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WestConnex

M4 Widening

Project Management Deed

December 2014





EXECUTION VERSION

WestConnex M4 Widening Project Project Management Deed

WCX M4 Pty Ltd
ABN 92 602 963 806

WestConnex Delivery Authority
ABN 33 855 314 176

2014

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THIS DEED is made on *4 December* 2014

BETWEEN:

- (1) **WCX M4 Pty Ltd** ABN 92 602 963 806 whose registered office is at Level 18, 101 Miller Street, North Sydney (the **Project Company**); and
- (2) **WestConnex Delivery Authority** ABN 33 855 314 176 of Level 18, 101 Miller Street, North Sydney (**WDA**).

RECITALS:

- (A) On or about the date of this Deed, RMS and the Project Company entered into the Project Deed in respect of the Project.
- (B) On or about the date of this Deed, the Project Company entered into the D&C Deed with the Contractor in respect of the Project.
- (C) The Project Deed and the D&C Deed contemplate that the Project Company will discharge those functions set out in Schedule 3.
- (D) The Project Company has determined to appoint WDA to perform those functions and services in relation to the Project Deed, the D&C Deed and other Project Documents on the terms and conditions of this Deed.
- (E) At all times WDA and the Project Company intend to work together in a collaborative manner and avoid duplication of work and processes wherever possible.

THE PARTIES AGREE AS FOLLOWS:

1. **INTERPRETATION**

1.1 **Definitions**

Capitalised terms used but not defined in this Deed have the meaning given in the D&C Deed and the Project Deed as at the date of this deed, and the following definitions apply in this Deed.

Completion has the meaning set out in the Project Deed.

Construction Completion has the meaning set out in the D&C Deed.

Contingency Claim means a claim managed by WDA in relation to a payment from the WDA Project Contingency Amount, including but not limited to claims relating to the D&C Deed.

D&C Deed means the document titled "Design and Construct Deed" dated on or about the date of this Deed between the Project Company and the Contractor.

Designated Motorway Projects has the meaning set out in the constitution of SMC.

Development Fee means a lump sum amount of _____ (ex GST) payable to WDA pursuant to this deed.

GST, GST law and other terms used in clause 12.2 have the meanings used in the *A New Tax System (Goods and Services Tax) Act 1999* (as amended from time to time) or any replacement or other relevant legislation and regulations, except "GST law" also includes any applicable rulings. Any reference to GST payable by the Supplier (as defined in clause 12.2) includes any GST payable by the representative member of any GST group of which the Supplier is a member.

Law has the meaning set out in the Project Deed.

Management Plan means the plan WDA is required to prepare and update in accordance with this Deed.

Open Book Basis means the provision of any pricing, costing and other information in a clear and transparent manner to enable an assessment of actual costs and profit margins, including a breakdown of all relevant:

- (a) preliminaries;
- (b) insurances;
- (c) labour;
- (d) equipment;
- (e) materials;
- (f) subcontract costs;

- (g) margins; and
- (h) discount rates used to calculate net present values.

Payment Schedule means Schedule 5 to this Deed.

Permitted Acceleration Costs means costs, expenses or Liabilities that have been incurred by the Project Company in directing a Subcontractor to accelerate the progress of the Project Company's Activities (Direction).

Permitted Use means a use that is not an Excluded Use.

Project means the investigation, financing, funding, planning, design and construction and commissioning of the M4 Widening project.

Project Deed means the document titled "WestConnex M4 Widening Project Deed" dated on or about the date of this Deed between RMS and the Project Company.

Project Documents means those agreements and other documents described in Schedule 1 to this Deed, and includes the Planning Approval (as defined under the Project Deed).

Project Works has the meaning set out in the Project Deed.

Proposed Funding Plan means Project Company's proposed funding plan for the Project as set out in Schedule 2.

RMS means Roads and Maritime Services.

RMS Contract Administration Costs means the costs of RMS referred to in clause 2.3(c).

Separable Portion has the meaning set out in the D&C Deed.

Services means those services listed in Schedule 3 to this Deed.

Significant Claim means a Contingency Claim, the value of which exceeds (excluding GST);

SMC means Sydney Motorway Corporation Pty Limited ABN 47 601 507 591.

Subcontractor has the meaning set out in the Project Deed.

Tolling RSE Contract has the meaning set out in the Project Deed.

Tolling RSE Contractor has the meaning set out in the Project Deed.

WDA Project Contingency means the funds made available for meeting Contingency Claims in accordance with this Deed, up to the WDA Project Contingency Amount.

WDA Project Contingency Amount means the total of the amount of the WDA Project Contingency in the table set out in Schedule 2.

WDA Management Fee means the amount payable to WDA for the performance of the Services in accordance with the Payment Schedule.

1.2 Interpretation

In this Deed:

(a) headings are for convenience only and do not affect interpretation;

and unless the context indicates a contrary intention:

(b) an obligation or liability assumed by, or a right conferred on, two or more parties binds or benefits all of them jointly and each of them severally;

(c) the expression "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;

(d) a reference to any party includes that party's executors, administrators, successors and permitted assigns, including any person taking by way of novation and, in the case of a trustee, includes any substituted or additional trustee;

(e) a reference to any document (including this Deed) is to that document as varied, novated, ratified or replaced from time to time;

(f) a reference to any statute or to any statutory provision includes any statutory modification or re-enactment of it or any statutory provision substituted for it, and all ordinances, by-laws, regulations, rules and statutory instruments (however described) issued under it;

(g) words importing the singular include the plural (and vice versa), and words indicating a gender include every other gender;

(h) references to parties, clauses, schedules, exhibits or annexures are references to parties, clauses, schedules, exhibits and annexures to or of this Deed, and a reference to this Deed includes any schedule, exhibit or annexure to this Deed;

(i) where 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;

(j) the word **includes** in any form is not a word of limitation; and

(k) a reference to **\$** or **dollar** is to Australian currency.

1.3 Governing Law

This Deed is governed by and will be construed according to the laws of New South Wales.

2. APPOINTMENT OF WDA

2.1 Appointment

(a) The Project Company appoints and authorises WDA under this Deed to perform the Services (whether as agent or delegate).

(b) WDA confirms its acceptance of the appointment referred to in clause 2.1(a).

2.2 Payments to WDA

The Project Company will pay WDA:

(a) the Development Fee; and

- (b) the WDA Management Fee,
- in accordance with the Payment Schedule.

2.3 **Proposed Funding Plan**

- (a) The parties acknowledge and agree that Project Company proposes to fund the Project up to Completion in accordance with the Proposed Funding Plan set out in Schedule 2.
- (b) The parties acknowledge and agree that the cost of interests in land required to be procured for the Project will be funded by RMS.
- (c) Under the Project Deed, the Project Company will agree with RMS to pay to RMS the amounts set out in the Proposed Funding Plan.

2.4 **WDA Project Contingency**

The Project Company and WDA acknowledge and agree that WDA will, as part of the Services, manage claims and payments of the WDA Project Contingency in accordance with Clause 7 and Schedule 4 of this Deed.

2.5 **Project Documents Funding**

The Project Company must ensure that:

- (a) any amounts payable by the Project Company to the Contractor or any other counterparty under or in connection with a Project Document to which it is expressed to be a party; and
- (b) any other financial obligations of the Project Company under or in connection with the Project Documents to which it is a party,

are directly paid and performed by the Project Company in accordance with the relevant Project Document.

3. **STATUTORY FUNCTIONS AND OBLIGATIONS**

3.1 **WDA**

The parties acknowledge and agree that:

- (a) WDA is a public corporation established by and with the functions under the *Transport Administration (General) Amendment (WestConnex Delivery Authority) Regulation 2013* and is, amongst other things, responsible for delivering the WestConnex program of works, including facilitating, developing, planning, procuring, supervising, managing or carrying out the whole or any part of the WestConnex program of works;
- (b) WDA has a separate Board of Directors (which include representatives of RMS) who oversee the activities of WDA and may advise and make recommendations to WDA in relation to the delivery of Services under this Deed; and
- (c) in accordance with section 81(1) of the *Transport Administration Act 1988*, WDA has, in the exercise of its functions, a duty to operate as efficiently and as economically as possible.

3.2 **WDA Statutory Roles**

The parties acknowledge and agree that:

- (a) WDA has statutory responsibilities and functions (including by reason of being a subsidiary of RMS) and, to the extent that WDA is not able to provide the Services pursuant to this deed by reason of those responsibilities and functions, it will advise Project Company of its inability to provide the relevant Services; and
- (b) to the extent that WDA is acting under the control or direction of the Minister for Roads in relation to the Project, it will promptly advise Project Company that it is so acting or has received a direction and the extent to which it is not able to provide the Services by reason of that control or direction, will not provide the relevant Services,

and Project Company will undertake, or arrange for a third party to undertake, those aspects of the Project and WDA will not incur any liability by reason of being unable to perform the Services by operation of this clause 3.2.

3.3 **SMC**

The parties acknowledge and agree that:

- (a) Project Company has been formed as a subsidiary of SMC to make a commercial investment in Designated Motorway Projects and to undertake associated activities;
- (b) nothing in this agreement requires Project Company or SMC to invest or provide any financial contribution or accommodation to the WestConnex program of works (other than as contemplated in this deed in respect of the Project) and that any investments by SMC through, or facilitated by, the Project Company will be subject to their respective internal approval processes and appropriate due diligence and external advice; and
- (c) Project Company and SMC each have separate Boards of Directors who oversee their activities.

3.4 **Collaborative Approach**

Without limiting clause 13.12, the parties agree to work collaboratively with each other in fulfilling their respective statutory and commercial functions and obligations, including through the provision of the Services under this Deed.

4. **WDA'S OBLIGATIONS**

4.1 **Acknowledgement**

- (a) WDA acknowledges that:
 - (i) it has received a copy of the Project Documents and that it has read, and is familiar with, the terms of each of these documents to the extent they relate to the Services; and
 - (ii) its obligations extend to and include:
 - (A) exercising the rights and powers and performing the obligations, functions, duties and services of the "Principal's Representative" under the D&C Deed; and

- (B) exercising the rights and powers and performing the obligations, functions, duties and services of the "Independent Certifier" under the Project Deed.
 - (iii) the Project Company:
 - (A) is relying upon the knowledge, skill, expertise and experience of WDA in the performance of its obligations under this Deed; and
 - (B) may suffer loss if WDA does not perform its obligations in accordance with the requirements of this Deed; and
 - (iv) it must, when accessing the Construction Site and all places at which the Contractor's Work are being undertaken, comply with the reasonable directions of the Principal Contractor.
- (b) WDA warrants to the Project Company that:
- (i) in performing the Services, it will comply with all Law, applicable NSW Government procurement policies, act honestly, diligently, reasonably and with the degree of professional care, knowledge, skill, expertise, experience and care which would be reasonably expected of an expert professional providing services similar to the Services within the design and construction industry generally and the design and construction of major engineering works in particular;
 - (ii) warrants to the Project Company that, at all times, it will act within the time requirements for the performance of its obligations under this Deed and the Project Documents, and, where no time is prescribed, within a reasonable time, and will comply with the requirements of the Payment Schedule;
 - (iii) it will carry out and perform the Services in accordance with this Deed.

4.2 **WDA's Organisation and Personnel**

- (a) WDA will provide a dedicated management team and personnel who are engaged under an effective organisation structure and have an appropriate and sufficient degree of knowledge, skill, expertise and experience to perform its obligations under this Deed.
- (b) WDA will ensure that the people referred to in clause 4.2(c):
 - (i) perform the services required of their respective positions; and
 - (ii) if any such people are removed:
 - (A) they are replaced by people of at least equivalent ability, knowledge, skill, expertise and experience (including the ability, knowledge, skill, expertise and experience required by the Management Plan); and
 - (B) prior to removal and replacement, there is a proper and adequate handover to ensure that the new personnel have a reasonable understanding of the Project and the Services; and
 - (iii) are available for consultation as any party may reasonably require from time to time.
- (c) WDA's "Principal's Representative" under the D&C Deed must possess a recognised qualification relevant to the position and the Services and have extensive

experience in the administration of design and construction contracts of large projects similar to the Project Works.

4.3 **Subcontracting**

- (a) WDA may subcontract the performance of any part of the Services.
- (b) WDA remains responsible for the performance of the Services in accordance with this Deed, notwithstanding any subcontracting, and will be liable for the acts and omissions of any subcontractor as if they were acts and omissions of WDA.

4.4 **Management Plan**

- (a) WDA will prepare and submit to the Project Company as soon as possible but within 3 months of the date of this Deed a Management Plan which will enable the Project to be delivered in accordance with the requirements of NSW Government procurement policy and sets out the plan WDA proposes to follow in performing the Services.
- (b) WDA will:
 - (i) progressively amend, update and develop the Management Plan throughout the performance of the Services as necessary to reflect the commencement of new stages of the Project Works, material Variations under the D&C Deed, Changes under the Project Deed and any material changes in the manner of performing the Services; and
 - (ii) provide copies of or access to each revision of the Management Plan to the Project Company.
- (c) The Project Company owes no duty to WDA to review the Management Plan (or any revised Management Plan) for errors, omissions or compliance with this Deed.

4.5 **Progress Reports by WDA**

During the period from the date of this Deed until Completion, WDA will provide a monthly progress report to Project Company consistent with the reporting provided to the WDA Board (one hard copy plus simultaneous provision of an electronic copy) no later than 15 Business Days after the end of the month containing, identifying or setting out:

- (a) details of the progress of the Project including the costs incurred to date and the expected costs to achieve Completion in accordance with Schedule 3; and
- (b) any act, matter or thing which has or is likely to have a material adverse effect on the progress and provision of the Services, together with detailed particulars on how WDA is dealing or proposes to deal with any such act, matter or thing.

4.6 **Review and monitoring**

- (a) The parties agree that the WDA Board and Project Company's Board will regularly consult together review or monitor of the delivery of the Project and the performance of the Services.
- (b) WDA will make available to Project Company the details of any reviews and monitoring of the delivery of the Project or performance of the Services which WDA has undertaken or arranged for a third party to undertake.
- (c) To the extent Project Company is not satisfied with the information provided the issue will be referred for Dispute Resolution under clause 11.

4.7 **Access to records**

- (a) From the date of this Deed and for a period of seven years following completion of the Services, WDA will, within a reasonable time of any request, give the Project Company access to any records or other documents prepared or generated by or on behalf of WDA directly related to the carrying out the Services, subject to reasonable safety, security and governmental requirements.
- (b) Digital media records are to be provided in both native format and formats with the greatest potential for long term survival such as Portable Document Format specialised for the preservation of electronic documents (PDF/A-1) or equivalent.

5. **STANDARD OF CARE AND CONFIDENTIALITY**

5.1 **Standard of care**

WDA warrants to the Project Company that in performing the Services, it will:

- (a) act honestly, diligently and reasonably;
- (b) act in accordance with its statutory obligations and Government procurement policies where applicable;
- (c) act with the degree of professionalism, knowledge, skill, expertise, experience and care which would be reasonably expected of an expert professional providing services similar to the Services within the construction industry generally and the design and construction of major engineering works in particular;
- (d) act within the time prescribed under this Deed or the Project Documents;
- (e) in its role as "Principal's Representative" under the D&C Deed:
 - (i) administer the D&C Deed in good faith in accordance with its terms; and
 - (ii) act as servant or agent of the Project Company, and solely in the interests of the Project Company, as contemplated by clause 2.1(e)(i) of the D&C Deed; and
- (f) in its role as "Independent Certifier" under the Project Deed:
 - (i) act in accordance with the terms of the Project Deed; and
 - (ii) act independently of RMS, the Project Company and any of their respective Related Parties (as defined under the Project Deed), as contemplated by clause 12.3(c) of the Project Deed.

5.2 **Confidentiality**

WDA will keep confidential details of this Deed and all information and documents provided to, or by, WDA relating to the Services and not provide, disclose or use the information or documents except:

- (a) to the Project Company;
- (b) for the purposes of performing the Services;
- (c) where required by Law or to obtain legal advice on this Deed;
- (d) to the Minister (or office of the Minister) with responsibility for WDA or for any legitimate government purpose or process;
- (e) to RMS; or
- (f) with the prior written consent of the Project Company.

This obligation will survive completion of the Services or the termination of this Deed.

6. **OBLIGATIONS OF THE PROJECT COMPANY**

6.1 **Co-operation by the Project Company**

Without limiting or otherwise affecting any of the Project Company's obligations under this Deed or the Project Documents, the Project Company will:

- (a) co-operate with and provide WDA with all information and documents necessary or reasonably required by WDA; and
- (b) allow WDA to attend all meetings and procure for WDA access to such premises as may be reasonably necessary to enable WDA to perform the Services, including allowing access to the Construction Site and all places at which the Contractor's Work is being undertaken, provided that WDA will comply with the reasonable directions of the Principal Contractor.

7. **WDA PROJECT CONTINGENCY**

8. LIABILITY, INSURANCE AND INDEMNITY

8.1 Limitation of liability

Subject to clause 8.2, WDA's liability under this Deed, from all claims howsoever arising (including negligence and breach of statutory duty) will be limited in aggregate to

8.2 Exclusions

The limitation of liability in clause 8.1 does not apply to any claims arising out of or in connection with any of the following on the part of WDA or anyone for whom it is responsible:

- (a) fraud or criminal conduct;
- (b) wilful misconduct being any conduct, act or omission done or to be done which results from conscious, reckless or intentional indifference to any provision of this Deed or the rights or welfare of, or the foreseeable harmful consequences to, those who are or may be affected by that conduct, act or omission; or
- (c) gross negligence being any negligent act or omission which WDA knew, or ought reasonably to have been aware, would result in substantial losses being incurred by, or substantial harmful consequences being suffered by, another party to the Deed.

8.3 Insurances

WDA will from the date of the D&C Deed effect and maintain policies of insurance (including through the Treasury Managed Fund insurance scheme) consistent with government policies and typically effected by entities providing services similar to the Services.

8.4 Subcontractors' insurance

WDA will ensure that any material subcontractor engaged by WDA in relation to the Services, who is not covered by the professional indemnity policy of insurance effected and maintained by WDA, effects and maintains a professional indemnity policy of insurance on the terms, for the period and for the sum reasonably required by WDA.

8.5 Obligations unaffected by insurance

The requirement to effect and maintain insurance in this clause 8 does not limit the liability or other obligations of WDA under this Deed.

8.6 Indemnity

Subject to clause 8.1, WDA is liable for and indemnifies the Project Company against any liability, loss, claim, expense or damage which they may pay, suffer or incur in respect of:

- (a) any damage to or loss of property; or
- (b) death of or injury to any person,

insofar as the liability, loss, claim, expense or damage arises out of the negligent act, error or omission of WDA, its employees, agents, subcontractors or consultants in relation to the performance of the Services.

9. **CONFLICT OF INTEREST**

WDA and the Project Company will work collaboratively to mitigate and, where possible, avoid any conflicts of interest that exist or arise in relation to the Services, including complying with any requirements to ensure appropriate probity arrangements and compliance with Government policies to the extent such policies apply to them.

10. **TERMINATION OF APPOINTMENT**

10.1 **Notice of termination**

The Project Company may only terminate this Deed by notice in writing served on WDA if Project Company has obtained the prior written approval of SMC's shareholders.

11. **DISPUTE RESOLUTION PROCEDURE**

- (a) All disputes arising out of or in connection with this Deed between WDA and the Project Company will be resolved in accordance with this clause 11.
- (b) Where a dispute arises in connection with this Deed, either party may serve a notice in writing on the other party specifying:
 - (i) that it is a notice of dispute under this clause 11;
 - (ii) the particulars of the dispute; and
 - (iii) the position which the party believes is correct,

(Notice of Dispute).
- (c) If a Notice of Dispute is served, the persons holding the position of chief executive officer (or equivalent) of the Project Company (on the one hand) and the chief executive officer of WDA (on the other hand) or their nominees must meet within 10 Business Days of the Notice of Dispute and undertake good faith negotiations for the purposes of attempting to resolve the dispute.
- (d) If the dispute is not resolved with 15 Business Days after the date of the Notice of Dispute (or such longer period of time agreed between the parties in writing), the persons holding the position of chairman of SMC (on the one hand) and the chairman of WDA (on the other hand) or their nominees must meet within 20 Business Days of the date of the Notice of Dispute and undertake good faith negotiations for the purpose of attempting to resolve the dispute.
- (e) If the dispute is not resolved with 30 Business Days after the date of the Notice of Dispute (or such longer period of time agreed between the parties in writing), the dispute must be referred to the shareholders of SMC (on the one hand) and the Minister for Roads (on the other hand) for the purpose of attempting to resolve the dispute.
- (f) If the dispute is not resolved within 45 Business Days of the date of the Notice of Dispute (or such longer period of time agreed between the parties in writing), either party may commence legal proceedings in respect of the dispute provided that:

- (i) If Project Company intends to commence proceedings, it must first have the written approval of the shareholders of SMC; and
- (ii) If WDA intends to commence proceedings, it must first have the written approval of the Minister for Roads.

12. EXPENSES, STAMP DUTY AND GST

12.1 Expenses

Except as otherwise provided in this Deed, each party will pay its own costs and expenses in connection with the negotiation, preparation, execution and performance of this Deed.

12.2 GST

- (a) Notwithstanding any other provision of this Deed, any amount payable for a supply made under this Deed which is calculated by reference to a cost, expense or other amount paid or incurred by a party will be reduced by an amount equal to any input tax credits to which that party is entitled to in respect of that cost, expense or other amount.
- (b) If GST becomes payable on any supply made by a party (the **Supplier**) under or in connection with this Deed:
 - (i) any amount payable or consideration to be provided under this Deed for that supply (**Agreed Amount**) is exclusive of GST;
 - (ii) an additional amount will be payable by the party to whom that supply is made (the **Recipient**), equal to the amount of GST payable on that supply as calculated by the Supplier in accordance with the GST law and payable at the same time and in the same manner as for the Agreed Amount; and
 - (iii) the Supplier will provide a tax invoice (or equivalent documentation which complies with the GST law) to the Recipient in respect of that supply, no later than the time at which the Agreed Amount for that supply is to be provided under this Deed.
- (c) If, for any reason, the GST payable by the Supplier in respect of a supply it makes under this Deed (incorporating any increasing adjustments or decreasing adjustments relating to that supply) varies from the additional amount it receives from the Recipient under sub-clause (b) in respect of that supply, the Supplier will provide a refund or credit to or will be entitled to receive the amount of this variation from the Recipient (as appropriate). The payment of the variation amount by the Supplier or the Recipient under this clause (as the case may be) must be paid within 14 days of that party becoming aware of the variation in the amount of GST payable. Where an adjustment event occurs in relation to a supply, the Supplier will issue an adjustment note to the Recipient in respect of that supply within 14 days after becoming aware of that adjustment event occurring.
- (d) If the Recipient is dissatisfied with any calculation to be made by the Supplier under this clause, the Recipient may, at its own expense and after notifying the Supplier accordingly, refer the matter to an independent expert nominated by the President of the Institute of Chartered Accountants for expert determination, which will be final and binding on all parties. The expert will act as an expert and not as an arbitrator and will take into account the terms of this Deed, the matters required to be taken into account by the Supplier under this clause and any other matter considered by the expert to be relevant to the determination.

13. **MISCELLANEOUS**

13.1 **Further acts**

Each party will promptly do and perform all further acts and execute and deliver all further documents (in form and content reasonably satisfactory to that party) required by Law or reasonably requested by any other party to give effect to this Deed.

13.2 **Notices**

Any communication under or in connection with this Deed:

- (a) must be in writing;
- (b) must be addressed as shown below:

Project Company

Address:
Email:
Attention:

WDA

Address:
Email:
Attention:

(or as otherwise notified by that party to the other party from time to time);

- (c) must be signed by the party making the communication or (on its behalf) by the solicitor for, or by any attorney, director, secretary, or authorised agent of, that party;
- (d) must be delivered or posted by prepaid post to the address, or sent by fax to the number, or sent by email to the email address, of the addressee, in accordance with clause 13.2(b); and
- (e) with respect to communications sent by email:
 - (i) an attachment to an email will only form part of a communication under or in connection with this Deed if it is in .pdf, .jpeg, .xls, .doc, .vsd, .mpp, .mdb, .xer or .ppt format, or such other form as may be agreed between the parties from time to time; and
 - (ii) in cases of notices that have been sent under clause 10 and clause 11, an identical copy of the notice must also be printed and delivered or posted to the person's address or sent to the person's facsimile number in accordance with this clause 13.2;
- (f) will be deemed to be received by the addressee:
 - (i) (in the case of prepaid post) on the third business day after the date of posting to an address within Australia, and on the fifth business day after the date of posting to an address outside Australia;
 - (ii) (in the case of fax) at the local time (in the place of receipt of that fax) which then equates to the time at which that fax is sent as shown on the transmission report which is produced by the machine from which that fax is sent and which confirms transmission of that fax in its entirety, unless that local time is a non-business day, or is after 5.00 pm on a business day,

when that communication will be deemed to be received at 9.00 am on the next business day;

- (iii) (in the case of delivery by hand) on delivery at the address of the addressee as provided in clause 13.2(b), unless that delivery is made on a non-business day, or after 5.00 pm on a business day, when that communication will be deemed to be received at 9.00 am on the next business day; and
- (iv) (in the case of email) at the local time (in the place of receipt of that email) which then equates to the time at which that email is sent as shown on the automatic receipt notification received by the party, unless that local time is a non-business day, or is after 5.00 pm on a business day, when that communication will be deemed to be received at 9.00 am on the next business day,

and where "Business Day" means a day (not being a Saturday or Sunday) on which banks are generally open for business in the place of receipt of that communication.

13.3 **Jurisdiction**

- (a) Each party irrevocably submits to the non-exclusive jurisdiction of the courts of New South Wales, and the courts competent to determine appeals from those courts, with respect to any proceedings which may be brought at any time relating in any way to this Deed.
- (b) Each party irrevocably waives any objection it may now or in the future have to the venue of any proceedings, and any claim it may now or in the future have that any proceedings have been brought in an inconvenient forum, where that venue falls within clause 13.3(a).

13.4 **Amendments**

This Deed may only be varied by a document signed by or on behalf of each of the parties.

13.5 **Assignment**

WDA and the Project Company may not assign, novate or otherwise transfer any of their rights or obligations under this Deed without the prior written consent of each other party to this Deed.

13.6 **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 any party 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 or consent given by any party under this Deed will only be effective and binding on that party if it is given or confirmed in writing by that party.

13.7 **Consents**

Any consent or approval referred to in, or required under, this Deed from any 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 Deed expressly provides otherwise.

13.8 Counterparts

This Deed may be executed in any number of counterparts and by the parties on separate counterparts. Each counterpart constitutes the agreement of each party who has executed and delivered that counterpart.

13.9 Indemnities

Each indemnity in this Deed is a continuing obligation, separate and independent from the other obligations of the parties, and survives termination, completion or expiration of this Deed.

It is not necessary for a party to incur expense or to make any payment before enforcing a right of indemnity conferred by this Deed.

13.10 Entire agreement

To the extent permitted by law, in relation to the subject matter of this Deed, this Deed:

- (a) embodies the entire understanding of the parties and constitutes the entire terms agreed upon between the parties; and
- (b) supersedes any prior agreement (whether or not in writing) between the parties.

13.11 No representation or reliance

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

13.12 Relationship of the parties

- (a) The relationship between and among the parties to this Deed will not be that of partners or joint venturers and nothing herein contained will be deemed to constitute a partnership or joint venture among them and, other than in the performance of the Services as contemplated by this Deed, no party will have authority or power to act unilaterally as agent for the other.
- (b) The Project Company acknowledges and agrees that:
 - (i) neither this Deed nor any other Project Document will in any way unlawfully restrict or otherwise unlawfully affect the unfettered discretion of WDA to exercise any of its functions and powers pursuant to any Law; and
 - (ii) without limiting the foregoing, anything which WDA does, fails to do or purports to do pursuant to its functions and powers under any Law will be deemed not to be an act or omission by WDA under this Deed and will not entitle the Project Company) to make any claim against WDA.

13.13 Severance

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.

13.14 Moratorium Legislation

To the extent permitted by Law, the provisions of all Laws which at any time operate directly or indirectly to lessen or affect in favour of a party any obligation under this Deed, or to delay or otherwise prevent or prejudicially affect the exercise by a party of any right, power or remedy under this Deed or otherwise, are expressly waived.

13.15 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 13.15(a) it is further agreed that the rights, obligations and liabilities of the parties (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.

SCHEDULE 1

PROJECT DOCUMENTS

Contract Name and Parties		Contract Date
1.	D&C Deed and Schedules	
2.	Exhibits to the D&C Deed and Appendices	
3.	Project Deed and Schedules	
4.	Exhibits to the Project Deed and Appendices	
5.	Deed of Appointment of Independent Certifier (as defined in the D&C Deed)	
6.	Deed of Appointment of ER (as defined in the D&C Deed)	
7.	Parent Company Guarantee (as defined in the D&C Deed)	
8.	M4 Widening Tolling Roadside Contract - DSI	
9.	M4 Tolling Maintenance Contract	
10.	Interface Agreement - Tolling Contractor (Roadside) and Tolling Contractor (Back Office)	
11.	Tolling Commitment Deed Poll	
12.	Deed of Engagement of Principal Contractor (D&C)	
13.	Side Deed Poll (D&C)	
14.	D&C Contractor's Unconditional Undertaking	
15.	Independent Certifier Deed Poll (D&C)	
16.	Environmental Representative Side Deed Poll	
17.	Probity & Process Deeds	
	Any other document that the parties agree from time to time is to be a "Project Document"	

SCHEDULE 2

PROPOSED FUNDING PLAN

ITEM	AMOUNT	PAYMENT DETAILS
Part A – WDA Fees		
<hr/> Sub Total Part A \$45m <hr/>		

SCHEDULE 3

SERVICES

1. OVERVIEW

The Services are described in this Schedule 3 and include:

- (a) **(D&C Deed and Principal's Representative)** WDA's role as Project Company's agent under the D&C Deed and as "Principal's Representative" under the D&C Deed – see clause 2 of this Schedule 3;
- (b) **(Independent Certifier)** WDA's role as "Independent Certifier" under the Project Deed – see clause 3 of this Schedule 3;
- (c) **(Other Project Documents)** WDA's role under other Project Documents – see clause 4 of this Schedule 3;
- (d) **(Contingency Claims)** WDA's management of Contingency Claims – see clause 5 of this Schedule 3;
- (e) **(Reporting)** WDA's reporting requirements – see clause 6 of this Schedule 3;
- (f) **(General)** WDA's other general services – see clause 7 of this Schedule 3; and
- (g) **(O&M Services)** services in relation to the operations and maintenance of the Project during construction.

In performing the Services under this deed, subject to clause 3.2 of this deed, WDA will ensure that it protects Project Company's position under the Project Deed and, to this extent, will act under the D&C Deed in a manner which optimises the pass up of any liability to RMS and pass down of liability to the D&C Contractor and does not act in a manner which increases the gap risk of the Project Company under the D&C Deed and the Project Deed.

2. WDA'S ROLE AS PRINCIPAL'S REPRESENTATIVE

2.1 D&C Deed functions

WDA will discharge the functions, obligations, duties and services under the D&C Deed as agent for Project Company including those functions which the D&C Deed contemplates will be discharged by the "Principal's Representative".

The Services which the WDA is required to perform in its role as "Principal's Representative" under the D&C Deed include:

- (a) all the functions, obligations, duties and services which the D&C Deed (including the Scope of Works and Technical Criteria) contemplates will be discharged by the "Principal's Representative", including:
 - (i) providing notices required under the D&C Deed;
 - (ii) appointing "Principal's Surveillance Officers" under clause 2.1(b) of the D&C Deed;
 - (iii) appointing "Principal's Assistant Representatives" under clause 2.1(b) of the D&C Deed; and

- (b) being familiar with the role, functions, obligations, duties and services (express or implied) under the D&C Deed of the "Principal's Representative" and reviewing information made available to WDA by the Project Company in order to become fully acquainted with the Project.

2.2 **Agent of the Project Company**

In performing the Services, including in acting as the "Principal's Representative" under the D&C Deed, and as contemplated by clause 2.1(e)(i) of the D&C Deed, WDA will:

- (a) act as the agent of the Project Company;
- (b) act subject to the direction of the Project Company (where appropriate); and
- (c) act solely in the interest of the Project Company.

WDA will notify the Project Company of any dispute between the Project Company and the Contractor under the D&C Deed.

2.3 **Consent limits and recommendation reports**

3. WDA'S ROLE AS INDEPENDENT CERTIFIER

3.1 Independent Certifier functions

WDA will discharge the functions, obligations, duties and services which the Project Deed contemplates will be discharged by the "Independent Certifier".

The Services which the WDA is required to perform in its role as "Independent Certifier" under the Project Deed include:

- (a) all functions, obligations, duties and services which the Project Deed (including the Scope of Works and Technical Criteria) contemplates will be discharged by the "Independent Certifier", including:
 - (i) certifying Design Documentation under clause 13.3(c) and completion of the Project Works under clause 16.13(e) of the Project Deed;
 - (ii) establishing and managing the Operational Readiness Group under clause 16.15A(b) of the Project Deed; and
 - (iii) determining disagreements regarding directions to correct defects under clause 17.1(c) of the Project Deed; and
- (b) being familiar with the role, functions, obligations, duties and services (express or implied) under the Project Deed of the "Independent Certifier" and reviewing information made available to WDA by the Project Company in order to become fully acquainted with the Project.

In performing the Services, where WDA is acting as the "Independent Certifier" under the Project Deed, and as contemplated by clause 12.3(c) of the Project Deed, WDA will act independently of RMS, the Project Company and any of their respective Related Parties (as defined under the Project Deed).

4. **OTHER PROJECT DOCUMENTS**

WDA will provide Services in relation to administration and management of each of other Project Documents in Schedule 1 and such other contracts as agreed from time to time in relation to the Project.

5. **CONTINGENCY CLAIMS**

The Services include the management of Contingency Claims, using the WDA Project Contingency and the performance of other tasks and activities, in accordance with and as contemplated by clause 7 and Schedule 4.

6. **REPORTING**

- (a) (**Approach**) The parties agree to work in good faith to develop the form and content of all reports to be provided by WDA. WDA will ensure that such reporting will be consistent with the quality and details of reports provided to the WDA Board.
- (b) (**Overview Report**) WDA will prepare a monthly overview report setting out:
 - (i) tasks undertaken by WDA during that month in relation to the Project in relation to the Services;
 - (ii) any issues under the Project Documents identified by WDA in performing the Services; and
 - (iii) such other matters as the Project Company may require (acting reasonably),

and submit that report to the Project Company no later than 15 Business Days after the end of the month to which the report relates.

- (c) **(Financial Report)** WDA will prepare a monthly financial report (consistent with reporting provided to the WDA Board) in relation to the Project setting out:
- (i) the anticipated cost to complete the Project Works, estimated on a robust basis taking into account a reasonably cautious opinion of WDA of the cost and time of reaching Completion;
 - (ii) detailed records of all amounts paid by and to the Project Company in connection with the Project Documents during the relevant period;
 - (iii) the unclaimed balance of the WDA Project Contingency;
 - (iv) cash flow budgets and analysis; and
 - (v) such other matters as the Project Company may require (acting reasonably),
- and submit that report to the Project Company no later than 15 Business Days after the end of the month to which the report relates.

7. **GENERAL**

In discharging the functions, obligations, duties and services required by this Schedule 3, WDA will, as a minimum:

- (a) attend meetings and report as required from time to time as agreed between WDA and the Project Company;
- (b) carry out any additional services in relation to the Project as agreed in writing by the Project Company from time to time (provided it is adequately funded by the Project Company); and
- (a) do all other functions that should have been reasonably anticipated by an experienced and competent professional provider of the Services as being necessary for the performance of the Services or that are otherwise capable of inference from this Deed or the Project Documents.

8. **O&M SERVICES**

WDA will provide to Project Company Services as required by this Schedule 3 in relation to the operations and maintenance of the Project during construction, including in relation to procuring the operations and maintenance providers for the period after construction.

SCHEDULE 4

WDA PROJECT CONTINGENCY

SCHEDULE 5

PAYMENT SCHEDULE

1. PAYMENT OF DEVELOPMENT FEE

- (a) On or after the date of Financial Close, WDA will submit to the Project Company a claim for payment of the Development Fee.
- (b) The Project Company will, within 15 Business Days after receipt of WDA's claim for payment of the Development Fee, pay WDA the Development Fee.
- (c) The parties acknowledge and agree that the payment of the Development Fee by the Project Company to WDA is a single, one-off payment to WDA by the Project Company in recognition of WDA's development of the Project.

2. PAYMENT CLAIM FOR WDA MANAGEMENT FEE

At the end of each month after the date of the D&C Deed, WDA will submit to the Project Company a claim for payment on account of the WDA Management Fee:

- (a) setting out the value of the Services performed in accordance with this Deed during the relevant month;
- (a) calculated in accordance with this Payment Schedule; and
- (b) in such form and with such details and supporting documentation as the Project Company may reasonably require but consistent with reporting requirements,

(Payment Claim).

3. PAYMENT

Subject to clause 4 of this Payment Schedule, the Project Company will, within 15 Business Days after receipt of the Payment Claim for the month, pay WDA the amount claimed payment on account of the WDA Management Fee, other than in case of manifest error, where the parties will meet as soon as possible to resolve in good faith.

4. NOTIFICATION OF DISPUTED AMOUNTS

If the Project Company disagrees with an amount included in the Payment Claim, the Project Company will within 10 Business Days after receipt of the relevant Payment Claim refer the matter for Dispute Resolution in accordance with clause 11.

5. THE WDA MANAGEMENT FEE

WDA will seek to manage the delivery of the Services under this deed to ensure that the total Project Costs incurred prior to Completion do not exceed the total of the Proposed Funding Plan in Schedule 2.

6. GST

All lump sums, rates and amounts in this Payment Schedule exclude GST.

EXECUTED as a deed.

EXECUTED by **WCX M4 PTY LIMITED**
ABN 92 602 963 806 in accordance with
section 127(1) of the *Corporations Act*
2001 by:

Signature of director

Name

Signature of director

Name

EXECUTED by the Chief Executive of the
WestConnex Delivery Authority for and on
behalf of the **WestConnex Delivery**
Authority:

Signature of Witness

Name

Chief Executive

WestConnex Delivery Authority

Mail

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North Sydney NSW 2059

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