmental requirements and the RMS' Project requirements (which will be issued in Phase II of the selection process).

## **9.3 ENVIRONMENTAL AND PLANNING REQUIREMENTS**

*[insert an outline of the planning carried out for the Project]*

The Project is currently subject to ongoing environmental assessments and may be subject to further environmental reports and approvals.

The Contractor will be required to develop, implement and maintain an environmental management system that complies with New South Wales Government *Environmental Management Systems Guidelines*, (3rd Ed. August 2013 (updated 13 January 2014)) as current or replaced from time to time.

## **9.4 INDICATIVE PROGRAM REQUIREMENTS**

RMS' current indicative key program milestones for the Project are as follows: -

- *[insert date]* Issue Invitation to submit a Registration of Interest;
- *[insert date]* Issue Request for Tender; and
- *[insert date]* Award of Contract.
- *[insert date]* Completion of the Project by the Contractor (excluding EOT)

The Contractor will be required to develop a program for the design and construction of the Project that will, together with all extensions of time for Excusable Causes of Delay (Acts of Prevention, Force Majeure Events, Changes in Law, Site Conditions, inclement weather and certain court orders each as detailed and defined in the Project Deed), provide a Date of Construction Completion as early as is reasonably practicable but no later than *[insert date]*.

A high level program is required with the Application, including the specific requirements set out in Schedule 3.

## **9.5 WORK HEALTH AND SAFETY REQUIREMENTS**

The Contractor will be required to develop, implement and maintain a Project specific Work Health and Safety (“WHS”) Management System in accordance with the New South Wales Government *Work Health and Safety Management Systems and Auditing Guidelines* (5<sup>th</sup> Ed September 2013 (updated March 2014) or any later edition).

## **9.6 SKILLS DEVELOPMENT AND TRAINING REQUIREMENTS**

The Applicant’s attention is drawn to the requirements of the NSW Government Procurement Guideline *Skills and Training in the Construction Industry*. The Guideline is attached to NSW Procurement Board Direction PBD 2016-02 - *Construction apprenticeships*, which is available for download from: <http://arp.nsw.gov.au/pbd-2016-02-construction-apprenticeships>

If shortlisted to submit the Tender, the Tenderer will be required to provide the skills development and training details.

If successful, the Contractor will be required to meet the commitments made in the accepted Tender.

If successful, the Contractor will be required to provide quarterly reports to RMS (at the end of March, June, September and December), giving details of the apprentices and trainees engaged in the carrying out of the Contractor's Work and demonstrating that the Contractor is meeting (or will meet at Completion) the commitments made in the Deed.

## **9.7 ABORIGINAL PARTICIPATION REQUIREMENTS**

The Applicant’s attention is drawn to the requirements of the NSW Government *Policy on Aboriginal Participation in Construction* (1 May 2015 or any later update). The Policy document is available from the *Policy framework for construction* page in the Procurepoint website at:

<https://www.procurepoint.nsw.gov.au/policy-and-reform/nsw-procurement-reform/construction/policy-framework-construction>

**NOTE TO DOCUMENTER** (*delete this text box after customising the model ROI document*):

*The NSW Procurement Board may vary the minimum targeted project spend at any time. The latest version of the Aboriginal Participation Policy as well as any directions issued by the NSW Procurement Board in relation to these targets must be checked at the time of preparing the ROI documents, to ensure that the ROI Invitation reflects the current targets. These details can be obtained from the website provided in clause below.*

If successful, the Contractor will be required to comply with [*insert Category*] requirements of the Policy. The mandatory minimum Targeted Project Spend (TPS) for the [*insert project Name*] will be 1.5% of the design and construct Contract award value (excl GST) less allowable exclusions, in line with the Policy goals.

If successful, the Contractor will be required to provide to RMS and the NSW Procurement Board the Aboriginal Participation Plan and the Aboriginal Participation Reports, at the times specified in the Deed and in the format prescribed by the NSW Procurement Board. Templates are available at:

<https://www.procurepoint.nsw.gov.au/aboriginal-participation-construction-information-contractors>

If shortlisted to submit the Tender, the Tenderer will be required to:

- (i) provide evidence of its ability to meet the obligations under the Policy on the Contract and include its Aboriginal participation in construction performance outcomes on other RMS or NSW Government contracts; and
- (ii) nominate proposed exclusions for determining the TPS.

## **9.8 VERIFICATION AND PROOF ENGINEERING OF DESIGN AND CONSTRUCTION**

The Contractor will be required to engage an independent project verifier to verify that the design and construction complies with the requirements of the Contract. The nomination of the project verifier is not required with this Application.

The Contractor may be required to engage a proof engineer to independently certify design of some critical elements. The nomination of a proof engineer is not required with this Application.

## **9.9 ENVIRONMENTAL REPRESENTATIVE**

The Contractor will be required to engage an Environmental Representative that is independent of the design and construction personnel to carry out the role defined within the Planning Minister's Approval. The nomination of an Environmental Representative is not required with this Application.

## **9.10 DISPUTE AVOIDANCE BOARD**

RMS has adopted a dispute avoidance procedure, including a three member Dispute Avoidance Board (DAB), designed to avoid disputes where possible, and otherwise to provide an efficient mechanism for quick and efficient resolution of disputes.

The DAB will comprise of a member nominated by the Contractor and a member nominated by RMS. The nominees of the Contractor and RMS will nominate the third member.

The nomination of a DAB Member is not required with this Application.

The Applicant is to note that the DAB costs are to be shared equally by RMS and the Contractor.

## **9.11 HEAVY VEHICLE LAW - CHAIN OF RESPONSIBILITY PROVISIONS**

The Applicant's attention is drawn to the chain of responsibility provisions of the Heavy Vehicle Law. Under the Heavy Vehicle Law, the Contractor may be a party to the chain of responsibility.

The chain of responsibility provisions are directed at ensuring that road transport operations involving heavy vehicles are conducted safely for all road users, and without causing damage to

assets or infrastructure or having significant adverse effects on the environment or community amenity.

If shortlisted to submit the Tender, the Applicant will be required to demonstrate a commitment to ensuring compliance with the chain of responsibility provisions of the Heavy Vehicle Law.

The Contractor will be required to develop and implement a Chain of Responsibility (CoR) Management Plan, to ensure compliance with the chain of responsibility duties.

The Contractor will also be required to provide a monthly report on how the Contractor is meeting compliance with the chain of responsibility provisions of the Heavy Vehicle Law.

## **9.12 NSW GOVERNMENT CODE OF PRACTICE FOR PROCUREMENT AND IMPLEMENTATION GUIDELINES**

### *Terminology*

- (a) The *New South Wales Government's Code of Practice for Procurement (NSW Code)* and the *New South Wales Government's Implementation Guidelines to the New South Wales Code of Practice for Procurement: Building and Construction (NSW Guidelines)* apply to this Project.
- (b) Terms used in this clause 9.12 have the same meaning as is attributed to them in the *NSW Guidelines*.

### *Primary obligation*

- (c) By submitting an Application to undertake the Project, the Applicant acknowledges and agrees that it:
  - (i) is aware that the *NSW Code* and *NSW Guidelines* apply to the Project;
  - (ii) is taken to have read and understood the *NSW Code* and *NSW Guidelines* and the obligations they impose;
  - (iii) will comply with the *NSW Code* and *NSW Guidelines* on this Project, which includes giving access to authorised personnel to inspect any work, material, or machinery, inspect and copy any record relevant to the Project, and interview any person;
  - (iv) will agree, if successful in this Invitation process, to contractual terms that give effect to the *NSW Code* and *NSW Guidelines* and mechanisms to ensure their compliance and enforcement; and
  - (v) will comply with, and ensure all of its related entities (as defined in the *NSW Guidelines*) comply with, the *NSW Code* and *NSW Guidelines* in respect of any of their building and construction work (including any subsequent privately funded work), on and from the date of submitting an Application.

### *Cost, efficiency, productivity and workplace safety*

- (d) The Applicant agrees that:
  - (i) it must include in its Application a Schedule of Compliance which is set out in Annexure 1 to the Invitation Form included in this Invitation, properly executed by or on behalf of the Applicant; and
  - (ii) in the event that it is shortlisted to submit a Tender, it will provide the following with its Tender:

- A. a Workplace Relations Management Plan (State) and any other documents and information necessary to meet the requirements of section 6.1 of the *NSW Guidelines*; and
  - B. a Work Health Safety Management Plan or Site Specific Safety Management Plan and other documents and information necessary to meet the requirements of section 9 of the *NSW Guidelines* [*noting that the shortlisted Applicant who adopts and complies with the “Work Health and Safety Management Systems and Audit Guidelines, 5<sup>th</sup> Edition published September 2013” and demonstrates that compliance in its Tender will not be required to submit a separate “Work Health and Safety Management Plan” under section 9 of the NSW Guidelines, as given in “Practice Direction 2013/2 – Workplace Safety” issued by the NSW Industrial Relations*].
- (e) The Applicant acknowledges that, by submitting an Application, it agrees to RMS and the NSW Government Construction Compliance Unit (CCU) taking any steps to investigate claims, statements and assertions made by the Applicant in any of the documents referred to above in clause 9.12(d) before any contract is awarded. The Applicant acknowledges and agrees to co-operate with RMS and the CCU in respect of the investigation of compliance with the *NSW Code* and *NSW Guidelines* and further agrees that compliance is a mandatory requirement of the procurement process. The Applicant will allow authorised personnel to:
- (i) access premises and sites controlled by the Applicant or its related entities;
  - (ii) inspect and copy relevant records and documents;
  - (iii) inspect any work, material, machinery, appliance article or facility; and
  - (iv) interview any person,

as is necessary to investigate the claims, statements and assertions made by the Applicant in the Application or to demonstrate the Applicant's current or, where relevant, past compliance with the *NSW Code* and *NSW Guidelines* during the procurement process.

*Disclosure of information*

- (f) Notwithstanding any other provision of the Invitation Documents, the Applicant agrees and consents to the disclosure of information concerning the Applicant's, and the Applicant's related entities', compliance with the *NSW Code* and *NSW Guidelines*, including the disclosure of details of past and present compliance with the *NSW Code* and *NSW Guidelines* as varied from time to time, including whether or not sanctions have been imposed on the Applicant or any of its related entities by the Commonwealth or any State or government agency. This consent is given to the State of New South Wales, including its agencies (including RMS), Ministers and the CCU (and its authorised personnel) for purposes including monitoring and investigating compliance and ensuring, facilitating and promoting compliance with the *NSW Code* and *NSW Guidelines*.

*Subcontractors etc*

- (g) Where the Applicant proposes to subcontract an element of the Project, the Applicant agrees that it will ensure through contract that each subcontractor or consultant agrees to:
- (i) the contractual promises in clauses 9.12(c) and 9.12(f) in respect of the relevant subcontractor or consultant;
  - (ii) comply with the applicable plans and policies on the Project referred to in clause 9.12(d); and

- (iii) where a subcontractor or consultant is nominated in the Application, that the nominated party co-operates with authorised personnel during the procurement process for the purposes outlined in clause 9.12(e).

## **9.13 BUILDING CODE & AUSTRALIAN GOVERNMENT WORK HEALTH AND SAFETY ACCREDITATION SCHEME**

### **9.13.1 Building Code**

- (a) This clause 9.13.1 only applies if the Contractor's Work will be partially or fully funded by the Commonwealth, as identified in Item 20 of Schedule 1 to the Project Deed.
- (b) The Applicant agrees that it must include in its Application:
  - (i) a “Declaration of Compliance” which is set out in Annexure 2A to the Invitation Form included in this Invitation, properly executed by or on behalf of each Participant in the Applicant that is or will be a “building contractor” or “building industry participant” (as defined in section 5 of the BCIIP Act); and
  - (ii) the further information outlined in Attachment A to the Declaration of Compliance,  
to demonstrate the Applicant's compliance with the Building Code.
- (c) To be eligible to submit the Application for the Contractor’s Work the subject of this Invitation, the Applicant must, on and from the date on which the Applicant submits its Application, at all times meet the following eligibility requirements:
  - (i) neither the Applicant nor any of the Applicant's Related Entities may be subject to an Exclusion Sanction;
  - (ii) the Applicant and each of the Applicant's Related Entities must comply with the Building Code when performing:
    - A. the Contractor’s Work the subject of this Invitation (if the Applicant is the successful tenderer); and
    - B. all other Building Work (including privately funded projects) on and from the date on which the Applicant submits its response to this Invitation (even if the Applicant is not the successful tenderer);
  - (iii) the Applicant must be eligible to perform Commonwealth Funded Building Work;
  - (iv) subject to the exceptions set out in subsection 26(5) of the Building Code, the Applicant must not have had an adverse decision, direction or order made by a court or tribunal for a breach of the BCIIP Act, a Designated Building Law, work health and safety law (including, but not limited to, the *Work Health and Safety Act 2011* (NSW) and the *Work Health and Safety Regulation 2011* (NSW)) or competition and consumer law (including, but not limited to, the *Competition and Consumer Act 2010* (Cth)) and failed to comply with the decision, direction or order;
  - (v) the Applicant must, if it is the successful tenderer, undertake to only use products in relation to the Contractor’s Work the subject of this Invitation that, at a minimum, comply with the relevant Australian standards published by, or on behalf of, Standards Australia Limited (ABN 85 087 326 690); and

- (vi) the Applicant must demonstrate a positive commitment to the provision of appropriate training and skill development for its workforce.
- (d) In the event that the Applicant is shortlisted to submit a Tender and where the Request for Tender specifies that a Workplace Relations Management Plan (Commonwealth) is required (because the Commonwealth funding above the minimum thresholds specified in Schedule 2 of the Building Code has been received for the Project), the Applicant will be required to include a Workplace Relations Management Plan (Commonwealth) in its Tender for approval by the ABCC in accordance with Part 6 of the Building Code. It is a precondition to RMS entering into a contract with the successful tenderer to perform the Contractor's Work the subject of this Invitation that the ABCC has approved the successful tenderer's Workplace Relations Management Plan (Commonwealth).
- (e) It is a precondition to RMS shortlisting the Applicant to submit a Tender for the Contractor's Work the subject of this Invitation that:
  - (i) the Applicant confirms whether, within the three years preceding the date of this Invitation, the Applicant has:
    - A. had an adverse decision, direction or order made by a court or tribunal for a breach of a Designated Building Law, work health and safety law (including, but not limited to, the *Work Health and Safety Act 2011* (NSW) and the *Work Health and Safety Regulation 2011* (NSW)) or the *Migration Act 1958* (Cth); or
    - B. been required to pay any amounts under an adjudication certificate (provided in accordance with a law relating to the security of payments (including, but not limited to, the *Building and Construction Industry Security of Payment Act 1999* (NSW)), that are due to persons in respect of Building Work); or
    - C. owed any unsatisfied judgement debts (including by any Related Entity) to a Building Contractor or a Building Industry Participant; and
  - (ii) the Applicant must at no time be excluded from performing Building Work funded by a state or territory government (unless approval to shortlist the Applicant has been obtained from the ABC Commissioner).
- (f) In addition to a Workplace Relations Management Plan (Commonwealth) referred to in clause 9.13.1(d), if the Applicant is shortlisted to submit a Tender, the Applicant will be required to include the following information in its tender, which may be used by RMS in determining whether to select the Applicant as the successful tenderer:
  - (i) the extent to which domestically sourced and manufactured building materials will be used to undertake the Building Work;
  - (ii) the Applicant's assessment of the whole-of-life costs of the project to which the Building Work relates;
  - (iii) the impact on jobs of the project to which the Building Work relates;
  - (iv) whether the project to which the Building Work relates will contribute to skills growth;
  - (v) the number of apprentice and trainee employees intended to be engaged by the Applicant to undertake the Contractor's Work; and
  - (vi) the number and classes of persons that hold visas under the *Migration Act 1958* (Cth) intended to be engaged by the Applicant to undertake the Contractor's Work.



### 9.13.2 Australian Government Work Health and Safety Accreditation Scheme

- (a) This clause 9.13.2 only applies if Item 20A of Schedule 1 to the Project Deed specifies that the Contractor is required to maintain accreditation under the Australian Government Work Health and Safety Accreditation Scheme.
- (b) All Participants of the successful Tenderer that will carry out 'building work' (as defined in the BCIIIP Act) for the Project must be accredited under the Australian Government Work Health and Safety Accreditation Scheme ("the **Scheme**") established by section 43 of the BCIIIP Act when entering into contracts for 'building work' (as defined in the BCIIIP Act) and must maintain accreditation under the Scheme while the 'building work' (as defined in the BCIIIP Act) is being carried out.
- (c) It is a requirement of this Invitation that all Participants of the Applicant are either accredited or seeking accreditation under the Scheme. The Contract will contain a provision requiring all those carrying out 'building work' (as defined in the BCIIIP Act) for the Project to maintain accreditation under and comply with all conditions of the Scheme.
- (d) Each Participant in the Applicant that will carry out 'building work' (as defined in the BCIIIP Act) for the Project must provide a signed "Confirmation of WHS Accreditation Status" which is set out in Annexure 2B to the Invitation Form included in this Invitation, with details of any accreditation status as relevant for each Participant, including the expiry date of accreditation, or evidence that accreditation is being sought under the Scheme.
- (e) The Applicant's attention is drawn to Section 26(1)(f) of the *Fair Work (Building Industry – Accreditation Scheme) Regulation 2016* (Cth), which outlines provisions applying to joint ventures that include accredited and unaccredited members.

### 9.14 AUSTRALIAN INDUSTRY PARTICIPATION PLAN

This clause 9.14 only applies if required by Item 20B of Schedule 1 to the Project Deed.

Roads and Maritime Services (RMS) are required to prepare and implement an Australian Industry Participation Plan for the project, in order to provide full, fair and reasonable opportunities to Australian entities through all tiers of the supply chain.

A draft of the RMS AIP Plan (draft AIP Plan) will be included in Appendix 28 of the Scope of Works and Technical Criteria.

The Contractor will be required to provide RMS with details necessary to finalise the AIP Plan and RMS will use these details to obtain certification of the AIP Plan from the Department of Industry.

Where the AIP Plan is required to be prepared under the *Australian Jobs Act 2013*, RMS may obtain certification of the AIP Plan from the AIP Authority at tender time and include the Certified AIP Plan in Appendix 28 of the Scope of Works and Technical Criteria.

RMS will issue a copy of the Certified AIP Plan to the Contractor and the Contractor will be required to comply with the Certified AIP Plan at all times.

The Contractor will also be required to report on how the Contractor is implementing the Certified AIP Plan.

## **10. PHASE I EVALUATION**

### **10.1 MANDATORY SELECTION REQUIREMENTS**

Only those Applicants which satisfy the mandatory selection requirements identified in the Executive Summary (“ES Schedule”) in clause 11.2 and clause 13.2(b) will be assessed under the comparative evaluation as outlined in clause 10.2, and considered for short listing to Phase II.

### **10.2 COMPARATIVE EVALUATION**

Applicants which satisfy the mandatory selection requirements will then be assessed by a comparative evaluation to shortlist those Applicants which demonstrate the best capability to carry out the Project. The comparative evaluation will compare Applicants using the information provided by each Applicant in Schedules 1 to 4 against the evaluation criteria outlined in clause 10.3 and in the context of the Project objectives set out in clause 6. Information other than that provided by the Applicants may be used by RMS in the comparative evaluation as stated in this Invitation.

## 10.3 EVALUATION CRITERIA

### Criterion No 1. Demonstrated:

- capability, experience and performance record by the Applicant, Participants and principal design organisations to manage, investigate, design and construct the Project

(noting that the type of information RMS is seeking for the purposes of assessment is set out in Schedule 1).

### Criterion No 2. Demonstrated:

- appropriate management structures to provide certainty of delivery of the Project;
- skills, experience, expertise, capability and performance record of the proposed personnel; and
- capability to provide appropriate resources to deliver the Project

(noting that the type of information RMS is seeking for the purposes of assessment is set out in Schedule 2).

### Criterion No 3. Demonstrated:

- understanding of Project programming requirements and constraints; and
- recognition of key Project issues and strategies to manage these issues

(noting that the type of information RMS is seeking for the purposes of assessment is set out in Schedule 3).

### Criterion No 4. Demonstrated:

- ability to work effectively with the NSW Government

(noting that the type of information RMS is seeking for the purposes of assessment is set out in Schedule 4)

## 11. APPLICATION REQUIREMENTS

### 11.1 FORMAT

The Application should: -

- be clear and concise; and
- be in point and table format where possible.

The Application must be divided into the following separate schedules: -

ES Schedule – Executive Summary (including the mandatory selection requirements);

Schedule 1 – Capability, Experience and Performance Record of the Applicant, Participants and Principal Design Organisations;

- Schedule 2 – Management Structures, Key Staff, Labour, Plant, Equipment and Materials;
- Schedule 3 – Program, Key Issues and Strategies;
- Schedule 4 - Referees; and
- Schedule 5 – Project Deed Proposed Changes & Parent Company Details.

Each schedule must be a stand-alone document and must directly address all relevant requirements. The schedules may be combined in one folder.

## 11.2 INFORMATION TO BE PROVIDED

The following sections detail the information required for each schedule. Applicants are advised to provide only the required information. Responses should be in size 12 font and be **must be limited** to the number of single-sided A4 (or A3 if noted) pages listed for the relevant item or schedule. References to the Applicant should distinguish, where appropriate, between different Participants.

Note that financial information is not required to be submitted with this Application.

### ES Schedule - Executive Summary

#### (a) Mandatory Selection Requirements

*(unlimited)*

The Applicant must demonstrate satisfaction of the following mandatory selection requirements by completing and signing the Invitation Form (and annexure to that Invitation Form) attached to this ES Schedule: -

- (i) The Applicant must include and nominate in the Application at least one Participant that is, at a Closing Date and Time, a construction firm included on both RMS' F150 PLUS (Financial) and R5 (Roadworks) Register of Prequalified Contractors;
- (ii) The Applicant must acknowledge and agree in the Application that construction of the roadworks must be by the construction firms nominated in the Application which are, at a Closing Date and Time, prequalified to RMS' R5 (Roadworks) Register of Prequalified Contractors;
- (iii) The Applicant must acknowledge and agree in the Application that construction of all bridgeworks must be by the construction firms nominated in the Application which are, at a Closing Date and Time, prequalified to at least RMS' B3 (Bridgeworks) Register of Prequalified Contractors as listed on RMS' Bridgeworks Register of Prequalified Contractors;
- (iv) The Applicant must acknowledge and agree in the Application that construction of any pavement must be by the construction firms which are, at a Closing Date and Time, prequalified to RMS' K2 (Concrete Paving) or RMS' A2 (Asphalt Paving) Register of Prequalified Contractors whichever is required for the main carriageway;
- (v) The Applicant must acknowledge and agree in the Application that pretensioned concrete work must be by the construction firms which are, at a Closing Date and Time, prequalified to RMS' C2 (Pretensioned Concrete - Complex) Register of Prequalified Contractors;
- (vi) The Applicant must acknowledge and agree in the Application that steel fabrication work must be by the construction firms which are, at a Closing Date and Time, prequalified to RMS' S (Steel Fabrication – Complex) Register of Prequalified Contractors;

- (vii) Where a Participant (and, to the extent relevant, the Participant's holding company) has entered into a formal probity deed with RMS, the Applicant must acknowledge and agree in the Application that, in the event that it is selected as a Tenderer and prior to the issue of the Request for Tender or Information Documents, RMS may issue a notice to the relevant Participant (and/or the Participant's holding company), under the probity deed activating it for this Project;
- (viii) Where a Participant (and, to the extent relevant, the Participant's holding company) has not entered into a formal probity deed with RMS, the Applicant must acknowledge and agree in the Application that, in the event that it is selected as a Tenderer and prior to the issue of the Request for Tender or Information Documents, the Participants in the Application will enter into, and activate for this Project, a formal probity deed with RMS in a form that is acceptable to RMS;
- (ix) The Applicant must provide in the Application:
  - A. an acknowledgement and agreement from each Participant's Parent Company (or a Non-approved Entity proposed by a Participant) (**'Holding Company Acknowledgement'**) that, in the event that the Contract is awarded to the Applicant, each Participant's Parent Company (or the Non-approved Entity proposed) is willing to sign a Parent Company Guarantee in the form included as Appendix 4.
  - B. Applicant's acknowledgement and agreement that RMS may not accept the entity providing the Holding Company Acknowledgement and may require an alternate entity acceptable to RMS to be the Parent Company;
- (x) The Applicant must acknowledge and agree in the Application that, in the event that it is selected as a Tenderer and prior to the issue of Information Documents, each Participant is willing to sign a Deed of Disclaimer in respect of all Information Documents in the form included as Appendix 3;
- (xi) The Applicant and its related entities must comply with the NSW Code and the NSW Guidelines, on and from the date of submitting the Application, and:
  - A. the Applicant and its related entities must not be subject to a sanction or other circumstances that would preclude the Applicant from submitting an Application, or, if successful, being awarded a contract; and
  - B. the Applicant must submit a signed Schedule of Compliance in the form set out in Annexure 1 to the Invitation Form.
- (xii) Where the Building Code applies to the Contractor's Work the subject of this Invitation, the Applicant (including Related Entities) must comply with the Building Code at the time of lodgement of the Application and the Applicant (including Related Entities) must:
  - A. not be precluded from tendering for Commonwealth Funded Building Work;
  - B. submit in its Application:
    - (i) a signed "Declaration of Compliance" which is set out in Annexure 2A to the Invitation Form included in this Invitation, properly executed by or on behalf of each Participant in the Applicant that is

or will be a “building contractor” or “building industry participant” (as defined in section 5 of the BCIP Act);

- (ii) the further information outlined in Attachment A to the Declaration of Compliance; and
  - (iii) a written confirmation as to whether on or after 2 December 2016, the Applicant (including Participants) or a Related Entity of the Applicant (including Participants) submitted a response to an expression of interest or tender (howsoever described) for Commonwealth Funded Building Work (regardless of whether or not that project was procured by RMS or whether or not the Applicant (including Participants) or the Applicant’s (including Participants’) Related Entity were successful). [*noting that **this written confirmation is required to be submitted by the Applicant even if Item 20 of Schedule 1 to the Project Deed states that the Building Code does not apply to the Contractor’s Work***]
- (xiii) Where the Australian Government WHS Accreditation Scheme applies to the Contractor’s Work, each Participant in the Applicant must provide a signed "Confirmation of WHS Accreditation Status" which is set out in Annexure 2B to the Invitation Form included in this Invitation.; and
- (xiv) The Applicant, including each Participant, must have sufficient financial resources and liquidity, in the opinion of RMS, to satisfactorily undertake the Project. The Applicant and each Participant must acknowledge and agree in the Application to provide all information requested by RMS, including the information outlined below, to be used in assessing the financial capability of the Applicant’s and each Participant’s ability to design and construct the Project and the Parent Company’s capability.

Where the Applicant or Participant is a trustee, the financial information will be required for both the trust and the trustee.

Where the Applicant or Participant proposed a Non-approved Entity to provide the Holding Company Acknowledgement, the Applicant and each Participant must acknowledge and agree in the Application to provide, upon request, all information in relation to the Non-approved Entity of the same kind as outlined below, for use in assessing the financial capability of the proposed Non-approved Entity.

**No financial information is to be forwarded with this Application.** Financial information may be requested by RMS after the Closing Date and Time.

The financial information requested from the Applicant and each Participant may include at least the following: -

- A. Financial statements for the past three financial years.
  - 1. Financial statement should preferably be prepared in accordance with Australian Accounting Standards. Financial statement should contain a Balance Sheet, Profit and Loss Statement, summary and detailed), Statement of Cash Flows, Notes to the Accounts, Compilation Report (if externally prepared), Director’s / Trustee Report (if prepared), and Auditor’s Report (if required to be audited).

2. Most recent half-yearly or management accounts (preferably no more than 6 months old)
  3. Forecast Balance Sheet and Profit & Loss to the end of the current financial year.
  4. Forecast Cash Flow Statements to the end of the current financial year.
- B. Contracting entity
1. The Applicant must ensure that the financial information provided relates to the contracting entity itself.
- C. Business details
1. Brief description of business and company history.
- D. Ownership and structure
1. Details of directors and executive managers including their background and experience and contingency plans for risk management.
  2. An organisational chart showing internal management structure and key positions.
- E. Wider corporate tree
1. Diagram of corporate relationships and listing of related parties.
  2. Listing of all related party loans.
- F. Key customers
1. For 20 largest clients, prepare information including client name, number of jobs completed in last 12 months and percentage of total revenue in last 12 months.
- G. Working capital management
1. Ageing analysis of all trade debtors and trade creditors i.e. 1-30 days, 31-60 days, 61-90 days, over 90 days.
  2. Individual ageing debtor analysis of top 50 trade debtors by total amount owed.
  3. Individual ageing creditor analysis of top 50 trade creditors by total amount owing.
- H. Supplier concentration
1. Listing of critical suppliers and value of spend in past 12 months.
- I. Projects
1. Listing of current tender's submitted and potential value.
  2. A list of all contract works and services currently being undertaken by the Applicant for a client including details of RMS or client for each contract, the contract value, the percentage completed and payments received to date.
  3. Summary of forecast revenue in the current financial year end based on work remaining from secured work.

- J. Claims
  - 1. Summary of any significant claims against the applicant or by the applicant that could affect financial capacity
- K. Regulatory environment
  - 1. List of major regulatory requirements governing the operation of the business.
- L. Financing facilities
  - 1. Listing of all banking facilities such as overdraft, loan facilities and bank guarantee facilities including facility limit, amount drawn and amount remaining. Details of any refinancing required and covenants that exist between the company and financial.
  - 2. A recent letter from a bank or financier confirming the banking facility details is required.
- M. Trade survey information
  - 1. Nomination of at least 10 suppliers and 10 subcontractors with fax and email contact details for assessors to conduct trade surveys.
- N. Cash flow forecasts
  - 1. Applicant (and each Participant) must submit a detailed monthly cash flow forecast for the 12 months from the last financial year end to the current financial year end together with information regarding assumptions relating to the forecasts, or other relevant information requested by the financial assessor.

- (xv) Where the Applicant is a joint venture, the Applicant must acknowledge and agree in its Application that, in the event that it is selected as a Tenderer and prior to proceeding to Phase II (as defined in clause 2), the Participants are prepared to provide a binding agreement between the Participants that is acceptable to RMS and will execute the agreement if the Applicant is awarded the Contract.

The draft agreement must be submitted to RMS prior to proceeding to Phase II and must be acceptable to RMS.

**(b) Contacts**

*(1 No. A4 page)*

Applicants must provide the names and contact details of two (2) persons who will be responsible for responding to enquiries regarding the Application.

**(c) Organisation Details**

*(5 No. A4 pages)*

The Applicant must provide details of: -

- (i) the company name, nature of the entity (eg public listed company, partnership, proprietary company) and ACNs and ABNs of the Applicant and of each of the Participants;
- (ii) the relationship and the clear definition of risk allocation between the Applicant and the Participants and between each of the Participants;



- (iii) the registered office, head office address, date of incorporation, principal shareholders (unless a public listed company) and the names of all directors (and where relevant, all partners) of the Applicant and of each of the Participants;
- (iv) the proposed entities to provide the Parent Company Guarantee in the form included as Appendix 4 for the Applicant, should the Applicant be invited to submit a Tender, and the ACNs and ABNs of those entities; and
- (v) a summary of the roles of each of the Participants.

**(d) Competitiveness, Probity and Related Companies**

*(6 No. A4 pages)*

Where a Related Company of the Applicant or a Participant is or may in the future be involved as a Participant or Provider for a different Applicant, or in relation to a different Application, the Applicant must provide details of: -

- (i) the relationship between the Related Companies;
- (ii) the processes by which decisions concerning the Applicant's Tender will be made and responsibilities discharged during the selection process, should the Applicant be invited to submit a Tender;
- (iii) any internal governance arrangements and other procedures which the Applicant has or will put in place to address and resolve probity and competitiveness issues; and
- (iv) the manner by which compliance with such internal governance arrangements and other procedures will be certified.

**(e) Project Deed**

*(no limit)*

The Applicant must provide the acknowledgement and agreement described in clause 7 if requested.

## ATTACHMENT TO ES SCHEDULE - INVITATION FORM

TO: ROADS AND MARITIME SERVICES

BY: *[Applicant to insert name of the Applicant]*

We refer to the Invitation to Submit a Registration of Interest in respect of the design and construction of *[insert Project name]* ("**Invitation**").

Terms used in this Invitation Form have the meaning given to them in the Invitation.

### Application

- (a) We submit our Application on the basis of and accept and agree with the terms of the Invitation.

### Contractor Pre-Qualification Requirements

We acknowledge and agree that:

- (b) our Application includes *[Applicant to nominate the Participant]* that is, at a Closing Date and Time, a construction firm included on both RMS' F150 PLUS (Financial) and R5 (Roadworks) Register of Prequalified Contractors;
- (c) construction of the roadworks must be by *[Applicant to nominate the construction firms]* which are, at a Closing Date and Time, prequalified to RMS' R5 (Roadworks) Register of Prequalified Contractors;
- (d) construction of all bridgeworks must be by *[Applicant to nominate the construction firms]* which are, at a Closing Date and Time, prequalified to at least RMS' B3 (Bridgeworks) Register of Prequalified Contractors as listed on RMS' Bridgeworks Register of Prequalified Contractors;
- (e) construction of any pavement must be by the construction firms which are, at a Closing Date and Time, prequalified to RMS' K2 (Concrete Paving) or RMS' A2 (Asphalt Paving) Register of Prequalified Contractors, whichever is required for the main carriageway;
- (f) pretensioned concrete work must be by the construction firms which are, at a Closing Date and Time, prequalified to RMS' C2 (Pretensioned Concrete - Complex) Register of Prequalified Contractors;
- (g) steel fabrication work must be by the construction firms which are, at a Closing Date and Time, prequalified to RMS' S (Steel Fabrication – Complex) Register of Prequalified Contractors;

### Probity Requirements

We acknowledge and agree that:

- (h) where a Participant in our Application (and, to the extent relevant, the Participant's holding company) has entered into a formal probity deed with RMS, in the event that it is selected as a Tenderer and prior to the issue of the Request for Tender or Information Documents, RMS may issue a notice to the relevant Participant (and/or the Participant's holding company) under the probity deed activating it for this Project, and.
- (i) where a Participant in our Application (and, to the extent relevant, the Participant's holding company) has not entered into a formal probity deed with RMS, in the event that it is selected as a Tenderer and prior to the issue of the Request for Tender or Information Documents, the relevant Participant will enter into, and activate for this Project, a formal probity deed with RMS in a form that is acceptable to RMS.

### **Information Documents**

- (j) We acknowledge and agree that, in the event that we are selected as a Tenderer and prior to the issue of Information Documents, each Participant is willing to sign a Deed of Disclaimer in respect of all Information Documents in the form included as Appendix 3.

### **Financial Resources**

- (k) We acknowledge and agree that we have sufficient financial resources to satisfactorily complete the Project and will provide all information when requested by RMS to be used in assessing the financial capability of the Applicant's and each Participant's ability to design and construct the Project.

### **Holding Company Acknowledgement**

- (l) We attach an acknowledgement and agreement from each Parent Company (or a Non-approved Entity proposed by a Participant) (**'Holding Company Acknowledgement'**) that, in the event that the Contract is awarded to the Applicant, each Participant's Parent Company (or the Non-approved Entity proposed) is willing to sign a Parent Company Guarantee in the form included as Appendix 4.

We acknowledge and agree that:

- i) if the Holding Company Acknowledgement is provided by a Non-approved Entity we will, upon request, provide information in relation to the Non-approved Entity of the same kind as is described in clause (a)(xiv) of the ES Schedule, for use in assessing the capability of the Non-approved Entity proposed; and
- ii) RMS is not bound to consider nor to accept the entity providing the Holding Company Acknowledgement and may at any time up until signing the Contract (including where RMS has previously indicated acceptance of that entity) require an alternate entity acceptable to RMS as the Parent Company.

### **Binding Agreement**

- (m) Where we submit our Application as a joint venture, we acknowledge and agree that, in the event that we are selected as a Tenderer and prior to proceeding to Phase II, the Participants are prepared to provide a binding agreement between the Participants, to the RMS' satisfaction (as referred to in Clause 11.2(a)(xv) of this Invitation).

### **Project Deed**

- (n) We agree to provide the acknowledgement and agreement described in Clause 7 if requested.

### **NSW Government Code of Practice for Procurement and Implementation Guidelines**

- (o) We agree to comply with the NSW Government Code of Practice for Procurement.
- (p) We attach a signed Schedule of Compliance in the form set out in Annexure 1 to the Invitation Form included in this Invitation.

### **Building Code**

- (q) We agree to comply with the Building Code.
- (r) We attach:
  - a signed "Declaration of Compliance" in the form set out in the Annexure 2A to this Invitation Form;
  - the further information outlined in Attachment A to the Declaration of Compliance; and
  - a written confirmation as to whether on or after 2 December 2016, we or our Related Entity submitted a response to an expression of interest or tender (howsoever described) for Commonwealth Funded Building Work (regardless of whether or not that project was procured by RMS or whether or not we or our Related Entity were successful).

### **Australian Government WHS Accreditation Scheme**

- (s) We attach a signed "Confirmation of WHS Accreditation Status" in the form set out in the Annexure 2B to this Invitation Form and provide details of any accreditation status, including the expiry date of accreditation, or evidence that accreditation is being sought under the Scheme, as required by clause 9.13.2 of the Invitation.

DATED

**SIGNED** by [INSERT NAME AND POSITION )  
**OF SIGNATORY** ) .....  
for and on behalf of the )  
Applicant in the presence of: )

Witness:

.....

Print name and position:

.....

## Annexure 1 - Schedule of Compliance

This “Schedule of Compliance” must be completed by each Participant in the Applicant and lodged with the Application. Any Application in which this Schedule is not completed may be regarded as non-conforming.

Refer to clause 9.12 – *NSW Government Code of Practice for Procurement and Implementation Guidelines*.

### **SCHEDULE OF COMPLIANCE WITH THE NSW GOVERNMENT’S IMPLEMENTATION GUIDELINES TO THE NSW GOVERNMENT CODE OF PRACTICE FOR PROCUREMENT: BUILDING AND CONSTRUCTION**

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**Application:** *[insert Project Name and Invitation reference]*

**Applicant:** *[insert full legal name of the Applicant/Participant, including ABN and ACN where applicable]*

**Applicant's authorised representative:** *[insert full name and title of natural person completing this Compliance Schedule on behalf of the Applicant/Participant]*

#### **Primary acknowledgements and undertakings**

1. By completing this Compliance Schedule and submitting an Application, the Applicant:
  - a. acknowledges that the *NSW Government's Code of Practice for Procurement (NSW Code)* and the *NSW Government's Implementation Guidelines to the NSW Code of Practice for Procurement: Building and Construction (NSW Guidelines)* apply to this Project;
  - b. undertakes that it, and its related entities, comply with the *NSW Code* and *NSW Guidelines* on this Project and any privately and publicly funded building and construction work to which the *NSW Guidelines* apply, on and from the date of submitting this Application (if not already required to comply on such privately and publicly funded projects);
  - c. confirms that it and its related entities have complied with:
    - i. the *NSW Code* and *NSW Guidelines* on all its other projects to which the *NSW Guidelines* apply or have applied; and
    - ii. all applicable legislation, court and tribunal orders, directions and decisions, and industrial instruments;
  - d. confirms that neither it, nor any of its related entities, are subject to a sanction or other circumstances that would preclude the Applicant from submitting an Application, or, if successful, being awarded a contract.

#### **Sanctions for non-compliance**

2. The NSW Treasury, through the Construction Compliance Unit (CCU), has responsibility for enforcing and ensuring compliance with the *NSW Code* and *NSW Guidelines*.
3. The Applicant acknowledges that where it or a related entity fails to comply with the *NSW Code* or *NSW Guidelines*, a sanction may be imposed on the Applicant or its related entity or both. The sanctions that can be imposed include, but are not limited to, one or

more of the following:

- a. a formal warning that a further breach will lead to severe sanctions;
- b. referral of a complaint to the relevant industry organisation for assessment against its own professional code of conduct and appropriate action;
- c. reduction in tendering opportunities at either agency or government-wide level, for example, by exclusion of the breaching party from tendering for government work above a certain value or for a specified period;
- d. reporting the breach to an appropriate statutory body; and
- e. publicising the breach and identity of the party.

### **Disclosure of information**

4. The Applicant agrees and gives its consent (or reaffirms its consent), and confirms that its related entities agree and give their consent (or reaffirm their consent), to the disclosure of information concerning the Applicant's or the related entity's compliance with the *NSW Code* and *NSW Guidelines*, including disclosure of past conduct relating to the *NSW Code* and *NSW Guidelines*, and whether or not sanctions have been imposed on an Applicant or its related entities.
5. The Applicant confirms that it has obtained, or will obtain, the consent of each subcontractor or consultant it proposes to use on the Project, to the disclosure of information concerning the subcontractor's and consultant's compliance with the *NSW Code* and *NSW Guidelines*, including disclosure of details of past conduct relating to the *NSW Code* and *NSW Guidelines* and whether or not sanctions have been imposed on the subcontractor or consultant or its related entities.
6. The consent by the Applicant, its related entities and any proposed or subsequent subcontractors or consultants is given to the State of New South Wales, its agencies (including RMS), Ministers and the CCU (and its authorised personnel) for purposes including:
  - a. the exercise of their statutory authority or portfolio responsibilities;
  - b. investigating and checking claims and assertions made by the Applicant in any documents provided as part of the Application (including, but not limited to, any Workplace Relations Management Plan (State) or Health and Safety Management Plans);
  - c. monitoring, investigating and enforcing the *NSW Code* and *NSW Guidelines*; and
  - d. ensuring, facilitating and promoting compliance with the *NSW Code* and *NSW Guidelines*.
7. The Applicant acknowledges that this consent is not limited to this Application or this Project, as parties are expected to comply with the *NSW Code* and *NSW Guidelines* on future projects for which they apply.

### **Positive obligations**

8. Without limiting the obligations and requirements in the *NSW Code* and *NSW Guidelines*, the Applicant acknowledges and undertakes to comply with its positive obligations under the *NSW Code* and *NSW Guidelines*, including to:
  - a. in the event that the Applicant is shortlisted to submit a Tender and subsequently awarded the Contract, provide and comply with the Workplace Relations Management Plan (State) and Work Health and Safety Management Plan;

- b. allow NSW Government authorised personnel to:
    - i. access the Project site and other premises;
    - ii. monitor and investigate compliance with the *NSW Code* and *NSW Guidelines*;
    - iii. inspect any work, material, machinery, appliance, article or facility;
    - iv. inspect and copy any record relevant to the Project; and
    - v. interview any person,
 as is necessary to demonstrate compliance with the *NSW Code* and *NSW Guidelines*;
  - c. notify the CCU (or nominee) and RMS of any alleged breaches of the *NSW Code* and *NSW Guidelines*, and of voluntary remedial action taken, within 24 hours of becoming aware of the alleged breach;
  - d. (for principal contractors only) report any grievance or dispute relating to workplace relations or work health and safety matters that may impact on project costs, related contracts or timelines to the CCU (or nominee) and RMS within 24 hours of becoming aware of the grievance or dispute, and provide regular updates on the grievance or dispute;
  - e. report any threatened or actual industrial action that may impact the Project, costs of the Project, related contracts or timelines to the CCU (or nominee) and RMS within 24 hours and provide regular updates about the steps being taken to resolve the threatened or actual industrial action;
  - f. take all steps reasonably available to prevent or resolve industrial action which adversely affects, or has the potential to adversely affect, the delivery of the Project or other related contracts on time and within budget; and
  - g. take all reasonably available steps to prevent or bring to an end unprotected industrial action occurring on or affecting the Project, including by pursuing legal action where possible. Any such legal action must be conducted (and where appropriate, concluded) in a manner consistent with the guiding principles and objectives of the *NSW Guidelines*, namely supporting outcomes of compliance with the law, productivity in delivering the Project on time and within budget, maintaining a high standard of safety, and protecting freedom of association.
9. Without limiting the obligations and requirements of the *NSW Code* and *NSW Guidelines*, the Applicant acknowledges its obligation to ensure, through contract, that subcontractors and consultants similarly undertake, or allow for, each of these applicable positive obligations.

### **Privately funded work**

10. The Applicant acknowledges and agrees that in respect of its privately funded building and construction work to which the *NSW Guidelines* apply, it and its related entities will:
- a. comply with the *NSW Code* and *NSW Guidelines*;
  - b. maintain adequate records of compliance with the *NSW Code* and *NSW Guidelines* (including by contractors);
  - c. allow NSW Government authorised personnel to :
    - i. access the site and other premises;
    - ii. monitor and investigate compliance with the *NSW Code* and *NSW Guidelines*;



- iii. inspect any work, material, machinery, appliance, article or facility;
- iv. inspect and copy any record relevant to the project; and
- v. interview any person,

as is necessary to demonstrate compliance with the *NSW Code* and *NSW Guidelines*; and

- d. ensure contractors and consultants similarly undertake, or allow for, each of these obligations.

**Declaration by Applicant's authorised representative**

11. By signing this declaration on behalf of the Applicant, the authorised representative declares that he/she has full authority to execute it and has obtained any necessary consents and approvals to do so.

Signed for the Applicant/Participant by: .....

Name (in block letters): ..... (Authorised Officer)

In the Office Bearer capacity of: .....

Date: .....

## Annexure 2A to the Invitation Form – Declaration of Compliance

This “Declaration of Compliance” must be completed by each Participant in the Applicant that is or will be a “building contractor” or a “building industry participant” (as defined in section 5 of the BCIIIP Act) and lodged with the Application. Any Application in which this Declaration is not completed may be regarded as non-conforming.

Refer to clause 9.13.1

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### DECLARATION OF COMPLIANCE WITH THE CODE FOR THE TENDERING AND PERFORMANCE OF BUILDING WORK 2016

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**Application:** *[insert Project Name and Invitation reference]*

**Applicant:** *[insert full legal name of Applicant/Participant, including ABN and ACN where applicable]*

**Applicant's authorised representative:** *[insert full name and title of natural person completing this Declaration of Compliance on behalf of the Applicant/Participant ]*

1. In this Declaration of Compliance:

<b>ABCC</b>	means the body referred to in section 29 of the BCIIIP Act.
<b>ABC Commissioner</b>	means the Australian Building and Construction Commissioner referred to in subsection 15(1) of the BCIIIP Act.
<b>BCIIIP Act</b>	means the <i>Building and Construction Industry (Improving Productivity) Act 2016</i> (Cth).
<b>Building Code</b>	means the Building Code issued under subsection 34(1) of the BCIIIP Act, being the document titled ' <i>Code for the Tendering and Performance of Building Work 2016</i> ', which is available at <a href="https://www.legislation.gov.au/Details/F2017C00125">https://www.legislation.gov.au/Details/F2017C00125</a>
<b>Building Contractor</b>	has the same meaning as in the BCIIIP Act.
<b>Building Industry Participant</b>	has the same meaning as in the BCIIIP Act.
<b>Building Work</b>	has the same meaning as in subsection 3(4) of the Building Code.
<b>Commonwealth Funded Building Work</b>	means Building Work in items 1-8 of Schedule 1 of the Building Code.
<b>Contractor's Work</b>	means the Commonwealth Funded Building Work that is the subject of this Invitation .
<b>Designated Building Law</b>	has the same meaning as in the BCIIIP Act.
<b>Exclusion Sanction</b>	has the same meaning as in subsection 3(3) of the Building Code.

**Related Entity** has the same meaning as in subsection 3(2) of the Building Code.

**Workplace Relations Management Plan (Commonwealth)** has the meaning given to 'WRMP' in subsection 3(1) of the Building Code.

2. The Applicant confirms that it has complied with the Building Code in preparing its Application.
3. Should it be the successful Tenderer, the Applicant acknowledges that it and its Related Entities must comply with the Building Code in relation to all Building Work described in Schedule 1 of the Building Code on or after the date that the Building Code commenced, being 2 December 2016, and, should it be the successful Tenderer, in relation to the Contractor's Work.
4. The Applicant undertakes to ensure that it and its subcontractors that it subcontracts any of the Contractor's Work to, should it be the successful Tenderer, comply with the Building Code.
5. The Applicant acknowledges the powers and functions of the ABC Commissioner and the ABCC under the BCIIIP Act and the Building Code and undertakes to ensure that it and its subcontractors will comply with any requests made by the ABCC and the ABC Commissioner within those powers and functions, including but not limited to requests for entry under section 72 of the BCIIIP Act, requests to interview any person under section 74 of the BCIIIP Act, requests to produce records or documents under sections 74 and 77 of the of the BCIIIP Act and requests for information concerning matters relating to the Building Code under subsection 7(c) of the Building Code.
6. The Applicant declares that where it proposes to subcontract any of the Contractor's Work, should it be the successful Tenderer, it will:
  - a. require each subcontractor to whom it proposes to subcontract any of the Contractor's Work to confirm, prior to entering into the subcontract and every six months during the term of the relevant subcontract, that it has not, within the preceding three year period:
    - i. had an adverse decision, direction or order made by a court or tribunal for a breach of a Designated Building Law, work health and safety law (including, but not limited to, the *Work Health and Safety Act 2011* (NSW) and the *Work Health and Safety Regulation 2011* (NSW)) or the *Migration Act 1958* (Cth); or
    - ii. been required to pay any amounts under an adjudication certificate (provided in accordance with a law relating to the security of payments (including, but not limited to, the *Building and Construction Industry Security of Payment Act 1999* (NSW)) that are due to persons in respect of Building Work) or owed any unsatisfied judgement debts (including by any Related Entity) to a Building Contractor or Building Industry Participant;
  - b. not enter into a subcontract with a subcontractor who:
    - i. is subject to an Exclusion Sanction or is excluded from performing Building Work funded by a state or territory government (unless prior approval to engage that subcontractor is obtained from the ABC Commissioner); and
    - ii. in the three years prior to the date on which the Applicant submits its Application, has had an adverse decision, direction or order made by a court or tribunal for a breach of the BCIIIP Act, a Designated Building Law, work health and safety law (including, but not limited to, the *Work Health and Safety Act 2011* (NSW) and the *Work Health and Safety Regulation 2011* (NSW)) or competition and consumer law (including, but not limited to, the *Competition and Consumer Act 2010* (Cth)) and failed to comply with the decision, direction or order;

- c. only enter into a subcontract:
    - i. pursuant to which the subcontractor undertakes to:
      - A. comply with the Building Code in performing the Contractor's Work;
      - B. comply with the version of the Applicant's Workplace Relations Management Plan (Commonwealth) approved by the ABCC for the performance of the Contractor's Work; and
      - C. only use products in relation to the Contractor's Work that comply with the relevant Australian standards published by, or on behalf of, Standards Australia Limited (ABN 85 087 326 690);
    - ii. where the subcontractor has submitted a declaration of compliance, including the further information outlined in Attachment A to the declaration of compliance, in substantively the same form as the model declaration of compliance applicable to contractors and subcontractors in relation to the Building Code issued by the ABCC from time to time; and
    - iii. where the subcontract with the subcontractor contains clauses in substantively the same form as the model contract clauses applicable to contractors and subcontractors in relation to the Building Code issued by the ABCC from time to time.
7. The Applicant declares that it has provided all of the further information required by Attachment A to this Declaration of Compliance.
8. The Applicant declares that:
- a. it is not subject to an Exclusion Sanction;
  - b. it has not had an adverse decision, direction or order made by a court or tribunal for a breach of the BCIP Act, a Designated Building Law, work health and safety law (including, but not limited to, the *Work Health and Safety Act 2011* (NSW) and the *Work Health and Safety Regulation 2011* (NSW)) or competition and consumer law (including, but not limited to, the *Competition and Consumer Act 2010* (Cth)) and failed to comply with the decision, direction or order;
  - c. it will only use products in relation to the Works that comply with the relevant Australian standards published by, or on behalf of, Standards Australia Limited (ABN 85 087 326 690), should it be the successful Tenderer; and
  - d. if shortlisted to submit a Tender, it will provide as part of its Tender:
    - i. a Workplace Relations Management Plan (Commonwealth) for approval by the ABCC in accordance with Part 6 of the Building Code;
    - ii. the extent to which domestically sourced and manufactured building materials will be used to undertake the Building Work;
    - iii. the successful tenderer's assessment of the whole-of-life costs of the project to which the Building Work relates;
    - iv. the impact on jobs of the project to which the Building Work relates;
    - v. whether the project to which the Building Work relates will contribute to skills growth;
    - vi. the number of apprentice and trainee employees intended to be engaged by the Applicant to undertake the Contractor's Work; and
    - vii. the number and classes of persons that hold visas under the *Migration Act 1958* (Cth) intended to be engaged by the Applicant to undertake the Contractor's Work.

*[noting that, where the Tenderer comprises of more than one Participant, the information required under 8(d) will be required to be prepared and submitted on behalf of the Tenderer, not on behalf of each Participant]*

Signed for the Applicant/Participant by: .....

Name (in block letters): ..... (Authorised Officer)

In the Office Bearer capacity of: .....

Date: .....

**ATTACHMENT A – INFORMATION REGARDING  
COMPLIANCE WITH THE CODE FOR THE TENDERING  
AND PERFORMANCE OF BUILDING WORK 2016**

Each Participant in the Applicant that is or will be a “building contractor” or a “building industry participant” (as defined in section 5 of the BCIP Act) must provide the following information as part of its Declaration of Compliance. This information can either be set out in this table or in an annexure to this Attachment and the Declaration of Compliance.

Item	Requirement	Compliance
1	Is the Participant excluded from performing Building Work funded by a state or territory government? If so, the Commonwealth reserves the right to exclude the Applicant from further consideration.	<p>Yes/No</p> <hr/> <p>Details:</p>
2	Does the Participant positively commit to the provision of appropriate training and skills development for their workforce, and, if so, what evidence can the Participant supply in relation to this (for example, evidence of its compliance with any state or territory government building training policies and evidence of its support in the delivery of nationally endorsed building and construction competencies)?	<p>Yes/No</p> <hr/> <p>Details:</p>
3	Has the Participant within the preceding 3 years had an adverse decision, direction or order of a court or tribunal made against it for a breach of a Designated Building Law, work health and safety law (including, but not limited to, the <i>Work Health and Safety Act 2011</i> (NSW) and the <i>Work Health and Safety Regulation 2011</i> (NSW)) or the <i>Migration Act 1958</i> (Cth)?	<p>Yes / No</p> <hr/> <p>Details:</p>

Item	Requirement	Compliance
4	Has the Participant or its Related Entities within the preceding 3 years been required to pay any amount under an adjudication certificate (provided in accordance with a law relating to the security of payments (including, but not limited to, the <i>Building and Construction Industry Security of Payment Act 1999</i> (NSW)) that are due to persons in respect of Building Work) to a Building Contractor or Building Industry Participant?	<p data-bbox="772 230 879 259">Yes / No</p> <hr/> <p data-bbox="772 315 863 344">Details:</p>
5	Has the Participant or its Related Entities within the preceding 3 years owed any unsatisfied judgement debts to a Building Contractor or Building Industry Participant?	<p data-bbox="772 775 879 804">Yes / No</p> <hr/> <p data-bbox="772 860 863 889">Details:</p>

**Annexure 2B to the Invitation Form – Confirmation of WHS Accreditation Status**

This “Confirmation of WHS Accreditation Status” must be completed by each Participant in the Applicant that will carry out ‘building work’ (as defined in the BCIIIP Act) for the Project and lodged with the Application. Any Application in which this Confirmation is not completed may be regarded as non-conforming.

Refer to clause 9.13.2

**CONFIRMATION OF ACCREDITATION STATUS UNDER THE AUSTRALIAN GOVERNMENT WORK HEALTH AND SAFETY ACCREDITATION SCHEME**

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**Application:** *[insert Project Name and Invitation reference]*

**Applicant:** *[insert full legal name of Applicant/Participant, including ABN and ACN where applicable]*

**Applicant's authorised representative:** *[insert full name and title of natural person completing this Confirmation on behalf of the Applicant/Participant ]*

Insert details of accreditation status under the Australian Government Work Health and Safety Accreditation Scheme (the *Scheme*), including the expiry date of accreditation, or provide evidence that accreditation is being sought under the Scheme.

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Regulation 26(1)(f) of the *Fair Work (Building Industry – Accreditation Scheme) Regulations 2016* (Cth) outlines provisions applying to joint venture arrangements that include accredited and unaccredited members. Where the Applicant is a joint venture that includes an unaccredited member, the joint venture must provide evidence that the project specific exemption has been obtained or is being sought under regulation 26(1)(f).

Signed for the Applicant/Participant by: .....

Name (in block letters): ..... (Authorised Officer)

In the Office Bearer capacity of: .....

Date: .....



## **Schedule 1 – Capability, Experience and Performance Record of the Applicant, Participants and Principal Design Organisations (Applicable Comparative Evaluation Criterion - Criterion 1)**

In addition to assessing the information provided by an Applicant in this Schedule 1, assessment will also be based on: -

- Contractor performance reports generated under the NSW Government Guidelines for “Contractor Performance Reporting and Exchange of Reports between Government Agencies”;
- information from contacts nominated by the Applicant for listed projects; and
- independent checks by RMS.

### **(a) Applicant and Participants**

- (i) List all major projects recently completed or underway that demonstrate your ability to manage and construct this Project. *(4 No. A4 pages)*

Include a description of the project, relevant features, the value, the client, contract type (D&C, etc), commencement and completion dates and the role of the Applicant and Participants.

Provide a contact’s name and contact details for each project.

- (ii) Provide a summary of **substantiated** evidence where possible of superior achievement of each of the following attributes for each major project nominated, with attachments where applicable: *(4 No. A4 pages for summary, no limit for attachments)*

- A. time;
- B. quality;
- C. safe work practices;
- D. workplace relations;
- E. contractual disputes;
- F. community liaison;
- G. environmental practices; and
- H. co-operative relationship contracting.

### **(b) Principal Design Organisations**

The principal design organisations should include all those organisations that will carry out the design activities on this Project, including geometric, tunnel, drainage, structural, pavement, geotechnical, environmental, urban design, aesthetics and landscape designs.

- (i) List all major projects recently completed or underway that demonstrate the ability of your principal design organisations to carry out the design activities on this Project. *(4 No. A4 pages)*

Include a description of the project, the value, the client, contract type (D&C, etc), commencement and completion dates and role of principal design organisations.

Provide a contact’s name and contact details for each project.

(ii) Provide a summary of **substantiated** evidence where possible of achievement of the following attributes for each major project nominated, with attachments where applicable: - *(4 No. A4 pages for summary, no limit for attachments)*

- A. the role played by the organisation;
- B. timeliness of completion;
- C. satisfaction of the owner's requirements; and
- D. co-operative relationship contracting.

## **Schedule 2 – Management Structures, Key Staff, Labour, Plant, Equipment and Materials (Applicable Comparative Evaluation Criterion – Criterion 2)**

### **(a) Management Structures**

#### **(i) Applicant Organisation and Management Personnel**

*(4 No. A4 pages)*

Provide a structure of the organisations and management personnel participating in the Application (including Participants and Providers), demonstrating:

- A. roles and responsibilities;
- B. lines of communication within the Applicant's team;
- C. lines of communication with RMS; and
- D. alternative Providers if uncertainty exists.

#### **(ii) Design Organisations**

*(4 No. A4 pages)*

Provide a structure of the organisations and significant personnel participating in the design, demonstrating:

- A. roles and responsibilities of each significant person; and
- B. lines of communication and reporting within and between the organisations and significant personnel.

#### **(iii) Construction Organisations**

*(4 No. A4 pages)*

Provide a structure of the organisations and significant personnel participating in the construction of roadworks and bridgeworks, demonstrating:

- A. roles and responsibilities of each significant person; and
- B. lines of communication and reporting within and between the organisations and significant personnel.

### **(b) Key Staff**

Provide details on the personnel (in the positions outlined in (i), (ii) and (iii) below) that you intend to provide for the Project.

If the positions in your organisation are different to those outlined below, substitute your positions.

In respect of each position, provide:

- A. the nominated person for the position and the relevant experience of that person, including in cooperative relationship contracting;
- B. the availability of the person; and
- C. the CV for each person.

*(no limit)*

#### **(i) Applicant's Management Personnel**

*(1No. A4 page for each position)*

The qualifications, experience and skills of the personnel that you intend to nominate for the positions outlined below must meet the criteria specified in Schedule 19 to the Project Deed.

- A. Project Director;
- B. Design Manager;

- C. Construction Manager(s);
- D. Quality Manager;
- E. Community Relations Manager;
- F. Environmental Manager;
- G. Site WHS Representative;
- H. Traffic Manager;
- I. Landscape Representative;
- J. Geotechnical Design Manager; and
- K. General Superintendent

In respect of each position outlined in (ii) and (iii) below, provide the minimum skill levels and experience levels for the position;

**(ii) Principal Design Organisations' Personnel**

*(1 No. A4 page for each position)*

- A. Design team leader
- B. Geometric designer;
- C. Hydrology/drainage/water quality designer;
- D. Pavement designer;
- E. Structural designer;
- F. Bridges designer;
- G. Tunnel designer;
- H. Urban, aesthetics and landscape designer;
- I. Geotechnical designer;
- J. Environmental designer; and
- K. Design reviewer.

**(iii) Roadworks and Bridgeworks Construction Personnel**

*(1 No. A4 page for each position)*

- A. Project managers;
- B. Project engineers;
- C. Superintendents;
- D. Supervisors and foremen; and
- E. Surveyors.

**(c) Key Labour, Plant and Equipment**

*(3 No. A4 pages)*

Identify, quantify and state the availability to the Applicant of key items of labour and construction plant and equipment required to undertake the Project in the required time period, including details on:

- (i) tunnel construction labour, plant and equipment, including details on plant and equipment ownership;

- (ii) earthworks and paving labour, plant and equipment, including details on plant and equipment ownership;
- (iii) bridge construction labour, plant and equipment, including details on plant and equipment ownership;
- (iv) specialised plant and equipment, including ownership; and
- (v) alternatives.

**(d) Materials**

*(3No. A4 pages)*

Provide the strategy for the identification and procurement of materials required to undertake the Project in the required time period, including specific details on the following materials: -

- (i) sub-grade and pavement;
- (ii) drainage;
- (iii) bridge; and
- (iv) tunnels.

## **Schedule 3 - Program, Key Issues and Strategies (Applicable Comparative Evaluation Criterion - Criterion 3)**

### **(a) Program**

Provide a high level Gantt chart and program commentary for the design and construction activities associated with the Project, which should: *(4 No. A4 or A3 pages)*

- (i) include and identify separately the Applicant's allowances for all delays for which the Contractor will be responsible and the Applicant's estimate of delays due to Site Conditions and inclement weather that the Contractor is likely to encounter over the design and construction period for the Project;
- (ii) identify critical design milestones;
- (iii) demonstrate the integration between design approvals and construction activities;
- (iv) identify the constraints, considerations and methodologies impacting on the Applicant's design and construction activities;
- (v) identify the Applicant's ability to complete the Project in compliance with RMS' completion requirements; and
- (vi) identify any opportunities to provide early benefits to the community through early opening of local roads, interchanges and dual carriageway sections of the Project.

### **(b) Key Issues and Strategies**

Provide an outline of the key issues on this Project that you believe relate to any of the topics below and provide strategies and methodologies to address each key issue.

A response is not required for every topic listed below. Applicants are to nominate only those issues that they consider are key to this Project.

#### **(i) Design**

*(5 No. A4 pages)*

- A. Environmental constraints and hazard identification;
- B. Whole-of-life cost;
- C. Constructability;
- D. Design quality, reviews and auditing;
- E. Work health and safety, including safety in design issues;
- F. Fitness-for-purpose;
- G. Urban and landscaping design and integration with other elements of the design;
- H. Innovation in design; and
- I. Others – *[Applicant to nominate]*.

#### **(ii) Construction**

*(5 No. A4 pages)*

- A. Authority Approvals;
- B. Traffic management;
- C. Construction quality, including reviews and auditing;
- D. Work health and safety;
- E. Community impacts and liaison;
- F. Property adjustments;
- G. Environmental impacts; and
- H. Others – *[Applicant to nominate]*.

## **Schedule 4 – Referees**

In addition to assessing the information provided by referees nominated by the Applicant as required in this Schedule 4, assessment will also be based on: -

- Contractor performance reports generated under the NSW Government Guidelines for “Contractor Performance Reporting and Exchange of Reports between Government Agencies”;
- performance data held by RMS on the Applicant’s and its Participants’ collaboration with the NSW Government.; and
- independent checks by RMS.

### **(a) Applicant and Participants**

The Applicant must provide the details of two appropriate referees for each Participant to demonstrate its and its Participants’ capacity for successful collaboration with the NSW Government, as set out in Appendix 1 to this Schedule 4.

The referees will be asked to verify past performance of the Applicant and its Participants by:

- A. confirming that the Applicant and its Participants have the ability to achieve outcomes;
- B. advising the extent of any legal and contract disputes with the Applicant and its Participants; and
- C. confirming the Applicant’s and its Participants’ demonstrated commitment to working constructively with the NSW Government to resolve commercial issues.

Where the Applicant and its Participants have contracted with RMS in the past five years and intend to nominate RMS as the referee, they should not provide a specific name of RMS’ employee; it is sufficient to nominate RMS as one referee.

The Applicant and its Participants who nominate RMS as the referee must nominate another referee, from another organisation, preferably Government. If the second referee is from Government, then the referee must be at the level equivalent to the General Manager or higher. Otherwise, the referee must be at the level of a chief executive officer or executive director.

Regardless of the Applicant’s and/or its Participants’ nomination of referees, where the Applicant and/or its Participants have contracted with RMS in the past five years, the Evaluation Panel will obtain the performance data held by RMS on the Applicant’s and/or its Participants’ collaboration with the NSW Government from relevant RMS personnel, including the RMS Commercial Services Branch.

In the event that the Applicant and its Participants have not previously worked for the NSW Government, the Applicant must provide the details of two referees for each Participant from organisations that the Applicant and its Participants have contracted with within the past five years, preferably for works greater than \$100 million. The referees must be at the level of a chief executive officer or executive director, with the ability to comment on the Applicant's and its Participants’ history of legal and contract disputes, and their ability to work constructively to resolve commercial issues.

## Appendix 1 to Schedule 4

Where the Applicant comprises of more the one Participant, the Applicant is to provide separate schedule for each Participant.

Each Participant in the Applicant is to answer the following question:

Has the Applicant/Participant previously worked for the NSW Government?	<b>Yes / No</b>
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If the answer to the above question is “**Yes**”, each Participant in the Applicant must provide details of two referees from the NSW Government agencies it has contracted with within the past five years, as set out below, who could comment on the Participant’s past performance and verify details set out in Schedule 4.

<b>Name of Referee*</b>	<b>Name of NSW Government Agency</b>	<b>Referee’s Position Title*</b>	<b>Referee’s Contact Details (telephone number &amp; email)*</b>

*\* Where the Applicant and/or its Participants have contracted with RMS in the past five years and intend to nominate RMS as the referee, they should not provide a specific name of a RMS employee; it is sufficient to nominate RMS as one referee.*

If the answer to the above question is “**No**”, each Participant in the Applicant must provide details of two referees from the organisations it has contracted with within the past five years, preferably for works greater than \$100 million. The referees must be at the level of a chief executive officer or executive director, with the ability to comment on the Participant’s past performance and verify details set out in Schedule 4.

<b>Name of Referee</b>	<b>Name of Organisation</b>	<b>Referee’s Position Title</b>	<b>Referee’s Contact Details (telephone number &amp; email)</b>



**Schedule 5 – Project Deed Proposed Changes & Parent Company Details**

**(a) Project Deed**

(i) Identify each change that the Applicant proposes to the Project Deed and specify in detail the rationale for each change, in the following tabular format:

<b>Name of Applicant:</b> <i>[insert]</i>		
<b>Item</b>	<b>Proposed change to Project Deed</b>	<b>Rationale for change</b>
1.	<i>[insert]</i>	<i>[insert]</i>
2.	<i>[insert]</i>	<i>[insert]</i>
3.	<i>[insert]</i>	<i>[insert]</i>
4.	<i>[insert]</i>	<i>[insert]</i>
5.	<i>[insert]</i>	<i>[insert]</i>

(ii) If required, Applicants may attach additional supporting information relating to the rationale for the proposed change to the Project to justify the proposed change to the Project Deed. Any such additional supporting information must be clearly identified in the 'Rationale for change' column and attached in a logical manner to the table.

**(b) Parent Company**

- (i) Provide a corporate structure diagram:
  - A. showing the relationship between the Applicant (or Participant, where relevant) and the entity requested by the Applicant to provide the Parent Company Guarantee (refer to ES Schedule clause (a)(ix)); and
  - B. if the requested entity is not the ultimate holding company, showing the ultimate holding company and all intermediate entities and shareholdings.
- (ii) Where the requested entity by the Applicant to provide the Parent Company Guarantee is not the ultimate holding company, provide the reasons why RMS should consider accepting the Parent Company Guarantee from the requested entity.

## 12. APPLICATIONS

### 12.1 LODGEMENT OF APPLICATION

The Applicant must deliver, by hand or by courier, one (1) printed copy of the Application and one (1) electronic copy of documents in pdf format.

The Applications are to be:

- (a) enclosed in a sealed package no larger than 400mm x 270mm x 190mm:
  - (i) endorsed with the words “**Registration of Interest Application for** *[insert Project Name]*”
  - (ii) marked "**Tender Box/Strictly Private and Confidential**"; and
- (b) delivered by the Closing Date and Time to:

Ground Level  
20-44 Ennis Road  
MILSONS POINT NSW 2061

The Closing Date and Time for receipt of Applications is between 10:30am and 11am, on *[insert date]*. Applications submitted by post, facsimile or e-mail will not be accepted.

In the event that the Applicant’s Application does not fit into one sealed package of the dimensions specified in paragraph (a) above, the Applicant can submit multiple packages each not exceeding the specified dimensions. Each package must be additionally identified with “Volume 1”, “Volume 2”, etc., as relevant.

In the event of any discrepancies between the printed and electronic copies of Applications submitted, the printed copy will prevail.

### 12.2 ENQUIRIES

All communication relating to this Invitation to submit a Registration of Interest document must be addressed in writing to RMS’ Representative who is: -

*[insert name, title and postal address]*  
Facsimile: *[insert facsimile number]*  
Email: *[insert email address]*

### 12.3 LATE APPLICATIONS

An Application submitted after the Closing Date and Time referred to in clause 12.1 is a late Application.

A late Application will be excluded from consideration unless RMS otherwise determines, in its absolute discretion and without having any obligation to do so, that it is appropriate for a late Application to be considered.

## 13. LEGAL FRAMEWORK

### 13.1 VALIDITY OF APPLICATION AND WITHDRAWAL

By submitting an Application (whether or not it complies in all respects with this Invitation), an Applicant will be taken to have agreed, in consideration of RMS receiving the Application and

commencing to consider it along with any other Applications received, not to withdraw or amend the Application before *[insert date]* (except with the prior written consent of RMS, in its absolute discretion).

Nothing in this clause limits the operation of clause 13.4 (RMS' Discretion and Rights) or is to be taken as imposing any obligation (contractual or otherwise) on RMS to receive or to consider any Application from any Applicants.

If an Applicant purports to withdraw from Phase I or Phase II of the process for any reason, then without prejudice to any other right or remedy that RMS may have, RMS may, in its absolute discretion, further consider other Applicants.

## **13.2 CONFIDENTIALITY AND PUBLIC ACCESS TO INFORMATION**

- (a) The Applicant must keep confidential and not:
- (i) disclose to any person; or
  - (ii) copy, use or otherwise deal with for any purpose,  
any information regarding this Invitation, the Request for Tender or the Project or any other information with which it has been provided by RMS or any other person on behalf of RMS except to the extent:
    - (iii) the Applicant is specifically so authorised in writing by RMS;
    - (iv) the information is disclosed to and used by others (who are also bound to keep the information confidential) for the purposes of enabling the Applicant to prepare Application;
    - (v) the information is already in the public domain, otherwise than because of a breach by the Applicant of these confidentiality obligations; or
    - (vi) the information is required to be disclosed by law, and in such case the Applicant must provide RMS with written notice of the legal basis for the disclosure.
- (b) RMS may issue, or may have issued, a form of deed of confidentiality and disclaimer, and require that each Participant in the Applicant submit a duly completed and executed deed in that form, in which case, compliance with those requirements will be mandatory.
- (c) Applicants should note that documents relating to the Project may be disclosed to the public if requested by Parliament or under the *Government Information (Public Access) Act 2009* (NSW) (**GIPA Act**). Subject to certain exemptions the GIPA Act gives members of the public the right to be given access to documents held by public sector bodies, including RMS. These access rights are limited by exceptions and exemptions necessary for the protection of the public interest, the ability of the government to function effectively, and private and business affairs of persons or organisations in respect of which information is collected and held by the public sector bodies.
- (d) A person who makes an application under section 9 of the GIPA Act has a legally enforceable right to access that information unless there is an overriding public interest against disclosure. The GIPA Act provides that there may be public interest considerations against disclosure if such disclosure could reasonably be expected, among other things, to:
- (i) reveal commercial-in-confidence provisions (as that term is defined in clause 1 of Schedule 4 to the GIPA Act) of the proposed Project Deed or the Contract;

- (ii) diminish the competitive commercial value of any information contained in the Application; or
- (iii) prejudice any Applicant's legitimate business, commercial, professional or financial interests.

To assist RMS in determining whether, in the circumstances of any particular request for all or part of the Application, there is an overriding public interest against disclosure, Applicants are invited to identify information contained within their Application which they consider the disclosure of which might have one of the effects stated above (or which they consider may otherwise give rise to a public interest consideration against disclosure in accordance with the GIPA Act).

Identifying information in the manner stated above will not necessarily prevent disclosure in accordance with the GIPA Act and any decision to grant access to information will be determined by the requirements of the GIPA Act. RMS will consult with the Applicant in accordance with the GIPA Act prior to making a decision. If RMS determines to disclose the information, the Applicant will be entitled to pursue rights of review in accordance with GIPA Act. If RMS does not determine to disclose the information, the Applicant will have rights of review and Applicants will not be entitled to make any claim in respect of the decision or proceedings.

### **13.3 COSTS BORNE BY APPLICANT**

All costs and expenses incurred by the Applicant in preparing and submitting its Application and otherwise in the selection process must be borne entirely by the Applicant. The Applicant will not have any claim against RMS or the State of New South Wales (or any of their advisers) in tort, contract, equity, at law, under statute or otherwise, arising from or in connection with, any loss, damage or cost from any aspect of this Invitation or the Request for Tender or processes, activities or circumstances associated with or related to them, including the preparation of an Application or the exercise by RMS of any discretion, or the evaluation by RMS of any Applications.

### **13.4 RMS' DISCRETIONS AND RIGHTS**

RMS may conduct the process for the evaluation of Applications, the selection of an Applicant to Tender for Phase II or the selection of the Contractor in such manner as it thinks fit and, without limitation, may at its absolute discretion (without any obligation to do so): -

- cancel the Invitation and Request for Tender process at any time;
- provide to all Applicants any further information provided to a particular Applicant, including in response to queries regarding this Invitation (in which case, RMS may provide to all potential Applicants that have obtained the Invitation from RMS, any further information provided to a particular prospective Applicant);
- provide to an Applicant any further information (including information provided during Phase I discussion sessions, if undertaken);
- provide to a limited number of Applicants one or more Revised Project Deeds;
- consider or refuse to consider any Application which: -
  - is lodged by any means other than in accordance with this Invitation;
  - is lodged after the Closing Date and Time;
  - does not meet the Mandatory Selection Requirements referred to in clause 10.1; or

- has been lodged by an Applicant who has not complied with this Invitation;
- decide at any time to: -
  - use information held by RMS about any Applicant and Participant, not provided by the Applicant, for the purposes of evaluation;
  - not proceed with all or any part of the Project for any reason;
  - vary funding for the Project;
  - have any other person or persons (whether or not an Applicant who has submitted an Application) carry out all or any part of the Project;
  - extend or change the Closing Date and Time for the lodgement for Applications; or
  - reject any Application lodged by any Applicants who have breached the *Code of Practice for Procurement* or engaged in any collusive tendering, anti-competitive conduct or any similar conduct with any other Applicant or any other person in relation to the preparation or lodgement of their Application;
- at any time, re-invite applications for the Project from all or any of the Applicants who have submitted an Application, or from any other person (whether or not they submitted an Application);
- at any time, pre-qualify, short-list or enter into negotiations with any one or more persons;
- at any time, accept a substitution of, withdrawal of, or addition to any of the parties comprising an Applicant (including short-listed Applicants);
- at any time, issue addenda to this Invitation or clarify the Invitation in any way or to respond to potential Applicants' queries, including to vary the selection process (including the evaluation process) or its requirements for any Phase (including the contractual structure proposed for the carrying out of the Project): -
  - if in Phase I - by notice in writing to the potential Applicants to this Invitation; and
  - if in Phase II - by notice in writing to the short-listed Tenderers.

Any notice given after the completion of Phase I will be given to the short-listed Tenderers only, and not to all Applicants. Applicants must immediately acknowledge receipt of any addenda issued by RMS during Phase I and such addenda will become part of and will amend this Invitation;

- without limiting any requirements of this Invitation, at any time: -
  - request any Applicants to submit additional information or clarifications (and the Applicant in question must promptly respond, in writing, to any such requests);
  - request any Applicants to attend one or more meetings to discuss the Project Deed or Revised Project Deed, the Applicant's Application or to discuss issues associated with the selection process or any other aspect of the Application (and the Applicant in question must attend any such meetings as requested); and/or
  - otherwise communicate with any Applicants to discuss the Applicant's Application or to discuss issues associated with the selection process or any other aspect of the Project (and the Applicant in question must participate in any such communications as requested).

Where Applicants do not comply with the requirements of the three preceding paragraphs within the timeframe nominated by RMS, RMS may continue the evaluation or selection processes on the basis of the available information and: -

- decide whether or not to short-list Applicants, proceed to Phase II or enter into the Contract or any other contract with any Applicant or other person in connection with the Project; or
- in addition to any right under this clause 13.4, discontinue the Invitation process for Phase I, Phase II or any subsequent process at any time.

### **13.5 NO LEGAL RELATIONSHIP**

Other than the Deed of Disclaimer, the deed in respect of Related Companies referred to in clause 13.13, and the warranty and undertaking referred to in clause 13.10, no obligations arise from this Invitation as between any prospective Applicants or Participants and RMS or any of RMS' officers, employees or advisers, except to the extent that in consideration of RMS accepting an Application and commencing to consider it, the Applicant will not amend or withdraw the Application before *[insert date]*.

This Invitation is not an offer, it is an invitation to treat and, except as referred to in the preceding paragraph, must not be construed, interpreted, or relied upon, whether expressly or impliedly, as an offer capable of acceptance by any person, or as creating any form of contractual, quasi-contractual, restitutionary or promissory estoppel rights, or rights based upon other legal or equitable grounds.

Except as referred to in the first paragraph of this clause 13.5, no binding contract (including a process contract) or other understanding (including, without limitation, any form of contractual, quasi-contractual, restitutionary or promissory estoppel rights, or rights based upon similar legal or equitable grounds) will exist between RMS and any Applicant unless and until the Contract is signed by RMS and the Contractor.

### **13.6 OBLIGATIONS OF RMS**

Except as expressly stated in the Contract, RMS has no obligations or liabilities to any prospective Applicants or Participants in respect of the Invitation, the Invitation process or the evaluation or selection processes in Phases I or Phase II and to the maximum extent permitted by law, any obligations and liabilities which may otherwise be implied or imposed on RMS under contract, in tort including negligence, in equity, at law, by statute or otherwise are excluded.

### **13.7 DISCLAIMER**

Each Applicant and Participant acknowledges, accepts and agrees that: -

- any information, documents, statements and any representations in this Invitation and in any other documents referred to in this Invitation or provided as part of the Invitation process, are not exhaustive, may contain errors or omissions, may be amended at any time during Phase I and may be incomplete, inaccurate, misleading or inadequate for the needs of the Applicants;
- there may also be other information or documents in the knowledge or possession of RMS, other Government departments or agencies or their respective officers, employees, consultants, contractors or agents, which are relevant to the Project, this Invitation, the Invitation process or the preparation or lodging of an Application, which have not been provided to the Applicants or to which reference has not been made;
- it must make its own enquiries and make its own assessment of the information and documents provided and about any further information or documents required and must satisfy itself from its own investigations, evaluations, enquiries, assessments,

interpretations and sources as to all matters and things relevant to the Applicant's Application; and

- notwithstanding whatever information is provided to the Applicants by, or withheld from the Applicants by, or obtained by the Applicants from, any federal, state or local government department or agency (including RMS) or their respective officers, employees, consultants, contractors or agents or others, it must rely only upon its own investigations, evaluations, enquiries, interpretations and sources and its own assessments of the Project and as to all matters and things relevant to the Applicant's Application.

### **13.8 APPLICANT'S LEGAL OBLIGATIONS**

Each Applicant and Participant must, in preparing and lodging any Application, comply with all applicable laws, legal requirements and acceptable probity standards. Without limiting the application of this clause, each Applicant and Participant must not: -

- collude with, accept any commission from, or offer any commission to any other prospective Applicant, other Applicant or Participant of another Application;
- disclose any part of its Application (or any draft thereof) to any other prospective Applicant, other Applicant or Participant of another Application;
- enter any contract, arrangement or understanding with any other prospective Applicant, other Applicant or Participant of another Application or any trade, industry or other association with the effect that if the Applicant is short-listed or is selected as the Contractor, a benefit will be conferred on any other party (except another Participant in the same Application);
- enter any improper or anti-competitive contract, arrangement or understanding with any other person in connection with the Invitation, the Invitation process, Phase I or Phase II, or the Project; or
- procure information from, offer any incentives, gifts or other favours to, any person who is in any way involved with, in a position to influence, or capable of providing technical or other advice to, those who are involved in any way with the evaluation of the Applications.

### **13.9 CHANGES TO PARTIES TO AN APPLICATION**

If Participants to an Application change (or a Parent Company of a Participant changes) after the Closing Date and Time, the affected Applicant must immediately notify RMS of this change in writing. If RMS, in its absolute discretion, determines that this change is material, it reserves the right to re-evaluate the Application or to eliminate the Applicant from further participation in the Invitation process. Applicants should (as a minimum) notify RMS of any change to any of the following entities or individuals occurring after the Closing Date and Time: -

- any entity that proposes to take a direct equity interest in the Applicant or a Participant if the Applicant is short-listed or becomes the Contractor;
- the ultimate parent entity of any entity that proposes to take a direct equity interest of the type mentioned in the paragraph above;
- any other entity that is likely to be in a position to exercise control or influence (direct or indirect) over the future management and operation of the Applicant or a Participant;
- any director, secretary or chief executive of any entity falling within the above paragraphs and any proposed new director, secretary or chief executive officer; and

- any key Project resources identified by the Applicant as providing a core capability to the Applicant.

### **13.10 ACKNOWLEDGEMENT AND WARRANTY BY APPLICANT**

By submitting an Application (whether or not it complies in all respects with this Invitation), the Applicant and all Participants: -

- accept and agree with the terms of this Invitation;
- warrant to RMS that the information contained in the Application is accurate and complete as at the date on which it is submitted (except insofar as any information is not known to the relevant Participant), and may be relied upon by RMS in determining whether or not to short-list the Applicant or enter into the Contract with the Applicant; and
- undertakes to promptly inform RMS of any changes in circumstances within its knowledge that may cause the information contained in its Application to become inaccurate or incomplete in any respect.

### **13.11 JOINT AND SEVERAL**

Where a term is used in this Invitation to refer to the Applicant or to more than one person or Participant in an Application: -

- an obligation of those persons or entities (including of each Participant) is joint and several;
- a right of those persons or entities is held by each of them severally; and
- any other reference to that person or entity or term is a reference to each of those persons or entities separately.

### **13.12 PRIVACY ACT COMPLIANCE**

In relation to any personal information (as defined in the *Privacy Act 1988* (Cth) (“**the Privacy Act**”) provided by an Applicant or Participant in connection with the Applicant’s Application, each of the Applicant and Participant will comply with the provisions of the Privacy Act.

Each of the Applicants and Participants will comply with the provisions of the Privacy Act in relation to any personal information provided to them by RMS or by any of its officers, employees, agents or advisers.

### **13.13 COMPETITIVENESS, PROBITY AND RELATED COMPANIES**

RMS intends to ensure that the participation of Related Companies in two or more Applications does not materially impact the probity, competitiveness or cost of the Project.

The information required to be provided in section (d) of ES Schedule of each Application is intended to address this issue.

Depending upon the information provided by Applicants in their Application, RMS may require Applicants to: -

- clarify or improve the information provided and/or provide further information;
- implement internal governance arrangements and procedures to address probity and competitiveness concerns; and
- provide verification that all such arrangements and procedures have been complied with.



Without limiting the foregoing, if RMS proceeds to invite Tenders for the Project, RMS may, for each of the Tenderers, activate the relevant probity deed (referred to in ES Schedule) in order to preserve effective competition between, and competition and probity within, Tenderers including in relation to participation of Related Companies.

#### **13.14 REFERENCES TO DOCUMENTS**

A reference to a document including a policy document includes a reference to the document as up-dated, amended and reissued from time to time.

### **14 DEFINITIONS**

<b>ABC Commissioner</b>	The Australian Building and Construction Commissioner referred to in subsection 15(1) of the BCIIIP Act
<b>ABCC</b>	The body referred to in section 29 of the BCIIIP Act
<b>Applicant</b>	An organisation, joint venture, consortium or any other enterprise (including joint Participants) submitting an Application in response to this Invitation, to be short listed to submit a Tender for the Project.
<b>Application</b>	The submission by an Applicant in response to this Invitation, to register its interest to submit a Tender for the Project.
<b>BCIIP Act</b>	The <i>Building and Construction Industry (Improving Productivity) Act 2016</i> (Cth).
<b>Building Code</b>	The Building Code issued under subsection 34(1) of the BCIIIP Act, being the document titled ' <i>Code for the Tendering and Performance of Building Work 2016</i> ', which is available at <a href="https://www.legislation.gov.au/Details/F2017C00125">https://www.legislation.gov.au/Details/F2017C00125</a>
<b>Building Contractor</b>	Has the same meaning as in the BCIIIP Act
<b>Building Industry Participant</b>	Has the same meaning as in the BCIIIP Act.
<b>Building Work</b>	Has the same meaning as in subsection 3(4) of the Building Code.
<b>Certified AIP Plan</b>	The Australian Industry Participation Plan drafted by RMS, updated with the Contractor's details (where relevant) and certified by the relevant Authority.
<b>Chain of Responsibility Provisions</b>	Refers to any section of the Heavy Vehicle Law under which the Contractor is a ' <i>party in the chain of responsibility</i> ' (within the meaning given to that term under the Heavy Vehicle Law).
<b>Closing Date and Time</b>	The date and times identified in clause 12.1 of this Invitation.
<b>Commonwealth Funded Building Work</b>	Building Work in items 1-8 of Schedule 1 of the Building Code.
<b>Contract</b>	The documentation that forms the agreement between RMS and the Contractor to design and construct the upgrade and provide follow-up landscaping maintenance services.

<b>Contractor</b>	The successful Tenderer who will be engaged to carry out the Project.
<b>DAB</b>	Means the Dispute Avoidance Board contemplated in clause 9.10.
<b>D&amp;C Deed</b>	The RMS' model design and construct project deed which consists of the Terms and Conditions and Schedules which are available at <a href="http://www.rta.nsw.gov.au/doingbusinesswithus/specifications/modellegaldocuments.html">http://www.rta.nsw.gov.au/doingbusinesswithus/specifications/modellegaldocuments.html</a> .
<b>Designated Building Law</b>	Has the same meaning as in the BCIP Act.
<b>Environmental Assessment</b>	<i>[insert relevant volumes]</i>
<b>Environmental Representative</b>	The organisation / person that carries out the role for the Environmental Representative defined in the Planning Minister's Approval of the Project.
<b>Exclusion Sanction</b>	Has the same meaning as in subsection 3(3) of the Building Code.
<b>Government</b>	The New South Wales Government and/or Australian Federal Government.
<b>Heavy Vehicle Law</b>	means the: <ul style="list-style-type: none"> <li>a) Heavy Vehicle National Law (NSW) within the meaning of that term under the <i>Heavy Vehicle (Adoption of National Law) Act 2013</i> (NSW); and</li> <li>b) regulations in force under the Heavy Vehicle National Law (NSW) as applied (with modifications) under the <i>Heavy Vehicle (Adoption of National Law) Act 2013</i> (NSW) as amended, reproduced or updated from time to time.</li> </ul>
<b>Information Document</b>	Has the same meaning as in the Deed of Disclaimer included in Appendix 3.
<b>Invitation</b>	The invitation to register interest in making an Application contained in this document.
<b>Non-approved Entity</b>	Means an entity proposed by a Participant to sign a Parent Company Guarantee in the form included as Appendix 4, where the entity is not a Participant's Parent Company (as defined below).
<b>NSW Code</b>	The New South Wales Government's Code of Practice for Procurement.
<b>NSW Guidelines</b>	The New South Wales Government's Implementation Guidelines to the New South Wales Code of Practice for Procurement: Building and Construction. Copies of the Implementation Guidelines are available at <a href="http://www.industrialrelations.nsw.gov.au/biz_res/oirwww/pdfs/Construction_Guidelines_June_2013.pdf">http://www.industrialrelations.nsw.gov.au/biz_res/oirwww/pdfs/Construction_Guidelines_June_2013.pdf</a>
<b>Parent Company</b>	Means each Participant's ultimate holding company (as defined in section 9 of the <i>Corporations Act 2001</i> (Cth)) or such other entity as notified by RMS as being acceptable to it for the purposes of Phase I.

<b>Participant</b>	An entity which is a partner or joint participant in an Applicant.
<b>Phase</b>	Either of Phase I or Phase II or both Phase I and Phase II.
<b>Phase I</b>	The process described as Phase I under clause 2.
<b>Phase II</b>	The process described as Phase II under clause 2 and clause 8.
<b>Planning Minister's Approval</b>	The approval from the Minister for Planning under section 75J of the <i>Environmental Planning and Assessment Act 1979 (NSW)</i> to carry out the Project, including all conditions to it and all documents incorporated by reference, as that approval may be modified from time to time.
<b>Principal</b>	Roads and Maritime Services (RMS).
<b>Probity Adviser</b>	The person appointed by RMS to carry out probity related activities in respect of the process for engaging a Contractor, as referred to in clause 3.
<b>Project</b>	All activities associated with investigation, design and construction of the <i>[insert Project Name]</i> upgrade and provision of follow-up landscaping maintenance services.
<b>Project Deed</b>	Has the same meaning as under clause 7
<b>Provider</b>	An individual, organisation or other body proposed by the Applicant as part of its Application team but which would not be a partner, joint venturer or otherwise a Participant in an Applicant.
<b>Related Company</b>	A related body corporate as defined by section 9 of the <i>Corporations Act 2001</i> (Cth).
<b>Related Entity</b>	Has the same meaning as in subsection 3(2) of the Building Code.
<b>Request for Tender (or RFT)</b>	RMS document inviting the Tenderer to submit a Tender for the Project.
<b>RMS</b>	Roads and Maritime Services.
<b>“RTA” or “Roads and Traffic Authority”</b>	The Principal, and a reference to any “RTA” document (including an RTA Specification, Test Method or other document) is a reference to the equivalent document published by the Principal (or its predecessor, the RTA), regardless of whether it is titled “RTA” or “Roads and Maritime Services” or “RMS” (in this respect, the parties acknowledge that the Principal is progressively updating its documents from “RTA” to “[RMS]” and that this is likely to be ongoing during the currency of the Contract).”
<b>Tender</b>	The firm offer to enter into a Contract, submitted by a Tenderer to RMS.
<b>Tenderer</b>	An Applicant who has been short listed from the Registration of Interest process and has been invited to submit a Tender for the Project.
<b>Upgrade</b>	<i>[insert Project Name and brief description]</i>
<b>Workplace Relations Management Plan (Commonwealth)</b>	Has the meaning given to 'WRMP' in subsection 3(1) of the Building Code.

**Workplace Relations Management Plan (State)**      The Workplace Relations Management Plan contemplated by the NSW Guidelines.

In addition, definitions in the Project Deed apply in this Invitation.

**APPENDIX 1**  
**Location Map and Plan**

## **APPENDIX 2**

### **Information Package**

#### **1 General**

RMS is relying on the Applicant to make its own assessment of the information included in the Information Package.

The information is made available to indicate the nature of the work undertaken to date. RMS makes no undertaking that more weight should be given to one set or another set of data, nor does it warrant that any of the information made available is correct, adequate, complete, up to date, not misleading or otherwise suitable. RMS will not be liable if the information is not suitable for any reason, including if there is any omission relating to background information.

#### **2 Documents**

The documents in the Information Package are listed below and are included as electronic files on the CD titled: -

*[insert CD title]*

<b>Document Title and Descriptions</b>	<b>Electronic File</b>

The Project is currently subject to ongoing environmental assessments and further environmental reports and approvals may be added to this list.

## APPENDIX 3 Deed of Disclaimer

**This Deed Poll** is made by \_\_\_\_\_ ("**Tenderer**") in favour of Roads and Maritime Services ("**RMS**") in respect of the tender for the design and construction of the [*insert Project name*] ("**Project**").

1. In consideration of RMS inviting the Tenderer to participate in Pre-Tender Processes for the Project in accordance with the Pre-Tender Conditions which are to be provided to it by RMS ("**Conditions**") and submit a Tender for the Project in accordance with the Request for Tender which is to be provided to it by RMS ("**Tender Documents**"), subject to clause 2 of this deed of Disclaimer, the Tenderer:
  - (a) warrants that it will not rely upon the Tender Documents or Information Documents as being proper, adequate, suitable and/or complete for the purposes of enabling it to perform the design and construction obligations which the Tenderer will be required to perform if it enters into any contract with RMS with respect to the Project ("**Project Deed**");
  - (b) warrants that it will make its own independent evaluation of the Tender Documents' and or Information Documents' adequacy, accuracy, suitability and completeness for the purposes of enabling the Tenderer to perform the obligations which the Tenderer will be required to perform if it enters into the Project Deed, and it will base the price which it bids as part of its tender upon its own independent evaluations;
  - (c) acknowledges that no representation or warranty (express or implied) has been or is made by RMS (or by anyone on its behalf) to the Tenderer that the Scope of Works and Technical Criteria and any other specifications or drawings included in the Tender Documents will represent a completed or suitable design or that they will be suitable for design and construction purposes;
  - (d) acknowledges that:
    - (i) RMS will provide it with the Information Documents (and for that purpose, any information, opinion, data or document which is provided (including verbally or visually) by RMS at, or following from, any pre-tender or tender briefing, or as part of the Pre-Tender Processes will constitute 'Information Documents');
    - (ii) the Information Documents:
      - A. will be provided by RMS for the information only of the Tenderer; and
      - B. do not form part of the Tender Documents and will not form part of any contract with respect to the Project;
    - (iii) RMS does not owe any duty of care to the Tenderer with respect to the Information Documents;
    - (iv) to the extent that RMS is not the author or source of any of the Information Documents it merely passes those documents on to the Tenderer and does not adopt those documents;
    - (v) RMS:
      - A. is not responsible for; and

- B. makes no representation or warranty in respect of,  
the contents of the Information Documents including the accuracy, adequacy, suitability or completeness of any reports, data, test results, samples, reports or geotechnical investigations, opinions, recommendations, findings or other information contained in the Information Documents;
- (vi) where any information or document is referred to and incorporated by reference in an Information Document, the Tenderer should not rely upon any summary of the information or document which appears in the Information Document;
- (vii) no representation or warranty (express or implied) has been made by RMS (or by anyone on its behalf) to the Tenderer that the Information Documents are accurate, adequate, suitable or complete for any purpose connected with the Project including the preparation of its tender and the performance of any obligations which the Tenderer will be required to perform if it enters into the Project Deed; and
- (viii) it will have the opportunity during the tender period and subsequently to undertake for itself and to request others to make further enquiries and investigations relating to the subject matter of the Information Documents and for this purpose must have regard to the acknowledgments, warranties and releases in this Deed Poll in undertaking its own enquiries and investigations and in requesting further enquiries and investigations;
- (e) warrants that:
- (i) it will prepare its tender and (if its tender is successful) enter into the Project Deed based on its own investigations, interpretations, deductions, information and determinations including (without limitation) its own independent evaluation of the accuracy, adequacy, suitability and completeness of the Information Documents for the purposes of the Project including the preparation of its tender and the performance of any obligations which the Tenderer will be required to perform if it enters into the Project Deed; and
- (ii) it will not in any way rely upon:
- A. the Information Documents; or
- B. the accuracy, adequacy, suitability or completeness of the Information Documents,
- for any purpose in connection with the Project, including for the purposes of preparing its tender or entering into the Project Deed;
- (f) acknowledges and agrees that:
- (i) RMS will be providing the Information Documents to the Tenderer in reliance upon the acknowledgements and warranties contained in this Deed Poll;
- (ii) if RMS accepts its tender, RMS will be accepting its tender and entering into the Project Deed in reliance upon the acknowledgments and warranties contained in this Deed Poll; and
- (iii) RMS will not be liable to the Tenderer upon any Claim (to the extent permitted by law) arising out of or any way in connection with:
- A. the provision of, or the purported reliance upon, or use of, the Information Documents by the Tenderer or any other person associated



with the tender to whom the Information Documents are disclosed by the Tenderer; or

B. a failure by RMS to provide any information to the Tenderer;

(g) irrevocably releases and indemnifies RMS from and against:

(i) any Claim against RMS by, or liability of RMS to, any person; or

(ii) (without being limited by clause 1(g)(i)) any costs, losses or damages suffered or incurred by RMS,

arising out of or in connection with:

(iii) the provision of, or the purported reliance upon, or use of, the Information Documents by the Tenderer or any other person to whom the Information Documents are disclosed by the Tenderer; or

(iv) the Information Documents:

A. being relied upon; or

B. otherwise being used in the preparation of any information or document, including any information or document which is "misleading or deceptive" or "false and misleading" (within the meaning of those terms in the *Competition and Consumer Act 2010 (Cth)*, or any equivalent provisions of State or Territory Legislation),

by the Tenderer or any other person to whom the Information Documents are disclosed by the Tenderer; and

(h) irrevocably releases and indemnifies RMS from and against any Claim arising out of or in connection with any breach by the Tenderer of this Deed Poll; and

(i) accepts and agrees to be bound by the Conditions

2. The Contractor may rely on RMS Data, but only for the purposes of Claiming variations and extensions of time, if otherwise allowable in accordance with, under, and subject to the terms of, the Project Deed.

3. In consideration of RMS agreeing to provide the Tenderer with the Tender Documents and the Information Documents (in this clause 3 jointly called "Confidential Documents"), the Tenderer:

(a) acknowledges and agrees that the Confidential Documents are:

(i) owned by RMS; and

(ii) confidential and secret; and

(b) warrants that it will not:

(i) copy or otherwise reproduce in any form or medium the contents of the Confidential Documents (or any part of them) or otherwise cause, permit or allow the Confidential Documents (or any part of them) to be copied or reproduced in any form or medium;

(ii) disclose the contents of the Confidential Documents (or any part of them) or otherwise cause, permit or allow the Confidential Documents (or any part of them) to be disclosed; or

- (iii) use the contents of the Confidential Documents (or any part of them) or otherwise cause, permit or allow the Confidential Documents (or any part of them) to be used;

other than:

- (iv) for the purpose of its Tender; or
- (v) where the Tenderer enters into a Project Deed, as permitted by that Project Deed; or
- (vi) as required by law or as otherwise permitted by RMS.

Nothing in this clause 3 will in any way limit clause 1 of this Deed Poll.

4. In this Deed Poll,

**"Claim"** includes (without limitation) any claim, action, demand or proceeding:

- (a) under, arising out of, or in connection with the Project Deed;
- (b) arising out of, or in connection with, any task, thing or relationship connected with the Project; or
- (c) otherwise at law or in equity including (without limitation):
  - (i) by statute;
  - (ii) in tort for negligence or otherwise, including (without limitation) negligent misrepresentation; or
  - (iii) for restitution including (without limitation) restitution based on unjust enrichment.

The term "Claim" does not include a claim made against RMS by any third party, other than a third party to whom the Tenderer disclosed the Information Documents, arising from a breach by RMS of an obligation which RMS owes to that third party in relation to the Information Documents.

**"Information Document"** means any information, data or document which is:

- (a) referred to in the Schedule A and issued by, or on behalf of, RMS to the Tenderer as a hard copy document or as an electronic file;
- (b) issued or made available by, or on behalf of, RMS to the Tenderer in connection with Conditions (including any Pre-Tender Processes), Request for Tender, the Tender Documents or the Project and which at the time of issue (or being made available) is expressly classified or stated to be an "Information Document";
- (c) issued or made available by, or on behalf of, RMS to the Tenderer in connection with the Conditions (including any Pre-Tender Processes), Request for Tender or the Project, but which is not intended to form part of the Request for Tender or the Tender Documents (regardless of whether or not it is expressly classified or stated to be an "Information Document"), including any information, opinion, data or document which is provided (including verbally or visually) by RMS at, or following from, any of the Pre-Tender Processes or pre-tender or tender briefing; or
- (d) referred to or incorporated by reference in an Information Document, whether issued or made available:
- (e) before or after the date of this Deed Poll;

- (f) before or after the Closing Date and Time for Tenders; or
- (g) before or after the date of execution of the Project Deed, other than any document which RMS is obliged by the terms of the Project Deed to provide to the Tenderer.

**"Pre-Tender Processes"** has the meaning given to that term in the Conditions.

**"RMS Data"** means the RMS Geotechnical Data, RMS Noise Data and RMS Flood Data.

**"RMS Flood Data"** means raw factual data:

- (a) only within the categories confirmed in Schedule C to be raw factual data; and
- (b) which is contained in Information Documents that are identified in writing by RMS as flood data for the purposes of this definition.

**"RMS Geotechnical Data"** means raw factual data:

- (a) only within the categories confirmed in Schedule B to be raw factual data; and
- (b) which is contained in Information Documents that are identified in writing by RMS as geotechnical reports for the purposes of this definition.

**"RMS Noise Data"** means raw factual data:

- (a) only within the categories confirmed in Schedule D to be raw factual data; and
- (b) which is contained in Information Documents that are identified in writing by RMS as noise data for the purposes of this definition.

5. If the Tenderer is more than one person, each person making up the Tenderer is jointly and severally bound by the terms of this Deed Poll.
6. This Deed Poll cannot be revoked or otherwise modified without the prior written consent of RMS.
7. This document operates as a Deed Poll and is enforceable against the Tenderer in accordance with its terms by RMS, despite RMS not being a party to this Deed Poll.
8. This Deed Poll is governed by the laws of New South Wales.

### Schedule A – Information Documents

The following documents:

<b>Information Document Number</b>	<b>Title / Description of Information Document</b>
1	
2	
3	
4	
5	
6	
7	
8	
9	

<b>Information Document Number</b>	<b>Title / Description of Information Document</b>
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	

<b>Information Document Number</b>	<b>Title / Description of Information Document</b>
20	
21	
22	
23	
24	
25	
26	

## Schedule B – RMS Geotechnical Data

Categories constituting raw factual data are laboratory test results and the data identified in the table below:

Raw factual data
<b>Boreholes</b>
Date of Drilling (start and end)
Location (Easting/Northing)
Elevation (RL)
Depth (total)
Diameter
Pocket Penetrometer Tests ( <i>depth and reading</i> )
SPT ( <i>Depth and reading</i> )
Vane Shear Tests ( <i>Depth and reading</i> )
Point Load Testing
Sample depths
Core Photographs
<b>Backhoe Test Pits</b>
Date of Excavation
Location (Easting/Northing)
Elevation (RL)
Depth (total)
DCP ( <i>blow count and depth</i> )
Pocket Penetrometer Tests ( <i>depth and reading</i> )
Sample depths
Test Pit Photos
<b>Window Sampling</b>
Date of Sampling
Location (Easting/Northing)
Elevation (RL)
Depth (total)
DCP ( <i>blow count &amp; depth</i> )
Pocket Penetrometer Tests ( <i>depth &amp; reading</i> )
Sample depths

<b>Raw factual data</b>
Sample Photos
<b>Hand Augers</b>
Date of Excavation
Location (Easting/Northing)
Elevation (RL)
Depth (total)
Auger Diameter
DCP ( <i>blow count and depth</i> )
Sample depths
Test Pit Photos
<b>Excavator Test Pits</b>
Date of Excavation
Location (Easting/Northing)
Elevation (RL)
Depth (total)
Pocket Penetrometer Tests ( <i>depth and reading</i> )
Hand Vane Shear Tests ( <i>depth and reading</i> )
Sample depths
Test Pit Photos
<b>Seismic</b>
Date
Location (Easting/Northing)
Elevation (RL)
Geophone Spacing
Shot Spacing
Total Line Length
Raw data
<b>RAAX Imaging</b>
Date
BH Number



<b>Raw factual data</b>
Location (Easting/Northing)
Elevation (RL)
Images
<b>CPT's</b>
Date
Location (Easting/Northing)
Elevation (RL)
Depth
Results (qc, fs, Rf, u2)
<b>Pavement Test Pits</b>
Date of Excavation
Location (Easting/Northing)
Depth (total)
Auger Diameter
DCP ( <i>blow count and depth</i> )
Sample depths
Test Pit Photos
<b>Deflectograph</b>
Date of Deflectograph Measurements
Roadloc Chainages
Length Analysed
Results

**Schedule C – RMS Flood Data**

Raw factual data
Hydrologic model
Hydraulic model

## Schedule D – RMS Noise Data

Raw factual data
<b>Noise logger results</b>
Dates
Times
Date time
Noise levels
Weather information
Traffic data

Date                    day of

**Executed as a deed poll**

**Executed** by [insert name and ABN of  
**Tenderer]** by or in the presence of:



---

Signature of Director

---

Signature of Secretary/other Director

---

Name of Director in full

---

Name of Secretary/other Director in full

## APPENDIX 4

# Parent Company Guarantee

Deed of Guarantee and Indemnity

made at \_\_\_\_\_ on \_\_\_\_\_ 20\_\_\_\_

between **ROADS AND MARITIME SERVICES**, ABN 76 236 371 088  
of 20-44 Ennis Road MILSONS POINT NSW 2061  
(**Beneficiary**)

and [*insert Guarantor's name*] (ABN [*insert Guarantor's ABN*]) of [*insert Guarantor's address*] (**Guarantor**)

### Recitals

- A The Beneficiary has agreed to enter into the Contract with the Contractor on the condition that the Guarantor provides this Deed.
- B The Guarantor considers that by providing this Deed there will be a commercial benefit flowing to the Guarantor.

This Deed witnesses

### 1. Definitions and interpretation

#### 1.1 Definitions

In this Deed:

Contract means the deed dated on or about the date of this Deed between the Beneficiary and the Contractor for the design and construction of the [*insert project description*].

Contractor means [*insert Contractor's name, ABN and address*].

Contractor's Obligations means the due and punctual performance by the Contractor of all of its liabilities, obligations and agreements (present or future, actual or contingent) to the Beneficiary pursuant to or in connection with the Contract and each other Transaction Document but excluding all of the Contractor's Obligations with respect to payment of the Guaranteed Money.

Encumbrance means a mortgage, charge, pledge, lien, hypothecation, guarantee (including the guarantee under this Deed), indemnity, letter of credit, letter of comfort, performance bond or other avoidance against loss which secures any obligation which is or may be or becomes owing by any other Relevant Person to the Guarantor.

Government Agency means a government or government department, a governmental, semi-governmental or judicial person or a person (whether autonomous or not) charged with the administration of any applicable law.

Guaranteed Money means all money which the Contractor (whether alone or with any other person) is or at any time becomes actually or contingently liable to pay to, or for the account of, the Beneficiary on any account whatsoever under or in connection with the Contract or other Transaction Document including, without limitation, by way of interest, fees, costs, indemnities, charges, duties and expenses, or through payment of damages under or in relation to, or as a consequence of any breach or default of, the Contract or any other Transaction Document.

Guaranteed Obligations means the due and punctual payment of the Guaranteed Money and the due and punctual performance of the Contractor's Obligations.

Material Adverse Effect means, in respect of a person, a material adverse effect on:

- (a) its business, assets or financial condition; or
- (b) its ability to perform its obligations under any Transaction Document.

Relevant Person means the Contractor, the Guarantor and any person who has executed a Security in favour of the Beneficiary.

Security means a mortgage, charge, pledge, lien, hypothecation, guarantee (including the guarantee under this Deed), indemnity (including the indemnity under this Deed), letter of credit, letter of comfort, performance bond, or other assurance against loss which secures the Guaranteed Money, and whether existing at the date of this Deed or at any time in the future.

Specified Rate means 2% above the Overdraft Index Rate fixed from time to time by the Commonwealth Bank of Australia.

Tax means any present or future tax, GST, levy, impost, deduction, charge, duty, compulsory loan or withholding (together with any related interest, penalty, fine and expense in connection with any of them) levied or imposed by any Government Agency, other than any imposed on overall net income.

Transaction Document means each of:

- (a) this Deed;
- (b) the Contract;
- (c) any other document which the Guarantor and the Beneficiary so designate in writing;
- (d) each other document contemplated by or required in connection with any of the above or the transactions they contemplate; and
- (e) each document entered into for the purpose of amending, novating, restating or replacing any of the above.

Unpaid Amount means an amount which is not paid on the date on which it is due and payable under this Deed.

## 1.2 The Contract

Defined words and expressions used in this Deed have the meanings given to them in the Contract.

## 1.3 Interpretation

In this Deed unless the context indicates a contrary intention:

- (a) if the "Contractor" is more than one person, "Contractor" means each of them severally and every two or more of them jointly;
- (b) if the Guarantor is more than one person, "Guarantor" means each of them severally and every two or more of them jointly;
- (c) "person" includes an individual, a body politic, a corporation and a statutory or other authority or association whether incorporated or unincorporated;
- (d) a reference to any party includes that party's executors, administrators, successors, substitutes and assigns, including any person taking by way of novation;
- (e) a reference to any document or agreement is to such document or agreement as amended, novated, supplemented or replaced from time to time;
- (f) the singular includes the plural (and vice versa) and words denoting a given gender include all other genders;

- (g) headings are for convenience only and do not affect interpretation; and
- (h) unless otherwise stated, a reference to any amount is a reference to all or part of the amount.

#### 1.4 No contra proferentem

No term or provision of this Deed shall be construed against a party on the basis that the Deed or the term or provision in question was put forward or drafted by that party.

### 2. Guarantee

#### 2.1 Guarantee

The Guarantor irrevocably and unconditionally guarantees to the Beneficiary:

- (a) the due and punctual payment by the Contractor of the Guaranteed Money; and
- (b) the due and punctual performance by the Contractor of all of the Contractor's Obligations.

#### 2.2 Payment of Guaranteed Money

If the Contractor does not pay the Guaranteed Money when due, the Guarantor must on demand pay to the Beneficiary the Guaranteed Money which is then due and payable.

#### 2.3 Perform obligations

If the Contractor defaults in the performance or observance of any of the Contractor's Obligations, the Guarantor shall, in addition to its obligations under clause 2.2 of this Deed, on demand from time to time by the Beneficiary, immediately perform (or procure the performance of) any of the Contractor's Obligations then required to be performed by the Contractor in the same manner and on the same terms as the Contractor is required to perform the Contractor's Obligations.

### 3. Indemnity

Subject to clause 3A, as a covenant separate and distinct from that contained in clause 2.1, the Guarantor irrevocably and unconditionally agrees to indemnify the Beneficiary and at all times to keep the Beneficiary indemnified against any loss or damage suffered by the Beneficiary arising out of or in connection with:

- (a) any failure by the Contractor to pay the Guaranteed Money duly and punctually; or
- (b) any failure by the Contractor to observe or perform any of the Contractor's Obligations; or
- (c) any Transaction Document being wholly or partly void, voidable or unenforceable against the Contractor or the Guarantor for any reason and whether or not the Beneficiary knew or ought to have known of that reason, with the result in any such case that:
  - (i) sums which would (but for the voidness, voidability or unenforceability) have been Guaranteed Money are not recoverable by the Beneficiary under clause 2; or
  - (ii) obligations which would (but for the voidness, voidability or unenforceability) have been Contractor's Obligations are not guaranteed under clause 2.3; or
- (d) a disclaimer of any contract (including the Contract) or property made by a liquidator of the Contractor pursuant to Part 5.6 Division 7A of the *Corporations Act 2001* (Cth) or any other applicable laws.

#### 3A. Limitation

- (a) Notwithstanding any other clause in this Deed but subject to paragraphs (b) and (c) below:
- (i) the aggregate liability of the Guarantor under this Deed will not exceed the aggregate liability of the Contractor under the Contract;
  - (ii) the liability of the Guarantor under this Deed in connection with a breach of the Contract by the Contractor shall not be greater than the liability of the Contractor under the Contract in respect of the breach;
  - (iii) nothing in this Deed is intended to render the Contractor and the Guarantor liable for the same loss twice for the one breach of the Contract by the Contractor; and
  - (iv) payment by one of the Contractor or the Guarantor to or in favour of the Beneficiary shall be deemed to be good discharge against the Beneficiary in respect of that payment.
- (b) The limitation of liability under this clause 3A does not apply to liability to pay any GST in accordance with clause 7.3 of this Deed or otherwise.
- (c) Nothing in this clause shall limit the Guarantor's liability for Contractor's Obligations which arise from or would have arisen from unenforceable Contractor's Obligations referred to in clause 3(c) of this Deed (if those Contractor's Obligations had not been voided, avoided or unenforceable), subject to such liability not exceeding the liability that the Contractor would have had if the Contractor's Obligations had not been unenforceable Contractor's Obligations.

#### 4. Nature and preservation of liability

##### 4.1 Absolute liability

The liability of the Guarantor under this Deed arises immediately on execution and delivery of this Deed by the Guarantor and:

- (a) arises notwithstanding that any person expressed to be a party to this Deed does not execute and deliver this Deed, that there is any invalidity, forgery or irregularity in the execution or purported execution of this Deed by any person, or that this Deed is or becomes unenforceable against any such person for any reason; and
- (b) is not conditional on the entering into by any other person of any other document or agreement which might benefit (directly or indirectly) the Guarantor, or on the satisfaction of any other condition.

##### 4.2 Unconditional liability

The liability of the Guarantor under this Deed will not be affected by any thing which, but for this clause 4.2, would release the Guarantor from or reduce that liability, including but not limited to:

- (a) (**Invalidity etc.**): any Security or any Transaction Document being terminated or discharged (whether by any party thereto or by operation of law) or being or becoming void, voidable or unenforceable for any reason;
- (b) (**Other Securities**): the Beneficiary accepting or declining to accept any Security from any person;
- (c) (**Time or indulgence**): the Beneficiary granting or agreeing with the Guarantor or the Contractor to grant time, waiver or other indulgence or concession to, or making any composition or compromise with any person whether or not pursuant to any Transaction Document;



- (d) (**Forbearance**): the Beneficiary not exercising or delaying in the exercise of any remedy or right it has at any time to terminate or enforce its rights under this Deed, any Transaction Document or any Security;
- (e) (**Variation**): any variation, novation or alteration to or substitution of this Deed, any Transaction Document or any Security, whether or not that variation, novation or alteration permits or results in a change in the Guaranteed Obligations including the amount of the Guaranteed Money or a change in the date by which it must be paid, or a change in the identity of the Contractor;
- (f) (**Release**): the partial or conditional release or discharge by the Beneficiary or by operation of law of any Relevant Person from its obligations under any Transaction Document or any Security except only to the extent that RMS has, in writing, provided a release or discharge which has the effect of reducing the obligations of the Relevant Person;
- (g) (**Securities**): the Beneficiary enforcing, releasing, disposing of, surrendering, wasting, impairing, destroying, abandoning, prejudicing, or failing or delaying to perfect, maintain, preserve, realise or enforce any Transaction Document or any Security, whether negligently or otherwise;
- (h) (**Accounts**): the opening or operation of any new account with the Beneficiary by the Contractor;
- (i) (**Change of constitution**): any change for any reason in the name or manner in which the Beneficiary or any Relevant Person carries on business, including any change in any partnership, firm or association of which the Beneficiary or any Relevant Person is a member;
- (j) (**Disclosure**): any failure by the Beneficiary to disclose to the Guarantor any material or unusual fact, circumstance, event or thing known by, or which ought to have been known by, the Beneficiary relating to or affecting any Relevant Person before or at any time after the date of this Deed;
- (k) (**Prejudicial conduct**): any breach by the Beneficiary of any term of any Transaction Document or Security or any other act or omission (negligent or otherwise) of the Beneficiary with regard to any Transaction Document, any Security or any Relevant Person which is prejudicial to the interests of the Guarantor;
- (l) (**Preference**): any claim by any person that a payment to, receipt by, or other transaction in favour of the Beneficiary in or towards satisfaction of the Guaranteed Money is void, voidable or capable of being set aside under any law relating to bankruptcy, insolvency or liquidation being upheld, conceded or compromised;
- (m) (**Assignment**): the transfer, assignment or novation by the Beneficiary or any Relevant Person of all or any of its rights or obligations under any Transaction Document or Security to which it is a party;
- (n) (**Death or incapacity**): (where the Guarantor is an individual) the death or mental incapacity of the Guarantor;
- (o) (**Administration**): the provisions of section 440J of the *Corporations Act 2001* (Cth) so operating as to prevent or delay:
  - (i) the enforcement of this Deed against the Guarantor; and/or
  - (ii) any claim for contribution against the Guarantor; or
- (p) (**Disclaimer**): a disclaimer of any contract (including the Contract) or property made by a liquidator of the Contractor pursuant to Part 5.6 Division 7A of the *Corporations Act 2001* (Cth) or other applicable laws.

#### 4.3 No marshalling

The Beneficiary is under no obligation to marshal or appropriate in favour of the Guarantor or to exercise, apply, transfer or recover in favour of the Guarantor any Security or any funds or assets that the Beneficiary holds, has a claim on, or is entitled to receive.

#### 4.4 Void or voidable transactions

If:

- (a) the Beneficiary has at any time released or discharged:
  - (i) the Guarantor from its obligations under this Deed or any Security executed by the Guarantor; or
  - (ii) any assets of the Guarantor from a Security,in either case in reliance on a payment, receipt or other transaction to or in favour of the Beneficiary;
- (b) that payment, receipt or other transaction is subsequently claimed by any person to be void, voidable or capable of being set aside for any reason, including under a law relating to bankruptcy, insolvency or liquidation; and
- (c) that claim is upheld, conceded or compromised,

then:

- (d) (**Restitution of rights**): the Beneficiary will immediately become entitled against the Guarantor to all such rights (including under any Security) as it had immediately before that release or discharge;
- (e) (**Restore Beneficiary's position**): the Guarantor must immediately do all things and execute all documents as the Beneficiary may reasonably require to restore to the Beneficiary all those rights; and
- (f) (**Indemnity**): the Guarantor must indemnify and keep indemnified the Beneficiary against costs, losses and expenses suffered or incurred by the Beneficiary as a result of the upholding, concession or compromise of the claim.

#### 4.5 No double proof

This Deed constitutes a guarantee of the whole of the Guaranteed Obligations, even if the Beneficiary and the Guarantor have agreed or agree at any time that the Guarantor's liability under this Deed will be limited to a maximum amount. Accordingly, the Guarantor is not entitled to:

- (a) lodge any proof of debt in the winding up of the Contractor;
- (b) exercise any right of subrogation; or
- (c) otherwise be entitled to the benefit of any Security held by the Beneficiary,

with respect to any claim arising as a result of the Guarantor making a payment under this Deed, unless and until the Guaranteed Obligations have been paid, discharged or recovered by the Beneficiary in full.

#### 4.6 Suspense account

The Beneficiary may retain and carry to a suspense account and appropriate at the discretion of the Beneficiary any dividend received by the Beneficiary in the winding up of any Relevant Person, plus any other sums received by the Beneficiary on account of the Guaranteed Money, until the Beneficiary has received the full amount of the Guaranteed Money.

#### 4.7 Proof of debt in competition with Beneficiary

The Guarantor must prove in the winding up of any Relevant Person in respect of any claim it has against that Relevant Person other than a claim arising as a result of the

Guarantor making a payment under this Deed, and agrees to hold any dividend received in respect of that proof on trust for the Beneficiary in or towards satisfaction of the Guarantor's obligations under this Deed.

#### 4.8 Claim on the Guarantor

The Beneficiary is not required to take any steps to enforce its rights under any Transaction Document or any Security before enforcing its rights against the Guarantor under this Deed.

#### 4.9 No representation by Beneficiary

The Guarantor acknowledges that in entering into this Deed it has not relied on any representation, warranty or statement by the Beneficiary.

#### 4.10 No contribution

The Guarantor must not make a claim under or enforce any right of contribution it may have against any other Relevant Person unless and until the Guaranteed Obligations have been paid, discharged or recovered by the Beneficiary in full.

### 5. Corporate representations and warranties

#### 5.1 Representations and warranties

If the Guarantor is a body corporate, it represents and warrants to the Beneficiary that:

- (a) (**Constitution**): the execution, delivery and performance of this Deed does not violate its constitution or any other document, agreement, law or rules by which it is bound;
- (b) (**Corporate power**): it has taken all action required to enter into this Deed and to authorise the execution and delivery of this Deed and the performance of its obligations under this Deed;
- (c) (**Filings**): it has filed all notices and effected all registrations with the Australian Securities and Investments Commission or similar office in its jurisdiction of incorporation and in any other jurisdiction as required by law, and those filings and registrations are current, complete and accurate;
- (d) (**Corporate benefit**): the execution of this Deed is in the best commercial interests of the Guarantor;
- (e) (**Consideration**): this Deed is executed for valuable consideration, the receipt and adequacy of which the Guarantor acknowledges;
- (f) (**Status**): it is not in liquidation, provisional liquidation or receivership, or under administration, and no matter relating to it or any of its subsidiaries is the subject of a direction under, or having effect as if it were a direction under, section 14 of the *Australian Securities and Investments Commission Act 2001* (Cth) ('**ASC Law**'), or the subject of an investigation under, or taken to be under, the ASC Law;
- (g) (**Ownership of property**): it has full legal capacity and power to own its property and assets and carry on its business as it is now being conducted;
- (h) (**Ranking of obligations**): this Deed constitutes a valid and legally binding obligation, enforceable in accordance with its terms, to rank at all times at least equally with all of its other present and future unsecured payment obligations (including, without limitation, contingent obligations), other than those which are mandatorily preferred by law and that the Guarantor has taken all action required to ensure that its obligations under this Deed so rank and will continue to so rank;
- (i) (**No litigation**): no litigation, arbitration or administrative proceedings are taking place, pending or, to the knowledge of any of its officers, threatened against it or any of its subsidiaries or any of its or their property which, if adversely determined,

would be likely to have either separately or in aggregate a Material Adverse Effect on it or any of its subsidiaries;

- (j) (**Financial statements**): its financial statements current as at the date of this Deed have been prepared in accordance with the laws of Australia and (except where inconsistent with those laws) generally accepted accounting principles consistently applied, and give a true and fair view of the financial condition of it and its subsidiaries as at the date to which they are made up, and of the results of operations for the financial year then ended, and there has been no change since that date having a Material Adverse Effect on it, or on it and its subsidiaries on a consolidated basis;
- (k) (**Other information**): the written information and reports (if any) which it has given to the Beneficiary in connection with the negotiation and preparation of this Deed:
  - (i) was, when given, true and accurate in all material respects and not misleading, whether by omission or otherwise; and
  - (ii) contain forecasts and opinions all of which were made or formed after due and careful consideration on the part of its relevant officers based on the best information available to it and were fair and reasonable when made or formed; and
- (l) (**No filings or Taxes**): it is not necessary or desirable to ensure the legality, validity, enforceability or admissibility in evidence of this Deed that this Deed or any other instrument be filed or registered with any Government Agency or that any Taxes be paid.

## 5.2 Reliance on representations and warranties

The Guarantor acknowledges that the Beneficiary entered into the Contract in reliance on the representations and warranties in this clause 5.

## 5.3 No representations to Guarantor

The Guarantor confirms that it has not executed this Deed as a result of or in reliance upon any promise, representation, statement or information of any kind or nature whatever given or offered to it by or on behalf of the Beneficiary whether in answer to any inquiry by or on behalf of the Guarantor or not.

## 6. Payments

### 6.1 On demand

All money payable by the Guarantor under this Deed must be paid on demand by the Beneficiary in immediately available funds to the account and in the manner notified from time to time by the Beneficiary to the Guarantor.

### 6.2 Payment in gross

All money received or recovered by the Beneficiary on account of the Guaranteed Money will be treated as payments in gross.

### 6.3 Appropriation of payments

The Beneficiary may appropriate any money received by it under or in respect of this Deed, any Transaction Document or any Security in the manner and order and at all times as the Beneficiary in its absolute discretion determines.

### 6.4 Interest

The Guarantor must on demand by the Beneficiary from time to time pay interest on all Unpaid Amounts. Interest will accrue on those amounts from day to day from the due date up to the date of actual payment at the Specified Rate and, if not paid when due, will

itself bear interest in accordance with this clause 6.4. Interest is calculated on the basis of the actual number of days on which interest has accrued and on a 365 day year.

## 6.5 Merger

If the liability of the Guarantor to pay to the Beneficiary any money under this Deed becomes merged in any judgment or order, then as an independent obligation the Guarantor must pay interest on the amount of that money at the rate which is the higher of that payable under clause 6.4 and that fixed by or payable under the judgment or order.

## 6.6 Withholding for Taxes

All payments by the Guarantor under this Deed will be without deduction or withholding for any present or future Taxes unless the Guarantor is compelled by law to make any deduction or withholding and if this is the case, the Guarantor must pay to the Beneficiary any additional amounts as are necessary to enable the Beneficiary to receive, after all those deductions and withholdings, a net amount equal to the full amount which would otherwise have been payable had no deduction or withholding been required to be made.

## 7. Expenses, stamp duty and GST

### 7.1 Expenses

The Guarantor must on demand indemnify and keep indemnified the Beneficiary against all reasonable expenses, including legal fees, costs and disbursements on a solicitor/own client basis, incurred by the Beneficiary in connection with the successful enforcement, attempted enforcement or preservation of any rights under this Deed.

### 7.2 Stamp duties

The Guarantor must:

- (a) (**Payment of all duties**): pay all stamp duties, registration and similar Taxes, including fines and penalties, financial institutions duty (if any) and debits tax (if any) in connection with the execution, delivery, performance, enforcement or attempted enforcement of this Deed or any payment or other transaction under or contemplated in this Deed; and
- (b) (**Indemnity**): indemnify and keep indemnified the Beneficiary against any loss or liability incurred or suffered by it as a result of the delay or failure by the Guarantor to pay Taxes.

### 7.3 Goods and Services Tax

- (a) Capitalised expressions which are not defined in this clause 7.3 but which have a defined meaning in the GST Law have the same meaning in this clause 7.3.

In this clause 7.3 and elsewhere in this Deed where relevant:

- (i) **GST** means the goods and services tax imposed by the GST Law including, where relevant, any related interest, penalties, fines or other charge arising directly as a result of a default by the Guarantor of an obligation under this Deed;
- (ii) **GST Amount** means, in relation to a Payment, an amount arrived at by multiplying the Payment (or the relevant part of a Payment if only part of a Payment is the consideration for a Taxable Supply) by the prevailing rate of GST;
- (iii) **GST Law** has the meaning given to that term in *A New Tax System (Goods and Services Tax) Act 1999* (Cth) or, if that Act is not valid or does not exist for any reason, means any Act imposing or relating to the imposition or administration of a goods and services tax in Australia and any regulation made under that Act; and

- (iv) **Payment** means:
  - (A) the amount of any monetary consideration (other than a GST Amount payable under this clause 7.3); and
  - (B) the GST Exclusive Market Value of any non-monetary consideration, paid or provided by the Guarantor for any Supply made under or in connection with this Deed or the Contract and includes an amount payable by way of indemnity, reimbursement, compensation or damages.
- (b) The parties agree that:
  - (i) all Payments have been set or determined at an amount which is net of GST;
  - (ii) if the whole or any part of a Payment is the consideration for a Taxable Supply made by the Beneficiary, the GST Amount in respect of the Payment must be paid by, or on behalf of, the Guarantor to the Beneficiary as any additional amount, either concurrently with the Payment or as otherwise agreed in writing; and
  - (iii) the Beneficiary will provide a Tax Invoice, before any GST Amount is payable under this clause 7.3(b).
- (c) If a payment (including a Payment as defined in this clause 7.3) to the Beneficiary by the Guarantor under this Deed is a reimbursement or indemnification, calculated by reference to a loss, cost or expense incurred by the Beneficiary, then the payment will be reduced by the amount of any input tax credit to which the Beneficiary is entitled for that loss, cost or expense.

## 8. Assignments

The Beneficiary may at any time assign or otherwise transfer all or any part of its rights under this Deed to any party to whom it validly assigns the benefit of the Contract and may disclose to a proposed assignee or transferee any information in the possession of the Beneficiary relating to the Guarantor.

## 9. Governing law and jurisdiction

### 9.1 Governing law

This Deed and where applicable, the arbitration reference contained in clause 9.3 of Schedule A, is governed by and will be construed in accordance with the laws of the State or Territory which govern the Contract.

### 9.2 Jurisdiction

- (a) **(Acceptance of jurisdiction):** The Guarantor irrevocably submits to and accepts, generally and unconditionally, the non-exclusive jurisdiction of the courts and appellate courts of the State or Territory whose laws govern this Deed with respect to any legal action or proceedings which may be brought at any time relating in any way to this Deed.
- (b) **(No objection to inconvenient forum):** The Guarantor irrevocably waives any objection it may now or in the future have to the venue of any action or proceeding, and any claim it may now or in the future have that any action or proceeding has been brought in an inconvenient forum.

## 10. Miscellaneous

### 10.1 Certificate of Beneficiary

A certificate in writing of the Beneficiary certifying the amount payable by the Contractor or the Guarantor to the Beneficiary or stating any other act, matter or thing relating to this

Deed, any Transaction Document or any Security will be prima facie evidence of the contents of the certificate.

## 10.2 Notices

Every notice or other communication to be given or made under or arising from this Deed:

- (a) must be in writing;
- (b) must be signed by a person duly authorised to do so by the sender;
- (c) will be deemed to have been duly given or made to a person if delivered or posted by prepaid post to the address, or sent by fax to the fax number of that person set out in clause 10.3 (or any other address or fax number as is notified in writing by that person to the other parties from time to time); and
- (d) will be deemed to be given or made:
  - (i) (in the case of prepaid post) on the fifth day after the date of posting;
  - (ii) (in the case of delivery by hand) on delivery; and
  - (iii) (in the case of fax) on receipt of a transmission report confirming successful transmission.

## 10.3 Address for notices

The addresses and fax numbers of the parties for the purposes of clause 10.2 are:

### **The Guarantor**

*Address:* [insert Guarantor's address]

Fax No.: [insert Guarantor's facsimile]

Attention: [insert]

### **The Beneficiary**

*Address:* [insert Beneficiary's address]

Fax No.: [insert Beneficiary's facsimile]

Attention: [insert]

## 10.4 Continuing obligation

This Deed will be a continuing obligation notwithstanding any termination by the Guarantor, settlement of account, intervening payment, a disclaimer of any contract (including any Transaction Document) or property made by a liquidator of the Contractor pursuant to Part 5.6 Division 7A of the *Corporations Act 2001* (Cth) or other applicable laws, express or implied revocation or any other matter or thing, and continues to entitle the Beneficiary to the due and punctual payment of any of the Guaranteed Money which becomes due or owing or is incurred after termination, settlement of account, payment, revocation or other matter or thing until a final discharge has been given to the Guarantor.

## 10.5 Further assurance

The Guarantor will immediately on demand by the Beneficiary, and at the entire cost and expense of the Guarantor, perform all things and execute all agreements, assurances and other documents as the Beneficiary reasonably requires, to perfect or give effect to the rights and powers of the Beneficiary created, or intended to be created, by this Deed.

## 10.6 Form of demand

A demand on the Guarantor for performance under this Deed may be in the form and contain any information as the Beneficiary determines. Where the demand relates to the payment of Guaranteed Money it shall specify the amount demanded and the basis of the calculation.

## 10.7 Severability of provisions

If at any time any provision of this Deed is or becomes illegal, invalid or unenforceable in any respect under the law of any jurisdiction, that will not affect or impair:

- (a) the legality, validity or enforceability in that jurisdiction of any other provision of this Deed; or
- (b) the legality, validity or enforceability under the law of any other jurisdiction of that or any other provision of this Deed.

## 10.8 Remedies cumulative

The rights and remedies conferred by this Deed on the Beneficiary are cumulative and in addition to all other rights or remedies available to the Beneficiary by law or by virtue of any Transaction Document or any Security.

## 10.9 Waiver

- (a) Failure to exercise or enforce or a delay in exercising or enforcing or the partial exercise or enforcement of any right, power or remedy provided by law or under this Deed by the Beneficiary will not in any way preclude, or operate as a waiver of, any exercise or enforcement, or further exercise or enforcement of that or any other right, power or remedy provided by law or under this Deed.
- (b) Any waiver, consent or approval given by the Beneficiary under this Deed will only be effective and binding on the Beneficiary if it is given or confirmed in writing by the Beneficiary, or given verbally and subsequently confirmed in writing by the Beneficiary.
- (c) No waiver by the Beneficiary of a breach of any term of this Deed will operate as a waiver of another breach of that term or of a breach of any other term of this Deed.

## 10.10 Consents and approvals

Where under this Deed the consent or approval of the Beneficiary is required to any act or thing then, unless expressly provided otherwise in this Deed, that consent or approval may be given or withheld in the absolute and unfettered discretion of the Beneficiary.

## 10.11 Moratorium legislation

To the fullest extent permitted by law, the provisions of all legislation whether existing now or in the future, operating directly or indirectly:

- (a) to lessen or otherwise to vary or affect in favour of the Guarantor any obligation under this Deed; or
  - (b) to delay or otherwise prevent or prejudicially affect the exercise of any rights or remedies conferred on the Beneficiary under this Deed,
- are expressly waived and excluded.

## 10.12 Debit accounts and set-off

The Beneficiary may without prior notice to the Guarantor set-off any amount which is owing on any account whatsoever by the Beneficiary to the Guarantor against any liability of the Guarantor to the Beneficiary under this Deed. The rights of the Beneficiary under this clause 10.12 are without prejudice and in addition to any other right or remedy to which it is at any time entitled.

## 10.13 Counterparts

This Deed may be executed in any number of counterparts and by the different parties on different counterparts, each of which constitutes an original of this Deed, and all of which together constitute one and the same instrument.



#### 10.14 Execution by less than all parties

This Deed binds each of the persons executing it notwithstanding:

- (a) that one or more of the persons named in this Deed as a Guarantor may not execute or may not become or may cease to be bound by this Deed; or
- (b) that the Beneficiary may not execute or may only subsequently execute this Deed.

#### 10.15 Resolution of disputes binding

The settlement or the final resolution of any dispute arising under or in connection with the Contract, including any dispute as to the Contractor's liability under or in connection with the Contract, in accordance with the procedures provided for in the Contract or otherwise as agreed between the parties in the Contract, will be final and binding on the Guarantor and the Guarantor will not reopen, revisit or otherwise dispute that settlement or resolution and the subject matter of that settlement or resolution.

#### 10.16 No right to be heard

To the fullest extent permitted by law, the Guarantor waives and expressly disclaims any right to be heard at or appear in any proceedings (whether judicial, arbitral, administrative or of any other nature including but not limited to any alternative dispute resolution) conducted for the purpose of settling or resolving or attempting to settle or resolve any dispute referred to in clause 10.15 or otherwise to be involved in the settlement or resolution of any such dispute.

#### 10.17 Civil Liability Act

- (a) It is agreed that the operation of Part 4 of the *Civil Liability Act* 2002 (NSW) is excluded in relation to all and any rights, obligations and liabilities under this Deed whether such rights, obligations or liabilities are sought to be enforced as a breach of contract or a claim in tort or otherwise.
- (b) Without limiting the generality of clause 10.17(a), it is further agreed that the rights, obligations and liabilities of the Beneficiary and the Guarantor (including those relating to proportionate liability) are as specified in this Deed and not otherwise whether such rights, obligations and liabilities are sought to be enforced by a claim in contract, tort or otherwise.

**Executed** as a deed.

Executed by [insert  
Guarantor's name and ABN] by  
or in the presence of:

---

Signature of Director

---

Name of Director in full

**Signed Sealed and Delivered** by

as an authorised delegate of **Roads and  
Maritime Services  
(ABN 76 236 371 088)** in the presence  
of:

---

Signature of Witness

---

Name of Witness in full

---

Signature of Secretary/other  
Director

---

Name of Secretary/other Director  
in full

---

Signature

# Dispute provisions for certain foreign Guarantors

(Clause 9)

**Explanatory Note:** Where the Guarantor is a foreign entity and resident in a jurisdiction with reciprocity of treatment in relation to the enforcement of judgments for the purposes of the *Foreign Judgments Act 1991* (Cth), clause 9.2 of the Deed will apply. If, however, the Guarantor is a foreign entity and resident in a jurisdiction where there is no reciprocity, clause 9.1 of the Deed and clauses 9.3 to 9.8 of this Schedule will apply.

## 9.3 Reference to arbitration

- (a) Any controversy, claim or dispute directly or indirectly based upon, arising out of, relating to or in connection with this Deed (including but not limited to any question relating to the existence, validity or termination of this Deed) shall be referred to and finally resolved by arbitration in accordance with the arbitration rules of the Australian Centre for International Commercial Arbitration (known as the ACICA Arbitration Rules).
- (b) The seat of the arbitration will be Sydney.
- (c) The number of arbitrators will be three.
- (d) The language of the arbitration will be English.

## 9.4 General principles

The parties further agree to the following general principles relating to the procedure of the arbitration:

- (a) that they have chosen arbitration for the purposes of achieving a just, quick and cost-effective resolution of any dispute;
- (b) that any arbitration conducted pursuant to this clause 9 shall not necessarily mimic court proceedings and the practices of those courts will not regulate the conduct of the proceedings before the arbitral tribunal;
- (c) that in conducting the arbitration, the arbitral tribunal must take into account the matters set out above, particularly in deciding issues such as:
  - (i) how many written submissions will be allowed;
  - (ii) where appropriate, the length of written submissions;
  - (iii) the extent of document discovery permitted, if any;
  - (iv) the consolidation of arbitration proceedings, when requested;
  - (v) the joinder of parties or the consolidation of proceedings, when requested;
  - (vi) the length of any hearing; and
  - (vii) the number of experts, if any, each party is allowed to appoint; and
- (d) that the arbitral tribunal has the power to grant all legal, equitable and statutory remedies, except punitive damages.

## 9.5 Expedited proceedings

- (a) The parties agree that the arbitral tribunal will conduct the arbitration as expeditiously as possible and no party will unnecessarily delay the arbitration proceedings.
- (b) All evidence in chief will be in writing, unless otherwise ordered by the arbitral tribunal.

- (c) Each party may only rely upon one expert witness in respect of any recognised area of specialisation, unless otherwise ordered by the arbitral tribunal.
- (d) After consultation with the parties the arbitral tribunal will determine whether to conduct the proceedings on the basis of documents and other materials only or whether an oral hearing will be held. In doing so the arbitral tribunal shall have particular regard to the parties' request for an expedited procedure and the rules of natural justice.
- (e) If the arbitral tribunal determines that an oral hearing will be conducted, the following principles will apply in respect of the oral hearing:
  - (i) the duration of the oral hearings shall be fixed by the arbitral tribunal;
  - (ii) unless otherwise ordered by the arbitral tribunal, the oral hearing shall be conducted on a stop-clock basis with the effect that the time available to the parties will be split equally between the parties so that each party shall have the same time to conduct its case unless, in the opinion of the arbitral tribunal, such a split would breach the rules of natural justice or is unfair to one of the parties;
  - (iii) oral evidence in chief at the hearing shall be permitted only with the permission of the arbitral tribunal for good cause;
  - (iv) not less than 14 days prior to the date fixed for the oral hearing, or any other period of time specified by the arbitral tribunal, each party shall give written notice of those witnesses (both factual and expert) of the other party that it wishes to attend the hearing for cross-examination; and
  - (v) in exceptional circumstances the arbitral tribunal may extend the time for the oral hearing set pursuant to clause 9.5(e)(i) above.

## 9.6 Consolidation

The parties agree that section 24 of the *International Arbitration Act 1974* (Cth) will apply in respect of consolidations.

## 9.7 Joinder

The arbitral tribunal has the power, on the application of any party to this arbitration agreement, to allow a third party who the arbitral tribunal considers has a sufficient interest in the outcome of the arbitration to be joined in the arbitration as a party. Each party to this Deed hereby consents to such joinder. In the event of such joinder of parties in the arbitration, the arbitral tribunal has the power to make a single final award, or separate awards, in respect of all parties so joined in the arbitration.

## 9.8 Award final and binding

Any award will be final and binding upon the parties.

## Joint Venture provisions

**Explanatory Note:** If the Contractor is a Joint Venture, the following amendments to the Deed apply:

- (a) the definition of 'Relevant Person' is amended to read:

Relevant Person means the Contractor, each Parent Company Guarantor and any person who has executed a Security in favour of the Beneficiary.

- (b) clause 2.2 is amended to read:

### 2.2 Payment of Guaranteed Money

(a) Subject to clause 2.2(b), if the Contractor does not pay the Guaranteed Money when due, the Guarantor must on demand pay to the Beneficiary the Guaranteed Money which is then due and payable.

(b) The Guarantor shall not be liable to pay to the Beneficiary any part or parts of the Guaranteed Money which have been paid to the Beneficiary by another Parent Company Guarantor.

- (c) clause 2.3 is amended to read:

### 2.3 Perform obligations

(a) Subject to 2.3(b), if the Contractor defaults in the performance or observance of any of the Contractor's Obligations, the Guarantor shall, in addition to its obligations under clause 2.2 of this Deed, on demand from time to time by the Beneficiary, immediately perform (or procure the performance of) any of the Contractor's Obligations then required to be performed by the Contractor in the same manner and on the same terms as the Contractor is required to perform the Contractor's Obligations.

(b) The Guarantor shall not be responsible for performing the Contractor's Obligations to the extent the relevant Contractor's Obligations have been performed by another Parent Company Guarantor.

- (d) the first paragraph of clause 4.2 is amended to read:

### 4.2 Unconditional liability

Except to the extent of a reduction in the Guarantor's liability expressly provided for in clauses 2.2(b) or 2.3(b), the liability of the Guarantor under this Deed will not be affected by any thing which, but for this clause 4.2, would release the Guarantor from or reduce that liability, including but not limited to:

- (e) clause 4.2(o) is amended to read:

(o) (**Administration**): the provisions of section 440J of the *Corporations Act 2001* (Cth) so operating as to prevent or delay:

- (i) the enforcement of this Deed against any Guarantor; and/or
- (ii) any claim for contribution against any Guarantor; or

- (f) clause 4.3 is amended to read:

### 4.3 No marshalling

The Beneficiary is under no obligation to marshal or appropriate in favour of any Guarantor or to exercise, apply, transfer or recover in favour of any Guarantor any Security or any funds or assets that the Beneficiary holds, has a claim on, or is entitled to receive.

(g) clause 10.15 is amended to read:

10.15 Resolution of disputes binding

The settlement or the final resolution of any dispute arising under or in connection with the Contract, including any dispute as to the Contractor's liability under or in connection with the Contract, in accordance with the procedures provided for in the Contract or otherwise as agreed between the parties in the Contract, will be final and binding on each of the Guarantors and a Guarantor will not reopen, revisit or otherwise dispute that settlement or resolution and the subject matter of that settlement or resolution.

**APPENDIX 5**  
**Project Deed**