

ATTACHMENT A

**DRAFT PROJECT AGREEMENT FOR
ASHMORE PRECINCT TRUNK
STORMWATER PROJECT (REDACTED
VERSION)**

ATTACHMENT A

DATED

2016

COUNCIL OF THE CITY OF SYDNEY
AND
SYDNEY WATER CORPORATION

PROJECT AGREEMENT
FOR
ASHMORE PRECINCT TRUNK STORMWATER
PROJECT

ATTACHMENT A

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ATTACHMENT A

THIS AGREEMENT is made the

day of

2016

BETWEEN **SYDNEY WATER CORPORATION** ABN 49 776 225 038 of 1 Smith Street,
Parramatta NSW (**Sydney Water**)

AND **COUNCIL OF THE CITY OF SYDNEY** ABN 22 636 550 790 of 456 Kent Street
Sydney NSW (**City**)

BACKGROUND

- (A) The Ashmore precinct is delivering 3,000 residential dwellings and housing 6,000 new residents. This development will make a major contribution to achieving the housing targets in the NSW Government's Metropolitan Strategy.
- (B) One of the key issues that is hindering development in the Ashmore precinct is the risk of stormwater causing flooding. Existing adjacent residential and commercial lands are also affected by the risk of flooding.
- (C) Flood risk management for the Ashmore precinct and adjoining redevelopment areas requires the delivery of new trunk stormwater infrastructure. The parties are committed to delivering this stormwater infrastructure to enable development at Ashmore precinct.
- (D) In addition to reducing local area flooding and the risk of flooding in stormwater events, augmenting Sydney Water's stormwater assets to accommodate development at Ashmore Estate and adjoining redevelopment areas will benefit the broader Sydney community.
- (E) On [insert date] and [insert date] respectively, the parties obtained the approval of Sydney Water's Board and the Council of the City of Sydney to procure the Project.
- (F) As yet the parties have yet to agree the timing for delivery of the Project.
- (G) Sydney Water will assume the lead role on the delivery of the Project and act as the project manager for the Project.
- (H) As at the date of this Agreement, the parties are yet to agree the appropriate vehicle to deliver the Project.
- (I) Sydney Water and the City acknowledge the importance of the Project to the Ashmore precinct and adjoining areas, and both parties have a strong commitment to the Project.
- (J) The parties agree to work together to deliver the Project in accordance with the terms of this binding Agreement.

IT IS AGREED as follows:

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Agreement:

Agreement means this agreement and any schedules, annexures and attachments hereto, and any amendments agreed in writing between the parties.

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Agreement Material means all material brought or required to be brought into existence as part of, or for the purpose of, the Project, including but not limited to documents, equipment, information and data stored by any means.

Approval means any licence, permit, consent, approval, determination, certificate, notice or other requirement of any Commonwealth, State, Territory or local authority, body or other organisation having any jurisdiction in connection with the Project or under any other applicable law, which must be obtained or satisfied to carry out the Project.

Associates means any officer, employee, agent, subcontractor, supplier or consultant of a party and includes their respective officers, employees, agents, subcontractors, suppliers and consultants.

Authority means any authority, or any other entity which is responsible for issuing an approval, authorisation, consent, declaration, exemption, permit, licence, notarisation or waiver, however it is described, and includes:

- (a) the City under the *Local Government Act 1993* (NSW) or the *Roads Act 1993* (NSW); and
- (b) Sydney Water under the *Sydney Water Act 1994* (NSW).

Authority Fee means any fee, charge, tax or other impost payable to a party in its capacity as an Authority.

Best For Project Variation has the meaning given to this term as specified in clause 6.

Business Case means the Initiating Approval Business Case, the Options Approval Business Case or the Delivery Approval Business Case.

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

City Material means all material provided to Sydney Water by the City for the Project, including documents, equipment, machinery and data (stored by any means).

Claims includes claims, suits, actions, demands, proceedings, penalty, costs, charges or expenses.

Compensation means any compensation required to be made under section 41 of the Sydney Water Act 1994, or any similar provision in any other Act, to compensate persons who suffer loss or damage as a consequence of the Works.

Confidential Information means information that:

- (a) relates to the business, assets or affairs of either party; and
- (b) is made available by or on behalf of one party to the other party or any third party Service Provider to deliver the Project; and
- (c) is marked 'confidential', is by its nature confidential or the recipient knows, or ought to know, is confidential,

and includes the City Material, Sydney Water Material and Agreement Material, including details of the Project Cost and Estimated Project Cost (and its components), and the Delivery Approval Business Case, Options Approval Business Case and Delivery Contract.

Customer Contract means the Sydney Water standard form customer contract (as varied, amended or replaced from time to time) which, as at the date of this Agreement, is included as Schedule 4 of the Operating Licence.

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Delivery Approval Business Case means the document described in clause 4.4(b), which must contain the information set out in clause 4.2(b).

Delivery Contract means a contract for the delivery of the Works.

Delivery Contractor means the contractor awarded the Delivery Contract in accordance with clause 4.6.

Delivery Contract Tenderer means any person who tenders for the role of Delivery Contractor.

Drain Corridor means that part of the Works Site highlighted in [insert colour] on the Works Site Plan.

Estimated Project Cost means the estimated Project Cost (as updated in accordance with this Agreement), which at the date of this Agreement is [REDACTED].

Estimated Internal Project Cost means the estimated Internal Project Cost (as updated in accordance with this Agreement), which at the date of this Agreement is [REDACTED], being:

- (a) for Sydney Water - [REDACTED]; and
- (b) for the City - [REDACTED].

Estimated Pre-Works Project Cost means the estimated Pre-Works Project Cost (as updated in accordance with this Agreement), which at the date of this Agreement is [REDACTED].

Estimated Works Cost means the estimated cost of the Works (as updated in accordance with this Agreement), which at the date of this Agreement is \$ [REDACTED].

Government Agency means:

- (a) a government or government department or other body;
- (b) a governmental, semi governmental or judicial person; or
- (c) a person (whether autonomous or not) who is charged with the administration of a law.

GST has the meaning given to it under the GST Law.

GST Law has the meaning used in the *A New Tax System (Goods and Services) Tax Act 1999* and also includes any applicable rules issued by the Commissioner of Taxation.

Individual Out of Scope Variation has the meaning given to this term as specified in clause 6.2(a).

Initiating Approval Business Case means the Sydney Water document that approved commencement of the Project.

Intellectual Property means all present and future rights throughout the world conferred by statute, common law or equity in or in relation to copyright, trade marks, designs, patents, circuit layouts, plant varieties, business and domain names, inventions and confidential information, and other results of intellectual activity in the industrial, commercial, scientific, literary or artistic fields, whether or not registrable, registered or patentable.

Internal Project Cost means the internal staff costs incurred by the parties in connection with the Project during the period commencing on the date of this Agreement and until expiry of the term of this Agreement.

Land Interest means any interest in land or right of access to land, including a freehold estate, lease, licence or easement, whether created by contract, deed or otherwise.

Loss means all liabilities, losses, damages, expenses and costs (including legal costs on a full indemnity basis and whether incurred or awarded) including in relation to any claim, demand, proceeding or complaint of any kind or nature.

Material Default means:

- (a) a party commits a material breach of this Agreement;
- (b) the insolvency of a party;
- (c) a failure by a party to make a payment under an indemnity contained in this Agreement;
- (d) a failure by a party to comply with clause 11;
- (e) a failure by a party to make a payment which has become due under this Agreement;
- (f) any act or omission by a party which is fraudulent or illegal in relation to this Agreement or the Project; or
- (g) a repudiation of this Agreement by a party.

Options Approval Business Case means the document described in clause 4.3(b), which must contain the information set out in clause 4.2(b).

Ownership Deed means a deed setting out the parties' respective ownership of the Works and Project Land Interests, as agreed under clause 7.1(d).

Preferred Contracting Model means the preferred contracting model for the delivery of the Works, as set out in the Options Approval Business Case and updated thereafter in accordance with this Agreement.

Pre-Works Project Cost means the Project Cost prior to the award of the Delivery Contract.

Project means the design and construction of a trunk stormwater drain for the Ashmore precinct.

Operating Licence means the Sydney Water Corporation Operating Licence 2015-2020 issued by the Independent Pricing and Regulatory Tribunal, or any replacement or substitute licence.

Project Committee means the committee established in accordance with clause 14.4.

Project Cost means the costs and expenses incurred by either party in connection with the planning, procurement, project management, oversight, design, construction, completion, hand over and commissioning of the Works and:

- (a) includes the Service Provider Cost, Internal Project Cost and Works Cost; but
- (b) excludes any Authority Fees payable in connection with the carrying out of Project activities within the Works Site.

Project IP means all Intellectual Property in any work arising from or created, produced or developed by the parties, whether alone or jointly with others or by any third party (including a Service Provider or the Works Contractor) in connection with the Project.

Project Land Interests means any Land Interests that are acquired by the parties for the purposes of the Project under clause 5.5(b).

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Project Management Services means the services to be provided by Sydney Water as detailed in clause 9.1.

Project Management Team means the project management team established under clause 14.3.

Project Milestones means the Project milestones set out in the Project Scope, as updated in accordance with this Agreement.

Project Objectives has the meaning given in clause 2.1.

Project Scope means the Project scope set out in Annexure A, as updated in accordance with this Agreement.

Records include, but are not limited to, both electronic and physical versions of records, accounts, ledgers, payroll, correspondence, tenders, minutes of meetings, notes, reports, instructions, plans, drawings, invoices, dockets, receipts, vouchers, computer programs but does not include any electronic or physical record that is subject to legal professional privilege.

Service Provider means any external third party consultant or contractor engaged to provide services in connection with the Project (with the exception of the Project Management Services), but does not include:

- (a) any subcontractor, sub consultant or in-house resource the City or Sydney Water may have as part of the Project team; or
- (b) the Delivery Contractor.

Service Provider Cost means the costs to the Project of services provided by Service Providers.

Sydney Water Material means all material provided to the City by Sydney Water for the Project, including documents, equipment, machinery and data (stored by any means).

Variation means any change, addition, increase, decrease, omission or deletion.

Works means the new trunk stormwater drain to be constructed as described in the Project Scope.

Works Cost means the amounts payable to the Delivery Contractor under the Delivery Contract.

Works Site means the area highlighted in yellow on the Works Site Plan.

Works Site Plan means the plan for the Works Site set out in Annexure B, as updated in accordance with this Agreement.

1.2 Interpretation

In this Agreement:

- (a) headings are for convenience only and do not affect interpretation;
- (b) "person" includes an individual, the estate of an individual, a corporation, an authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust;
- (c) a reference to a party includes that party's executors, administrators, successors and permitted assigns, including persons taking by way of novation;

- (d) a reference to a document (including this agreement) is to that document as varied, novated, ratified or replaced from time to time;
- (e) a reference to a statute includes its delegated legislation and a reference to a statute or delegated legislation or a provision of either includes consolidations, amendments, re-enactments and replacements;
- (f) a word indicating the singular includes the plural (and vice versa), and a word indicating a gender includes every other gender;
- (g) a reference to a party, clause, schedule, exhibit, attachment or annexure is a reference to a party, clause, schedule, exhibit, attachment or annexure to or of this Agreement, and a reference to this Agreement includes all schedules, exhibits, attachments and annexures to it;
- (h) if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;
- (i) "dispute" includes a failure to reach agreement on a matter where this Agreement requires the parties to reach agreement on that matter;
- (j) a cost or expense is taken to be "included" in the Estimated Project Cost (or any of its components) if the latest Business Case included in, or approved by the parties under, this Agreement contemplates that cost or expense and it has been factored into the Estimated Project Cost as set out in the relevant Business Case;
- (k) "includes" in any form is not a word of limitation; and
- (l) a reference to "\$" or "dollar" is to Australian currency.

1.3 Internal approvals

- (a) Sydney Water warrants and represents to the City that it has obtained the appropriate approvals from its Board (being Board Minute dated [insert date]) to procure the Project on the terms set out in this Agreement.
- (b) The City warrants and represents to Sydney Water that it has obtained the appropriate approvals from Council (being Council Resolution dated [insert date]) to procure the Project on the terms set out in this Agreement.

2. COMMITMENTS

2.1 Project Objectives

- (a) Sydney Water and the City agree to work together to achieve the Project Objectives.
- (b) The "Project Objectives" are to:
 - (i) significantly reduce flood risk in the Ashmore precinct;
 - (ii) minimise any downstream flooding impacts;
 - (iii) deliver the Project Scope;
 - (iv) achieve the Project Milestones;
 - (v) facilitate the parties working together for the benefit of the Project;

- (vi) achieve the best possible outcome for the Project and those affected by the Project;
- (vii) demonstrate a genuine commitment to innovation and continuous improvement in the development of the Project's design and the carrying out of the Works;
- (viii) facilitate private and public development at Ashmore precinct; and
- (ix) achieve a 'value for money' outcome.

2.2 Good faith

In performing their individual obligations under this Agreement, Sydney Water and the City agree to work cooperatively together and act in good faith at all times and will:

- (a) act in a manner which is fair, reasonable and honest;
- (b) do all things reasonably expected to give effect to the spirit and intent of this Agreement; and
- (c) not intentionally or recklessly impede or restrict the other's performance of this Agreement.

2.3 Co-operation of the parties

Sydney Water and the City agree that:

- (a) Sydney Water and the City will have equal authority in decision-making and approval processes for all Project decisions;
- (b) all communications between the parties will be open and honest to enable informed decision making;
- (c) the parties will, at all times during the term of this Agreement, co-operate with and assist each other to implement the Project and exercise their rights and comply with their obligations under this Agreement in an effective and timely manner, including by providing all relevant information and assistance requested by the other party;
- (d) the parties will co-operate with any relevant Service Providers in order to progress the Project; and
- (e) the parties will use reasonable endeavours to resolve any problems or disputes in a mutually beneficial, non-adversarial way.

2.4 Obligations

Sydney Water and the City will undertake the Project:

- (a) in a careful, diligent, skilful and workmanlike manner so that the Works are of the required quality and fit for intended purpose;
- (b) with the equal aim, at all times, of minimising costs and satisfying all non-cost Project Objectives; and
- (c) with the due skill, care, diligence, capacity and resources necessary to perform its obligations under this Agreement.

2.5 No authority to act outside the Project

Outside of the Project, unless expressly authorised in writing, neither party has authority to:

- (a) enter into any contracts, commitments or other legal documents or arrangements in the name of, or on behalf of, the other party; or
- (b) take any act or steps to bind or commit the other party in any manner, whether as a disclosed agent of the other party or otherwise.

3. TERM

The term of this Agreement commences on the date of this Agreement and will continue until the later of:

- (a) conclusion of the Works; or
- (b) execution of the Ownership Deed in accordance with clause 7,

or such other date as the parties may agree in writing is the expiry date for this Agreement, unless terminated earlier.

4. PROJECT KEY DECISION-MAKING FRAMEWORK

4.1 Overview

- (a) The parties acknowledge that studies have been prepared for the Project, which have informed the Project Scope, Estimated Project Cost, Estimated Pre-Works Project Cost, Estimated Internal Project Cost, Project Milestones, Works Site Plan and Preferred Contracting Model, as at the date of this Agreement.
- (b) The decision framework for the Project will involve the parties working together to:
 - (i) approve the Options Approval Business Case;
 - (ii) following approval of the Options Approval Business Case, approve the Delivery Approval Business Case; and
 - (iii) following approval of the Delivery Approval Business Case, award the Delivery Contract to the selected Delivery Contractor.
- (c) The parties agree that each party will bear its own costs incurred in relation to the Project (including the studies referred to above) prior to the date of this Agreement.

4.2 Sydney Water to prepare documents for approval

- (a) Sydney Water will be responsible for preparing the Options Approval Business Case and the Delivery Approval Business Case.
- (b) The Options Approval Business Case and the Delivery Approval Business Case will address the matters described in clauses 4.3(b) and 4.4(b) respectively, and must, as a minimum, set out the:
 - (i) Project Scope;
 - (ii) Estimated Project Cost, sufficiently itemised to clearly show the:
 - (A) Estimated Pre-Works Project Cost;

(B) Estimated Internal Project Cost (broken down by party); and

(C) Estimated Works Cost;

- (iii) Works Site Plan;
- (iv) Project Milestones; and
- (v) Preferred Contracting Model.

as necessarily updated, validated, refined and/or developed.

4.3 Options Approval Business Case

- (a) As soon as possible after the date of this Agreement, the parties will work together to approve the Options Approval Business Case.
- (b) The Options Approval Business Case will outline the proposed engineering and route options for the Project (with one option being recommended as preferred), the Project's key risks and benefits, and the procurement strategy for the design phase of the Project.
- (c) Sydney Water will submit the first draft of the Options Approval Business Case to the City as soon as reasonably practicable after it has been completed. The parties will then endeavour to agree on the final form of the Options Approval Business Case as soon as reasonably practicable.
- (d) If the parties reach agreement on the Options Approval Business Case, both parties must endorse their approval of the Options Approval Business Case in writing.
- (e) If the parties cannot reach agreement on the Options Approval Business Case within 90 days of the date on which Sydney Water submits the Options Approval Business Case to the City in accordance with clause 4.3(b) (or such later date agreed between the parties), either party may terminate this agreement and clauses 15.2 and 15.3 will apply.

4.4 Delivery Approval Business Case

- (a) As soon as possible after the approval of the Options Approval Business Case in accordance with clause 4.3(d), the parties will work together to approve the Delivery Approval Business Case.
- (b) The Delivery Approval Business Case will set out the technical specifications for the Project, the key environmental approvals required or applicable, the Project's key risks and benefits (in greater detail), and the procurement strategy for the construction phase of the Project. In particular, the Delivery Approval Business Case will:
 - (i) detail the design of the preferred engineering and route option for the Project; and
 - (ii) further develop the Estimated Project Cost (as set out in the Options Approval Business Case) using a risk-based cost estimate methodology.
- (c) Sydney Water will submit the first draft of the Delivery Approval Business Case to the City as soon as reasonably practicable after it has been completed. The parties will then endeavour to agree on the final form of the Delivery Approval Business Case as soon as reasonably practicable.
- (d) If the parties reach agreement on the Delivery Approval Business Case, both parties must endorse their approval of the Delivery Approval Business Case in writing.

- (e) If the parties cannot reach agreement on the Delivery Approval Business Case within 90 days of the date on which Sydney Water submits the Delivery Approval Business Case to the City in accordance with clause 4.4(c) (or such later date agreed between the parties), either party may terminate this agreement and clauses 15.2 and 15.3 will apply.

4.5 Updating of key Project parameters

The parties acknowledge and agree that where the:

- (a) Options Approval Business Case has been endorsed pursuant to clause 4.3(d); or
- (b) Delivery Approval Business Case has been endorsed pursuant to clause 4.4(d),

the Project Scope, Estimated Project Cost, Estimated Pre-Works Project Cost, Estimated Internal Project Cost, Estimated Works Cost, Works Site Plan, Project Milestones and Preferred Contracting Model will be taken to have been updated to reflect the details set out in the applicable endorsed document.

4.6 Delivery Contract award

- (a) As soon as possible after the approval of the Delivery Approval Business Case in accordance with clause 4.4(d), the parties will work together to award the Delivery Contract.
- (b) The parties agree that all tender documentation relating to the Delivery Contract must be approved by both Sydney Water and the City (both acting reasonably) in writing, before it is issued to the public. If the parties cannot reach agreement with respect to the approval of tender documentation within 90 days of the approval of the Delivery Approval Business Case (or such later date agreed between the parties), either party may terminate this agreement and clauses 15.2 and 15.3 will apply.
- (c) The Delivery Contract will be consistent with the Preferred Contracting Model. Sydney Water will manage:
 - (i) the preparation of the Delivery Contract; and
 - (ii) negotiations with Delivery Contract Tenderers,and will keep the City informed with respect to material issues arising in respect thereof.
- (d) The Delivery Contractor and the terms of the Delivery Contract must be approved by both parties. If the parties cannot reach agreement on the terms of the Delivery Contract within 365 days of the approval of the Delivery Approval Business Case (or such later date agreed between the parties), either party may terminate this agreement and clauses 15.2 and 15.3 will apply.
- (e) The parties agree that:
 - (i) Sydney Water and the City will be joint principals under the Delivery Contract;
 - (ii) the Delivery Contract must require the Delivery Contractor to pay all Authority Fees payable in respect of the carrying out of the Works; and
 - (iii) the Delivery Contract must require the Delivery Contractor to comply with the parties' instructions to give effect to the procedures in clauses 5.1(f) and 5.4.

5. PROJECT COSTS

5.1 Project Cost

- (a) The parties agree to equally share the Project Cost.
- (b) If at any time the Project Cost exceeds the Estimated Project Cost by more than 10%, the parties must not, unless otherwise agreed between them, incur any further Project Cost until the Estimated Project Cost has been increased by a Variation to the Estimated Project Cost approved in accordance with clause 6. If a party incurs further costs which would otherwise be further Project Cost in these circumstances, those further costs will not form part of the Project Cost unless and until the Estimated Project Cost has been updated to include them by an appropriate Variation.
- (c) Either party may request a Variation for the purposes of clause 5.1(b).
- (d) Clauses 5.1(b) and 5.1(c) apply to the Pre-Works Project Cost and Estimated Pre-Works Project Cost as if the words "Project Cost" are replaced with "Pre-Works Project Cost" and the words "Estimated Project Cost" are replaced with "Estimated Pre-Works Project Cost".
- (e) Each party will use its finance systems to record the Project Cost that it incurs, using timesheets (or equivalent) for recording of Internal Project Cost incurred. Each party will report to the other party on the Project Cost that it has incurred on a monthly basis.
- (f) If monthly reports referred to in clause 5.1(e) reveal that a party (**Party in Credit**) has incurred more Project Cost than the other party (**Party in Debt**) the parties agree to instruct the Service Providers (where they are jointly engaged by the parties) and/or the Delivery Contractor to invoice:
 - (i) the Party in Credit lesser amounts, and
 - (ii) the Party in Debt greater amounts,in each subsequent invoice until each party's Project Cost is equal.

5.2 Internal Project Cost

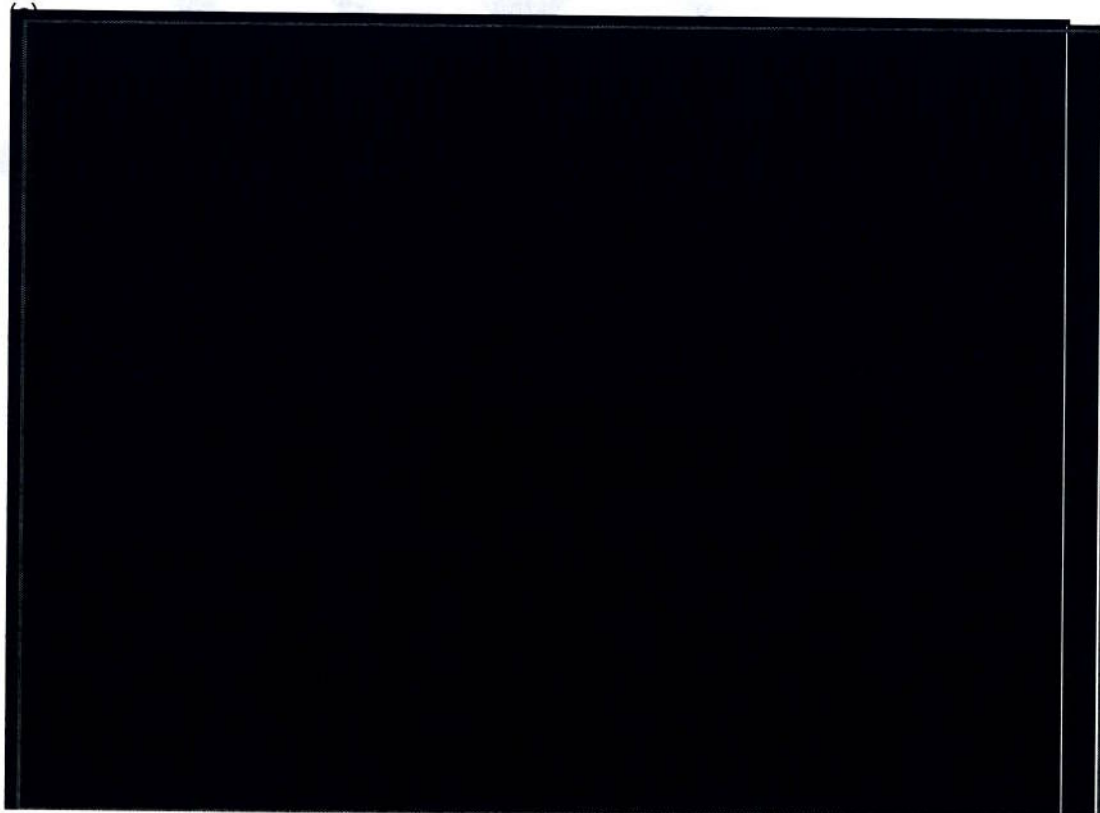
- (a) Each of Sydney Water and the City must ensure that at all times its Internal Project Cost is:
 - (i) minimised by acting efficiently and effectively; and
 - (ii) necessary to achieve the Project Objectives.
- (b) If at any time a party's Internal Project Cost exceeds its Estimated Internal Project Cost by more than 10%, that party must not incur any further Internal Project Cost. If a party incurs further costs which would otherwise be further Internal Project Cost in these circumstances, those further costs will not be included in the Internal Project Cost unless and until the Estimated Internal Project Cost has been updated to include them by an appropriate Variation.
- (c) If a party considers that its Internal Project Cost will exceed its Estimated Internal Project Cost by more than 10%, it must immediately notify the other party and request an appropriate Variation in accordance with clause 6 to increase the Estimated Internal Project Cost.

5.3 Engagement of Service Providers

- (a) Unless otherwise agreed between the parties, Sydney Water will solely engage Service Providers to provide services for the Project, including services required for the preparation of the Options Approval Business Case and Delivery Approval Business Case, and the preparation, tendering, negotiation and award of the Delivery Contract. Such services may include legal, commercial and probity consultation services and the costs of such services will be the Service Provider Cost.
- (b) Where a Service Provider is jointly engaged by the parties, the terms of the Service Provider's engagement must require the Service Provider to comply with the parties' instructions to give effect to the procedures in clauses 5.1(f) and 5.4.

5.4 Invoicing by Service Providers and Delivery Contractor, [REDACTED]

- (a) Where a Service Provider is jointly engaged by the parties, the parties agree to instruct each Service Provider to issue a separate invoice to each party which:
 - (i) sets out the total amount due to the Service Provider from both parties; and
 - (ii) subject to clauses 5.1(f) and 5.4(c), requires each party to pay 50% of total amount due.
- (b) The parties agree to instruct the Delivery Contractor to issue a separate invoice to each party which:
 - (i) sets out the total amount due to the Delivery Contractor from both parties; and
 - (ii) subject to clauses 5.1(f) and 5.4(c), requires each party to pay 50% of total amount due.



5.5 Land Interests and Compensation required for the delivery of the Project

(a) Compensation

- (i) The parties agree not to carry out any activity that may result in an obligation to pay Compensation to a third party unless the amount of the Compensation has been estimated and included in the Estimated Project Cost.
- (ii) The parties agree to use their best endeavours to estimate any Compensation required to be paid to third parties for the purposes of the Project prior to the approval of the Delivery Approval Business Case, and to include the amount of the relevant Compensation in the Estimated Project Cost (as set out in the Delivery Approval Business Case).
- (iii) If any Compensation becomes payable after the approval of the Delivery Approval Business Case, and the amount of the Compensation has not been included in the Delivery Approval Business Case as part of the Estimated Project Cost, the parties must follow the process in clause 6 to effect an appropriate Variation to the Estimated Project Cost to include the amount of the Compensation in the Estimated Project Cost.

(b) Acquisition of Land Interests

- (i) The parties agree to use their best endeavours to identify any Land Interests that must be acquired for the purposes of the Project prior to the approval of the Delivery Approval Business Case, and to include the costs of acquiring the relevant Land Interests in the Estimated Project Cost (as set out in the Delivery Approval Business case).
- (ii) As regards acquisition of Land Interests, the parties agree:
 - (A) that the preferred type of Land Interests for the Drain Corridor are easements;
 - (B) that the preferred type of Land Interests for the remainder of the Works Site are temporary licences or access rights, suitable for the carrying out of the Works;
 - (C) to use their best endeavours to seek the minimum possible area for Land Interests acquired for the purposes of the Project;
 - (D) that the party best placed to acquire a Land Interest, having regard to all relevant circumstances (including but not limited to its statutory powers), will acquire that Land Interest for the purposes of the Project, and following such acquisition, as far as legally possible, will be deemed to hold the Land Interest on trust for the benefit of both parties in equal shares; and
 - (E) to use their best endeavours to acquire Land Interests in such a manner so as to facilitate the processes in clauses 7.1(c) to 7.1(i), in particular the principles in clause 7.1(d).
- (iii) If any Land Interests required for the Project are to be acquired after the award of the Delivery Contract, and the Land Interests and the costs of acquiring them have not been identified in the Delivery Approval Business Case and included in the Estimated Project Cost, the parties must, before proceeding with the acquisition, follow the process in clause 6 to effect an appropriate Variation to the Estimated Project Cost to include the costs of acquiring the Land Interests in the Estimated Project Cost.

5.6 Final reconciliation of Project Cost

- (a) After practical completion of the Works and payment of all outstanding amounts due to Service Providers and the Delivery Contractor, each party will provide a final report to the other party on the Project Cost it has incurred (in the same manner as the reports provided under clause 5.1(e)).
- (b) If the reports provided under clause 5.6(a) reveal that a party (**Party in Credit**) has incurred more Project Cost than the other party (**Party in Debt**), then the parties agree the Party in Credit will be entitled to reimbursement from the Party in Debt of such an amount which, if paid by the Party in Debt to Party in Credit, would result in the parties sharing the Project Cost equally.
- (c) The reimbursement contemplated under clause 5.6(b) shall be payable within 5 Business Days of the date on which the parties agree the amount of the reimbursement.

6. VARIATIONS

6.1 Best For Project Variations

- (a) Any Variation to the Project Scope, Project Milestones, Estimated Project Cost, Estimated Pre-Works Project Cost or Estimated Internal Project Cost must be approved by both Sydney Water and the City and agreed to in writing.
- (b) The parties can only approve a Variation referred to in clause 6.1(a) where the proposed Variation satisfies the "Best For Project" test.
- (c) The "Best For Project" test means the proposed Variation:
 - (i) satisfies the Project Objectives;
 - (ii) will assist to achieve the Project Scope;
 - (iii) will assist meeting Project Milestones or not unreasonably delay Project Milestones; and
 - (iv) will not, directly or indirectly, cause any adverse consequences or outcomes for either Sydney Water or the City (both acting reasonably), whether those adverse consequences or outcomes are related to the Project or not.
- (d) If the parties approve a proposed Variation under this clause 6.1, it will be known as a "**Best For Project Variation**".
- (e) Best For Project Variations will initially be considered by the Project Management Team. If the Project Management Team cannot reach agreement with respect to, or do not have the delegated authority to approve, a proposed Best For Project Variation, the matter will be referred to the Project Committee. If the parties are unable to reach agreement on a proposed Best For Project Variation after referral to the Project Committee, the dispute resolution process at clause 16 will apply.
- (f) The cost of the Best for Project Variation will form part of the Project Cost and the Estimated Project Cost, Estimated Pre-Works Project Cost and/or Estimated Internal Project Cost (as applicable) will be deemed to have been increased accordingly.
- (g) The parties must act reasonably in considering Variation requests under this clause 6.1.

6.2 Individual Out of Scope Variations

- (a) A party may request a Variation to the Project which is not a Best for Project Variation. This will be a Variation that does not satisfy the Best for Project test and will be known as an **"Individual Out of Scope Variation"**.
- (b) An Individual Out of Scope Variation must be approved by both Sydney Water and the City via the Project Committee, and if the proposed Variation is considered to have no adverse impact on the Project, including:
 - (i) it is consistent with, or does not interfere with, the Project Objectives and the Project Scope;
 - (ii) it does not have any impact on the Project Milestones; and
 - (iii) it does not result in any additional costs for the party not requesting the Variation.
- (c) If an Individual Out of Scope Variation is approved by the parties, the party that requested the Individual Out of Scope Variation will be:
 - (i) the sole owner of the end product of the Individual Out of Scope Variation (to the extent that it can be reasonably separated from the Works); and
 - (ii) liable for all costs associated with the Individual Out of Scope Variation and accepts all risk and consequences associated with the Individual Out of Scope Variation.
- (d) The cost of an Individual Out of Scope Variation will not form part of the Project Cost.

7. ASSET OWNERSHIP AND MAINTENANCE

7.1 Asset ownership and care of Works


- (a) From the date of commencement of the Works until execution of the Ownership Deed, the Works will be owned jointly by the parties. Ownership of portions of the Works and the Project Land Interests will then be allocated to the City and Sydney Water in accordance with this clause 7.1.
- (b) From the date of practical completion of the Works until execution of the Ownership Deed, the City and Sydney Water will be jointly responsible for the care of the Works and the Project Land Interests. All repair, maintenance and third party costs incurred during this period will form part of the Project Cost, and the Estimated Project Cost will be deemed to have been increased accordingly (to the extent that such costs are not already included in the Estimated Project Cost).
- (c) As soon as reasonably practicable after the date of practical completion for the Works, the parties must jointly appoint an independent valuer (who is appropriately qualified and experienced) to value the Works and the Project Land Interests (excluding any part of the Works completed as an Individual Out of Scope Variation). The valuation must include a detailed breakdown of the value of the Works and Project Land Interests by geographical sections to enable ownership to be allocated equitably in accordance with clause 7.1(d). The valuer must be instructed to issue this valuation in writing to both parties within 20 Business Days of appointment. The costs of the valuation will form part of the Project Cost, and the Estimated Project Cost will be deemed to have been increased accordingly (to the extent that such costs are not already included in the Estimated Project Cost). The brief prepared by the parties to the independent valuer will state that the total constructed cost of the Works plus the costs of the Project Land Interests is equal to the total Project Cost. The valuer's decision will be binding on the parties in the absence of manifest error.

- (d) On receipt of the written valuation, the City and Sydney Water will agree in writing the sections of the Works and Project Land Interests (including the boundaries) that will be solely owned by each party, such that the total value of the sections owned by each party is, as close as reasonably practicable, equal to 50% of the total of the written valuation. The following principles will be applied to guide the written agreement between the parties:
 - (i) wherever possible, Sydney Water will own that part of the Works and Project Land Interests located adjacent to Alexandra Canal or existing Sydney Water owned open channels;
 - (ii) wherever possible, the City will own that part of the Works and Project Land Interests located within the Ashmore precinct;
 - (iii) wherever possible, the parties will own contiguous sections of the Works and Project Land Interests; and
 - (iv) the City will own all stubs to connect local drainage constructed as part of the Project.
- (e) Once ownership of each party's sections of the Works and Project Land Interests is agreed under clause 7.1(d), it is to be documented in the Ownership Deed.
- (f) The Ownership Deed will provide for the Transfer of portions of the Works and Project Land Interests between the parties to reflect the ownership allocation agreed under clause 7.1(d).
- (g) If the sections of the Works and Project Land Interests allocated to a party under the Ownership Deed have a value that is less than 50% of the total of the written valuation prepared for the purposes of clause 7.1(c), the Ownership Deed must document that the other party must pay to the first-mentioned party an amount equal to the difference between:
 - (i) the value of the sections of the Works and Project Land Interests allocated to the other party under the Ownership Deed; and
 - (ii) the value of the sections of the Works and Project Land Interests allocated to the first-mentioned party under the Ownership Deed,
 both determined using written valuation prepared for the purposes of clause 7.1(c).
- (h) Until the parties effect the Transfer of a Project Land Interest (or a portion thereof) as contemplated by clause 7.1(f), that Project Land Interest or portion will continue to be held on trust as contemplated by clause 5.5(b)(ii)(D).
- (i) For the purposes of this clause 7.1, "**Transfer**" means:
 - (i) with respect to a Project Land Interest (or a portion thereof), that a party will either assign or transfer that Project Land Interest or portion to the other party, or relinquish that Project Land Interest or portion on the condition that the other party is granted, as close as is reasonably practicable, an equivalent Project Land Interest; and
 - (ii) with respect to the Works, that a party will assign or transfer the relevant portion of the Works.

7.2 Maintenance

Following the execution of the Ownership Deed, the City and Sydney Water will maintain the Works and Project Land Interests in accordance with their ownership allocation as set out in the Ownership Deed.

8. WORKS SITE

- (a) Each party:
 - (i) will make any Land Interest held by it over any part of the Works Site available, at no cost, for the purpose of the Project;
 - (ii) without limiting clause 8(a)(i), consents to the grant of easements (or other appropriate Land Interests) over any such Land Interests, for the purposes of the Drain Corridor, at no cost; and
 - (iii) agrees that any easements (or other appropriate Land Interests) referred to in clause 8(a)(ii) will be acquired for the purpose of the Project in accordance with clause 5.5(b).
- (b) 
- (c) Each party acknowledges and agrees that the other party has not made any representation, given any advice or given any warranty as to:
 - (i) the suitability or adequacy of the Works Site for the Project;
 - (ii) the condition of the Works Site, including sub-surface conditions;
 - (iii) the existence or otherwise of any heritage items on the Works Site or heritage values of significance on the Works Site or anything on it; or
 - (iv) the existence or otherwise of any native title or Aboriginal heritage in respect of the Works Site.
- (d) Sydney Water and the City accept the Works Site in its present condition including any contamination or defects.
- (e) Before any part of the Works Site is occupied for the Project, the parties agree that a dilapidation report must be prepared and approved by the owner and, where relevant, occupier of the relevant part of the Works Site.
- (f) On vacation of the Works Site (or any part of the Works Site), the Works Site must be restored as follows:
 - (i) for roads where Roads and Maritime Services (RMS) is the roads authority, in accordance with all relevant RMS requirements and standards;
 - (ii) for roads where the City is the roads authority, in accordance with all relevant City codes and standards;
 - (iii) for all land not referred to in clauses 8(f)(i) or 8(f)(ii), to the same, or an equivalent, condition, using equivalent materials, as shown in the dilapidation report, or as otherwise agreed with the land owner and/or occupier (as applicable); and
 - (iv) to comply with the Contaminated Land Management Act 1997 (NSW) and any other relevant laws or requirements, as determined by an environmental auditor.

- (g) Any costs associated with restoration works undertaken pursuant to clause 8(f) will be deemed to form part of the Project Cost and the Estimated Project Cost will be deemed to have been increased accordingly (to the extent that such costs are not already included in the Estimated Project Cost). The parties will use their best endeavours to include the details and cost of the restoration works in the Options Approval Business Case and Delivery Approval Business Case.

9. PROJECT MANAGEMENT SERVICES

9.1 Sydney Water as project manager

Sydney Water will act as project manager for the Project and will:

- (a) assume the lead role in the delivery of the Project, including managing the Delivery Contractor and Service Providers;
- (b) prepare the Options Approval Business Case and Delivery Approval Business Case for approval by the parties;
- (c) negotiate Compensation (where required) for the purposes of the Project;
- (d) negotiate and implement the acquisition of Land Interests (where required) for the purposes of the Project;
- (e) obtain the Approvals identified at clause 10;
- (f) lead all community liaison for the Project, with appropriate support from the City; and
- (g) evaluate tenders for, and negotiate, the Delivery Contract.

9.2 City's obligations

The City will provide project management support for the Project, which must as a minimum include:

- (a) a dedicated project management resource (one full time equivalent) with:
 - (i) experience in leading and managing a multi-disciplined team of professionals within a collaborative work environment to support the business needs of the Project; and
 - (ii) effective oral and written communication competency at all levels with internal and external stakeholders, and the ability to manage and respond to multiple demands and deliverables in a timely and efficient manner,and having the authority (within the City) to perform the duties required of such a role; and
- (b) a dedicated technical resource (one full time equivalent) with:
 - (i) demonstrated knowledge of flood modelling, flood impact assessment, floodplain risk management, stormwater and urban drainage design, and water-sensitive urban design; and
 - (ii) effective oral and written communication competency at all levels with internal and external stakeholders.

9.3 Material changes

- (a) If Sydney Water becomes aware (whether notified by the City or otherwise) of any matter which:
- (i) is likely to significantly change or which has significantly changed the scope or timing of the Project Management Services or the Project Milestones;
 - (ii) significantly affects or may significantly affect the timing of the performance of the Project Management Services;
 - (iii) requires the Project Scope to be significantly updated, varied or changed; or
 - (iv) involves any significant error, omission or defect in any continuing or completed aspect of the Project Management Services,

Sydney Water must promptly give written notice of that matter to the City's Representative containing, as far as practicable in the circumstances:

- (v) particulars of the change, error, omission or defect and its likely impact;
 - (vi) the reason for, or cause of, the change, error, omission or defect; and
 - (vii) Sydney Water's recommendation as to how to minimise the likely impact.
- (b) Sydney Water and the City must then promptly, and in writing, make a decision on how to best manage the situation, whether that involves adopting the recommendation of Sydney Water, adopting an alternative course of action or that the issue be referred to the Project Committee for resolution. If the parties are unable to agree on a course of action, the matter is to be referred to the Project Committee for resolution.
- (c) Sydney Water and the City agree that any decision or course of action adopted for the purposes of clause 9.3(b) must not be inconsistent with other provisions of this Agreement (including clause 6).

9.4 Making of project management decisions

- (a) To ensure timeliness and to assist in achieving the timely completion of the Project, if:
- (i) Sydney Water, as project manager, requests information; or
 - (ii) Sydney Water recommends to the City that the parties adopt a particular course of action or that the City considers and selects one of a number of alternative courses of action; and
 - (iii) all information reasonably required to enable a decision to be made is provided by Sydney Water to the City or is otherwise available to the City,

then the City must:

- (iv) provide a response by close of business three (3) Business Days after receiving Sydney Water's written request; or
- (v) notify Sydney Water:
 - (A) that it considers, given the nature of the request or the complexity of issues involved (including whether the City's internal approvals are required), that it will be unable to provide a response within three (3) Business Days; and

(B) of the anticipated date it will provide a response (acting reasonably).

- (b) Where a request for approval of a recommended course of action has been issued by Sydney Water and no response for the purposes of clause 9.4(a)(iv) or 9.4(a)(v)(B) (as applicable) has been received by Sydney Water, by 6:01pm on the date referred to in clause 9.4(a)(iv) or 9.4(a)(v)(B) (as applicable), Sydney Water will deem its request approved by the City and will proceed in accordance with its recommended course of action. Sydney Water will keep the City informed of the actions it takes as a result of the deemed approval.
- (c) Clauses 9.4(a) and 9.4(b) do not apply to decisions that may have a significant and adverse effect on the Project or in respect of Variations to the Estimated Project Cost that amount to more than 10% of the then current Estimated Project Cost.

10. APPROVALS

10.1 Approvals to be obtained

- (a) Sydney Water will engage in consultation with the relevant authorities or entities and obtain the external Approvals identified below in respect of:
 - (i) where necessary, Review of Environment Factors and/or Environment Impact Studies;
 - (ii) RailCorp (including TfNSW);
 - (iii) roads;
 - (iv) the Office of Environment & Heritage and the Environmental Protection Authority;
 - (v) services and/or utilities approvals (including in respect of telecommunications, gas, electricity); and
 - (vi) telecommunications.
- (b) The City will support Sydney Water to obtain the Approvals and will provide that support in a timely manner.

10.2 Planning approvals

- (a) Sydney Water will obtain all relevant planning approvals for the Project (such as assessing the Review of Environment Factors and any relevant Environment Impact Studies).
- (b) Sydney Water will be the determining authority for all relevant assessments and will make recommendations to the City accordingly.

11. INTELLECTUAL PROPERTY

- (a) This Agreement does not assign ownership of any Intellectual Property existing on commencement of this Agreement and neither party may assert ownership of all or any part of the other party's pre-existing Intellectual Property.
- (b) If a party has any pre-existing Intellectual Property as at commencement of this Agreement to be used in connection with the Project, that party grants the other party an irrevocable, non-exclusive, world-wide, perpetual, transferable, sub-licensable, royalty-free licence of that pre-existing Intellectual Property for use in connection with the Project.
- (c) All Project IP will vest equally in the parties, as joint owners.

- (d) Each party can use, or grant a non-exclusive licence of, all or part of the Project IP without needing the consent of the other party where the Project IP is used in connection with the Project.
- (e) Each party must notify the other as soon as it becomes aware of any infringement or suspected infringement of the Project IP.

12. DOCUMENTS

12.1 Access to accounts, Records and documentation

Sydney Water and the City will give every assistance to, and make available to each other on request, all invoices, accounts, Records and documentation that relate to the Project.

12.2 Copies of documentation

Following completion of the Project or expiry or termination of this Agreement, Sydney Water and the City are each entitled to retain one copy of the City Material, the Sydney Water Material and any Agreement Material, subject to:

- (a) Sydney Water:
 - (i) providing prior written notice to the City of all City Material of which it will keep a copy; and
 - (ii) maintaining confidentiality in the City Material and taking all steps reasonably necessary to preserve and maintain confidentiality in the City Material;
- (b) the City:
 - (i) providing prior written notice to Sydney Water of all Sydney Water Material of which it will keep a copy; and
 - (ii) maintaining confidentiality in the Sydney Water Material and taking all steps reasonably necessary to preserve and maintain confidentiality in the Sydney Water Material.

13. CONFIDENTIALITY AND DISCLOSURES

13.1 Use and disclosure of Confidential Information

A party (receiving party) which acquires Confidential Information of another party (disclosing party) must not:

- (a) use any of the Confidential Information except to the extent necessary to exercise its rights and perform its obligations under this Agreement; or
- (b) disclose any of the Confidential Information except in accordance with clauses 13.2 or 13.3.

13.2 Disclosures to personnel and advisers

- (a) The receiving party may disclose Confidential Information to an officer, employee, agent, contractor, or legal, financial or other professional adviser if:
 - (i) the disclosure is necessary to enable the receiving party to perform its obligations or to exercise its rights under this Agreement; and

- (ii) prior to disclosure, the receiving party informs the person of the receiving party's obligations in relation to the Confidential Information under this Agreement and obtains an undertaking from the person to comply with those obligations.
- (b) The receiving party must ensure that any person to whom Confidential Information is disclosed under clause 13.2(a) keeps the Confidential Information confidential and does not use it for any purpose other than as permitted under clause 13.2(a).

13.3 Disclosures required by law

- (a) Subject to clause 13.3(b), the receiving party may disclose Confidential Information that the receiving party is required to disclose:
 - (i) by law or by order of any court or tribunal of competent jurisdiction; or
 - (ii) by any Government Agency, stock exchange or other regulatory body.
- (b) If the receiving party is required to make a disclosure under clause 13.3(a), the receiving party must:
 - (i) to the extent possible, notify the disclosing party immediately it anticipates that it may be required to disclose any of the Confidential Information;
 - (ii) consult with and follow any reasonable directions from the disclosing party to minimise disclosure; and
 - (iii) if disclosure cannot be avoided:
 - (A) only disclose Confidential Information to the extent necessary to comply; and
 - (B) use reasonable efforts to ensure that any Confidential Information disclosed is kept confidential.

13.4 Receiving party's return or destruction of documents

On termination of this Agreement the receiving party must immediately:

- (a) deliver to the disclosing party all documents and other materials containing, recording or referring to Confidential Information; and
- (b) erase or destroy in another way all electronic and other intangible records containing, recording or referring to Confidential Information,

which are in the possession, power or control of the receiving party or of any person to whom the receiving party has given access.

13.5 Security and control

The receiving party must:

- (a) keep effective control of the Confidential Information; and
- (b) ensure that the Confidential Information is secure from theft, loss, damage or unauthorised access or alteration.

14. GOVERNANCE

14.1 Sydney Water's Representative

- (a) Sydney Water must appoint, and ensure that at all times there is appointed a natural person to be Sydney Water's representative (**Sydney Water's Representative**). As at the date of this Agreement, Sydney Water's Representative is the person listed in clause 20.1(b).
- (b) Sydney Water acknowledges and agrees that:
 - (i) the role of Sydney Water's Representative is to be the primary point of contact for the purpose of implementing this Agreement and facilitating the objectives of this Agreement, and that all correspondence and communication in relation to this Agreement should be undertaken through Sydney Water's Representative;
 - (ii) matters within the knowledge of Sydney Water's Representative are taken to be within the knowledge of Sydney Water; and
 - (iii) Sydney Water's Representative has the authority to act on behalf of Sydney Water in its role under this Agreement but acts at all times as the agent of Sydney Water (and not as an independent certifier, assessor or valuer) and is subject to the directions of Sydney Water.
- (c) Sydney Water may at any time replace Sydney Water's Representative, in which event Sydney Water will appoint another person as Sydney Water's Representative and notify the City of that appointment.
- (d) Any substitute Sydney Water's Representative appointed under this clause will be bound by anything done by the former Sydney Water's Representative to the same extent as the former Sydney Water's Representative would have been bound.

14.2 City's Representative

- (a) The City must appoint, and ensure that at all times there is appointed, a natural person to be the City's representative (**City's Representative**). As at the date of this Agreement, the City's Representative is the person listed in clause 20.1(b).
- (b) The City acknowledges and agrees that:
 - (i) the role of the City's Representative is to be the primary point of contact for the purpose of implementing this Agreement and facilitating the objectives of this Agreement, and that all correspondence and communication in relation to this Agreement should be undertaken through the City's Representative;
 - (ii) matters within the knowledge of the City's Representative are taken to be within the knowledge of the City; and
 - (iii) the City's Representative has the authority to act on behalf of the City in its role under this Agreement but acts at all times as the agent of the City (and not as an independent certifier, assessor or valuer) and is subject to the directions of the City.
- (c) The City may at any time replace the City's Representative, in which event the City will appoint another person as the City's Representative and notify Sydney Water of that appointment.
- (d) Any substitute City's Representative appointed under this clause will be bound by anything done by the former City's Representative to the same extent as the former City's Representative would have been bound.

14.3 Project Management Team

- (a) The parties will immediately establish the Project Management Team. The Project Management Team is to be comprised of Sydney Water's Representative and the City's Representative.
- (b) The Project Management Team is responsible for the day-to-day management of the Project.

14.4 Establishment of the Project Committee

- (a) The parties will immediately establish the Project Committee.
- (b) Membership of the Project Committee is limited to no more than one representative from each of Sydney Water and the City and such membership is to be comprised of:
 - (i) Sydney Water – General Manager Liveable City Solutions; and
 - (ii) the City – Chief Operating Officer.

14.5 Role of the Project Committee

The role of the Project Committee is to:

- (a) evaluate and approve or reject (or make recommendations to approve, where internal Board, Council or senior management approval is required):
 - (i) the Options Approval Business Case, the Delivery Approval Business Case, the Delivery Contractor and the award of the Delivery Contract;
 - (ii) proposed Best for Project Variations that cannot be decided upon by the Project Management Team; and
 - (iii) proposed Individual Out of Scope Variations; and
- (b) attempt to resolve disputes between the parties at the Project Management Team level.

14.6 Project Committee Meetings

- (a) The Project Committee will meet on an as-needed basis.
- (b) Project Committee meetings will be conducted in accordance with procedures its members determine from time to time, provided that both members described in clause 14.4(b) (or a nominated alternate appointed in writing and notified to the other member) must be present in order for there to be a quorum at a meeting of the Project Committee.
- (c) To be effective, a decision of the Project Committee must be a unanimous decision of both members and there must be a quorum. No decision will be deemed to have been made by the Project Committee unless it is unanimous and there was a quorum.
- (d) The Project Committee will have delegated authority from the parties to make critical decisions for the Project within the limits of their own delegated authority. Such decisions will be binding on the parties.
- (e) The Project Committee decisions do not affect the rights of Sydney Water or the City except as set out in this clause.

- (f) If a dispute is referred to the Project Committee, the Project Committee will attempt to resolve the dispute at the next scheduled meeting of the Project Committee in which case:
 - (i) a decision of the Project Committee in respect of the dispute may only be made by unanimous agreement of both members of the Project Committee; and
 - (ii) if the dispute is not resolved at the meeting or within 5 Business Days after the meeting, either party may refer the dispute for resolution in accordance with clause 16.

15. TERMINATION

15.1 Notice of default

- (a) Subject to clause 15.1(d), if a party commits a Material Default, then the other party may give a default notice to the defaulting party.
- (b) A default notice under this clause must state:
 - (i) that it is a notice given under this clause 15;
 - (ii) the Material Default relied upon; and
 - (iii) that the non-defaulting party requires the defaulting party to:
 - (A) remedy the breach to the non-defaulting party's reasonable satisfaction; or
 - (B) provide a cure plan which sets out the actions and measures which will be undertaken by the defaulting party to remedy the default, within a reasonable number of days (being not less than 20 Business Days) as set out in the notice.
- (c) If the defaulting party fails to remedy the Material Default to the non-defaulting party's reasonable satisfaction (or otherwise provide a cure plan) within the period set out in the default notice, or if the Material Default is not remedied in accordance with the cure plan, then the non-defaulting party may, by further written notice to the defaulting party, terminate this Agreement.
- (d) The parties may only issue a default notice pursuant to this clause 15 after they have followed the dispute resolution process set out in clause 16 and the Material Default continues.

15.2 Project Cost contributions on termination

- (a) If this Agreement is terminated, the party who has incurred the greater amount of Project Cost will be entitled to reimbursement from the other party of such an amount which, if paid by the other party to the first-mentioned party, would result in the parties sharing the Project Cost equally.
- (b) For the purposes of clause 15.2(a), the Project Cost will include the amount of any payments made by a party to any third party for the purposes of the Project (provided such amount has been included in the Estimated Project Cost), which a party is legally bound to pay.

15.3 Rights preserved

The expiry or termination of this Agreement will not affect any rights of a party against the other in respect of any act, omission, matter or thing occurring or under this Agreement prior to that expiry or termination.

16. DISPUTE RESOLUTION

16.1 Dispute resolution process

- (a) If either party considers that there is a dispute between the parties in relation to this Agreement or the Project that cannot be resolved by the Project Management Team or the Project Committee, that party will notify the other party in writing, such notice to identify the nature and details of the dispute.
- (b) A party may only lodge a notification of dispute on the earlier of:
 - (i) the date the Project Committee has notified the parties that it has been unable to resolve the dispute at Project Committee level; and
 - (ii) the date which is 20 Business Days after the date the issue was raised in writing to the Project Committee.
- (c) Following a notice of dispute being issued by a party, the parties will seek to resolve the relevant dispute by elevating the dispute to the Chief Executive Officer of the City and the Managing Director of Sydney Water to meet and attempt to resolve the dispute within a further 20 Business Days.
- (d) If a party gives a notice of dispute, the parties will continue to meet their obligations under this Agreement until the dispute is resolved and, following resolution of the dispute, meet their obligations under this Agreement in accordance with the resolution of the dispute.

16.2 No litigation or arbitration

- (a) Subject to clause 16.2(c), the parties agree that there will be no litigation or arbitration between them arising out of or in connection with this Agreement. Sydney Water and the City must use their best endeavours to avoid issues arising as between each other and, to the extent an issue arises, must use their best endeavours to resolve the issue as between each other (at either the Project Management Team or Project Committee level) and otherwise comply with the procedure for the resolution of disputes set out in clause 16.1.
- (b) Sydney Water and the City agree that, subject to the exceptions in clause 16.2(c), a failure by a party to perform any obligation or to discharge any duty under, or arising out of or in connection with this Agreement, does not give rise to any enforceable right or obligation at law or in equity and, to the extent that it does, the other party releases and holds harmless that party from any consequences at law or equity for that failure.
- (c) Clauses 16.2(a) and 16.2(b) have no force or effect in respect of:
 - (i) a Material Default which has not been remedied in accordance with clause 15; and
 - (ii) in respect of a failure by a party to make a payment under an indemnity under this Agreement; and
 - (iii) any payment required under clauses 15.2 or 5.6, or otherwise required under this Agreement.

17. MUTUAL INDEMNITY AND LIABILITY

17.1 Mutual Indemnity

Each party (the **Indemnifier**) is liable for and indemnifies the other party (the **Indemnified Party**) from and against:

- (a) all third party Claims brought against, suffered or incurred by the Indemnified Party to the extent caused or contributed to by, or arising out of:
 - (i) any negligent act or negligent omission of the Indemnifier or its Associates in relation to, or as a consequence of, the Project (including the Project Management Services); or
 - (ii) any Material Default of this Agreement by the Indemnifier; and
- (b) any Loss incurred by the Indemnified Party to the extent caused or contributed to by, or arising out of:
 - (i) any Material Default of this Agreement by the Indemnifier;
 - (ii) termination of this Agreement due to Material Default; or
 - (iii) any negligent act or negligent omission of the Indemnifier or its Associates in relation to, or as a consequence of, the carrying out of the Project Management Services.

An Indemnifier's liability for and responsibility to indemnify the Indemnified Party under this clause 17.1 is reduced proportionally to the extent that a negligent act or negligent omission of the Indemnified Party or its Associates contributed to the Loss or Claim.

17.2 Exclusion for Consequential Loss

- (a) In this clause 17.2, "Consequential Loss" means any loss of profit, loss of any contract, loss of revenue, loss of use, loss of business opportunities, loss of anticipated savings, damage to goodwill, or any indirect and consequential losses or damages not in the reasonable contemplation of the parties at the time of the loss or damage.
- (b) Subject to clause 17.1(a), the parties are not liable to each other for any Consequential Loss sustained by a party, whatever the cause, arising out of or connected with this Agreement.

17.3 Liability under this Agreement

- (a) Each indemnity under this Agreement is a continuing obligation, separate and independent from the other obligations under this Agreement and survives termination or expiry of this Agreement.
- (b) It is not necessary for a party to incur expense or to make any payment before enforcing a right of indemnity conferred under this Agreement.

18. INSURANCE

The parties will each effect the insurance or self-insurance arrangements appropriate to this Agreement.

19. FORCE MAJEURE

19.1 Notification of a Force Majeure Event

If a party is affected by a Force Majeure Event, that party must immediately notify the other party, giving:

- (a) full details of the Force Majeure Event;
- (b) an estimate of the duration of the Force Majeure Event;
- (c) the obligations the Force Majeure Event affects and how much it will affect the party giving notice; and
- (d) the steps that the party has either taken or plans to take to manage the effects of the Force Majeure Event.

19.2 Effect on obligations

- (a) A party's obligations under this Agreement are suspended if those obligations are affected by a Force Majeure Event, for as long as the Force Majeure Event continues.
- (b) A party affected by a Force Majeure Event must do all it can to remove, overcome or minimise the effects of the Force Majeure Event as quickly as possible.

19.3 Definition of "Force Majeure Event"

For the purpose of this clause, a "Force Majeure Event" means an earthquake, cyclone, fire, riot or civil commotion, sabotage, act of God, war, revolution, or flood, the effects of which cannot be prevented by taking those steps a prudent and competent person would take.

20. GENERAL

20.1 Notices

Each communication (including each notice, consent, approval, request and demand) under or in connection with this Agreement:

- (a) must be in writing;
- (b) must be addressed as follows (or as otherwise notified by that party to each other party from time to time):

- (i) **Sydney Water's Representative**

Name: S Muralitharan
Address: 1 Smith Street
Parramatta NSW 2150
PO Box: PO Box 399 Parramatta NSW 2124
Email: S.MURALITHARAN@sydneywater.com.au

(ii) **The City's Representative**

Name: Peter Shields
Address: Town Hall House
456 Kent Street
Sydney NSW 2000
PO Box: GPO Box 1591 SYDNEY NSW 2001
Email: PShields@cityofsydney.nsw.gov.au

- (c) must be signed by the party making it or (on that party's behalf) by the solicitor for, or any attorney, director, secretary or authorised agent of, that party;
- (d) with the exception of notices for dispute, must be delivered by hand or posted by prepaid post to the address, or sent by email, of the addressee; and
- (e) notices for dispute in accordance with clause 16 must be delivered by hand or posted by prepaid post to the address of the addressee.

20.2 Governing law

This Agreement is governed by and must be construed according to the law applying in New South Wales.

20.3 Amendments

This Agreement may only be varied by a document signed by or on behalf of each party. For the avoidance of doubt, Variations properly effected in accordance with this Agreement and the matters referred to in clause 4.5 do not constitute variations to this Agreement for the purposes of this clause 20.3.

20.4 Consents

A consent required under this Agreement from a party may be given or withheld, or may be given subject to any conditions, as that party (in its absolute discretion) thinks fit, unless this Agreement expressly provides otherwise.

20.5 Assignment

A party cannot assign, novate or otherwise transfer any of its rights or obligations under this Agreement without the prior consent of each other party.

20.6 Counterparts

This Agreement may be executed in any number of counterparts and by the parties on separate counterparts. Each counterparty constitutes an original of this Agreement, and all together constitute one agreement.

20.7 No representation or reliance

- (a) Each party acknowledges that no party (nor any person acting on a party's behalf) has made any representation or other inducement to it to enter into this Agreement, except for representations or inducements expressly set out in this Agreement.
- (b) Each party acknowledges and confirms that it does not enter into this Agreement in reliance on any representation or other inducement by or on behalf of any other party, except for representations or inducements expressly set out in this Agreement.

20.8 Expenses

Except as otherwise provided in this Agreement, each party must pay its own costs and expenses in connection with negotiating, preparing and executing this Agreement.

20.9 Entire Agreement

This Agreement constitutes the entire agreement between the parties in connection with its subject matter.

20.10 Waiver

A right may only be waived in writing, signed by the party giving the waiver, and:

- (a) no other conduct of a party (including a failure to exercise, or delay in exercising, the right) operates as a waiver of the right or otherwise prevents the exercise of the right;
- (b) a waiver of a right on one or more occasions does not operate as a waiver of that right if it arises again; and
- (c) the exercise of a right does not prevent any further exercise of that right or of any other right.

20.11 Unfettered discretion

Subject to clause 8(b), nothing in this Agreement in any way restricts or otherwise affects the City or Sydney Water's unfettered discretion to exercise any of their respective statutory functions, powers as a public authority (in the case of the City) or powers to any law, or, in the case of Sydney Water, the ability of Sydney Water to comply with its Operating Licence and Customer Contract (each as amended from time to time).

20.12 No partnership, joint venture or other fiduciary relationship

Nothing in this Agreement will be construed or interpreted as constituting the relationship between Sydney Water on one hand and the City on the other hand as that of partners, joint venturers or any other fiduciary relationship.

20.13 GST

- (a) Any terms used in this clause 20.13 which are not defined in this Agreement, but which are defined in the GST Law, have the meanings given in the GST Law.
- (b) Unless otherwise stated in this Agreement, amounts payable, and consideration to be provided, in connection with this Agreement do not include GST.
- (c) If GST is payable on a supply made under this Agreement, the recipient must pay the supplier an additional amount equal to the GST payable on that supply at the time the recipient pays or provides consideration for the supply. However, if an adjustment event arises in respect of the supply, the additional amount must be adjusted to reflect the adjustment event and the recipient or the supplier (as the case may be) must make any payments necessary to reflect the adjustment.
- (d) Each party must notify the other party if it ceases to be registered for GST purposes or if it ceases to comply with any of the requirements of the GST Law.

ATTACHMENT A

Executed as an agreement.

Executed for and on behalf of THE COUNCIL OF THE CITY OF SYDNEY by its Chief Executive Officer in the presence of:

Signature of Witness:

Signature of Chief Executive Officer:

Patricia Monica Barone

Name of Witness (printed):

CHIEF EXECUTIVE OFFICER

Signed, sealed and delivered for and on behalf of **Sydney Water Corporation** ABN 36 776 225 by _____ in his capacity as _____, pursuant to Power of Attorney dated 21 November 2012 and Registered Book 4644 No 192, in the presence of:

Signature of witness:

Signature

Name of witness (block letters)

ANNEXURE A: Project Scope

Project Agreement, Approvals, Design and Procurement - August 2016 – February 2019

- Execute Project Agreement
- Prepare safety and quality management plans
- CCTV inspection and/or traverse inspections by specialists
- Features survey
- Hydrologic and hydraulic modelling and reporting
- Options identification and assessment
- Geotechnical investigations and soil contamination studies
- Services searches and consultation for the location of both existing and proposed utility services
- Review of environmental factors, supported by specialist studies of:
 - noise impacts
 - traffic management
 - heritage impacts
- Study into the potential mobilisation of contaminated sediment in Alexandra Canal as a result of changes to the stream hydrology of Sheas Creek
- Community and stakeholder consultation
- Risk-based cost estimation
- Workshops (risk, CHAIR design)
- Project management and coordination
- Procurement strategies and business case development

Construction and Commissioning - March 2019 to December 2020

- Scope for this phase is determined from procurement phase

Project Close Out and Defects Liability - January 2021 to January 2022

Annexure B: Works Site Plan

