



Transport for NSW

CONFIDENTIALITY DEED

DEED DETAILS

RECIPIENT:

[INSERT LEGAL NAME OF RECIPIENT] ACN [insert ACN] of [insert address] (Recipient).

COMMENCEMENT DATE:

APPROVED PURPOSE:

Access to and Participation in a Request for Tender for Independent Auditor for the Warringah Freeway Upgrade Project

NOTICES:

1. If to TfNSW:

Attention:

Tejas Mistry

Office held:

Procurement Team, Infrastructure & Place

Transport for NSW

Address:

**Level 22, 101 Miller Street, North Sydney NSW
2060**

2. If to the Recipient

Attention:

Office held:

Address:

EXECUTION

[Note: elect A, B, C or D depending on the status of the other party]

A. Where the Recipient is a company:

Executed as a deed poll by Recipient in
accordance with section 127 of the
Corporations Act:

Director

Co Secretary (or 2nd Director)

Name printed

Name printed

Date Signed

B. Where the Recipient is a sole trader:

Executed as a deed poll by Recipient in the
presence of:

Signature

Signature of witness

Name printed

Name printed

Date Signed

C. Where the Recipient is a partnership:

Executed as a deed poll by Recipient by each of its partners:

_____	_____
Signature of partner	Signature of partner
_____	_____
Signature of partner	Name printed
_____	_____
Name printed	Date Signed

D. Where the Recipient is a “sole director” company:

Executed as a deed poll by Recipient in accordance with section 127 of the Corporations Act:

_____	_____
Signature of witness	Signature of Sole Director and sole Company Secretary
_____	_____
Name printed	Name printed
_____	_____
Name printed	Date Signed

COVENANTS BY RECPIENT IN FAVOUR OF TFNSW

1. DICTIONARY AND INTERPRETATION

1.1 Definitions

The following words have these meanings in this deed poll unless the contrary intention appears:

Approved Purpose means the Approved purpose as set out in the Details.

Authorised Officer means a person appointed by a the Recipient or by TfNSW to act as an Authorised Officer for the purposes of this deed poll.

Confidential Information means all Information obtained by the Recipient from TfNSW or disclosed to the Recipient by TfNSW, any Representative of TfNSW, or any person acting on TfNSW's behalf, for or in connection with the Approved Purpose and all Information created by the Recipient in the course of carrying out the Approved Purpose, including:

- (a) information which, either orally or in writing, is designated or indicated as being the proprietary or confidential information of TfNSW, or a third party to whom TfNSW owes an obligation of confidentiality;
- (b) information derived or produced partly or wholly from the Information including any calculation, conclusion, summary or computer modelling; and
- (c) trade secrets or information which is capable of protection at law or equity as confidential information,

whether the information:

- (d) was disclosed orally, in writing or in electronic or machine readable form;
- (e) was disclosed or created before, on or after the date of this deed poll;
- (f) was disclosed as a result of discussions between the parties concerning or arising out of the Approved Purpose; or
- (g) was disclosed by TfNSW, any of its Representatives or by a person acting on TfNSW's behalf.

Details means the section of this deed poll headed Details.

Corporations Act means the Corporations Act 2001 (Cth).

Excluded Information means Confidential Information:

- (a) which is in or becomes part of the public domain otherwise than through breach of this deed poll or an obligation of confidence owed to TfNSW;
- (b) which the Recipient can prove by contemporaneous written documentation was already known to it at the time of disclosure by TfNSW, its Representative or a person acting

on TfNSW's behalf, unless such knowledge arose from disclosure of information in breach of an obligation of confidentiality; or

- (c) which the Recipient acquires from a source other than TfNSW, a Representative of TfNSW or a person acting on TfNSW's behalf where such source is entitled to disclose it.

Government Agency means any governmental, semi-governmental, administrative, fiscal, judicial or quasi-judicial body, department, commission, authority, tribunal, agency or entity.

Information means all information regardless of its Material Form, relating to or developed in connection with:

- (a) the business, technology or other affairs of TfNSW or any other Government Agency;
- (b) the Approved Purpose; or
- (c) any systems, technology, ideas, concepts, know-how, techniques, designs, specifications, blueprints, tracings, diagrams, models, functions, capabilities and designs, (including computer software, manufacturing processes or other information embodied in drawings or specifications), intellectual property or any other information, owned or used by, or licensed to TfNSW or any other Government Agency.

Material Form in relation to Information, includes any form (whether visible or not) of storage from which the Information can be reproduced and any form in which the Information is embodied or encoded.

Personal Information has the meaning it has in the Privacy and Personal Information Protection Act 1998 (NSW).

Representative of TfNSW or the Recipient includes their employee, agent, officer, director, auditor, adviser, partner, consultant, joint venturer, contractor or sub-contractor.

TfNSW means Transport for NSW (ABN 18 804 239 602) a NSW Government agency constituted under the Transport Administration Act 1988 (NSW).

1.2 References to certain general terms

Unless the contrary intention appears, a reference in this deed poll to:

- (a) **(variations or replacement)** a document (including this deed poll) includes any variation or replacement of it;
- (b) **(clauses, attachments and schedules)** a clause, attachment or schedule is a reference to a clause in or attachment or schedule to this deed poll;
- (c) **(reference to statutes)** a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- (d) **(law)** law means common law, principles of equity, and laws made by parliament (and laws made by parliament include State, Territory and Commonwealth laws and regulations and other instruments under them, and consolidations, amendments, re-enactments or replacements of any of them.
- (e) **(singular includes plural)** the singular includes the plural and vice versa;
- (f) **(person)** the word “person” includes an individual, a firm, a body corporate, a partnership, joint venture, an unincorporated body or association, or any Government Agency;
- (g) **(executors, administrators, successors)** a particular person includes a reference to the person’s executors, administrators, successors, substitutes (including persons taking by novation) and assigns;
- (h) **(two or more persons)** an agreement, representation or warranty in favour of two or more persons is for the benefit of them jointly and each of them individually;
- (i) **(jointly and severally)** an agreement, representation or warranty by two or more persons binds them jointly and each of them individually;
- (j) **(reference to a group of persons)** a group of persons or things is a reference to any two or more of them jointly and to each of them individually;
- (k) **(meaning not limited)** the words “include”, “including”, “for example” or “such as” are not used as, nor are they to be interpreted as, words of limitation, and, when introducing an example, do not limit the meaning of the words to which the example relates to that example or examples of a similar kind.

1.3 Headings

Headings (including those in brackets at the beginning of paragraphs) are for convenience and do not affect the interpretation of this deed poll.

1.4 Confidential Information not in public domain

Confidential Information will not be regarded as being in the public domain by reason only of the fact that some portion of it is public or that information is publicly available which, together with other information, could be used to produce any Confidential Information.

2. TERM

This deed poll commences on the Commencement Date. The obligations of the Recipient survive termination or expiry of this deed poll.

3. CONSIDERATION

The Recipient gives the undertakings in this deed poll in consideration of TfNSW agreeing to disclose and disclosing the Confidential Information or parts of the Confidential Information in accordance with this deed poll.

4. DISCLOSURE

4.1 No obligation to disclose information

Nothing in this deed poll obliges TfNSW, its Representatives or any person acting on TfNSW's behalf to disclose any particular information to the Recipient or its Representatives. TfNSW has an absolute discretion as to the information, which it chooses to disclose.

4.2 No representations or warranties given

The Recipient acknowledges that neither TfNSW, nor any of its Representatives, nor any person acting on TfNSW's behalf:

- (a) has made nor makes any representation or warranty, express or implied, as to the accuracy, content, legality or completeness of the Confidential Information;
- (b) is under any obligation to notify the Recipient or provide any further information to the Recipient if it becomes aware of any inaccuracy, incompleteness or change in the Confidential Information; or

- (c) has made nor makes any representation or warranty, express or implied that the Confidential Information does not infringe the intellectual property rights or any other right of any person.

4.3 Recipient to make its own assessment

The Recipient agrees and acknowledges that:

- (a) it will rely solely on its own investigations and analysis in evaluating the Information disclosed by TfNSW or its Representatives or any person acting on TfNSW's behalf; and
- (b) any forecasts or estimates in the Information disclosed by TfNSW or its Representatives or any person acting on TfNSW's behalf may not prove correct or be achieved.

4.4 Disclaimer by TfNSW

Subject to any law to the contrary, and to the maximum extent permitted by law, TfNSW, its Representatives and all persons acting on TfNSW's behalf disclaim all liability for any loss or damage (whether foreseeable or not) suffered by any person using, disclosing or acting on any information disclosed by TfNSW or any of its Representatives or any person acting on TfNSW's behalf, whether the loss or damage arises in connection with any negligence, default or lack of care on the part of TfNSW or any of its Representatives, or any person acting on TfNSW's behalf, or any misrepresentation or any other cause.

5. OBLIGATION OF CONFIDENCE

5.1 Confidential discussions

The Recipient undertakes not to disclose to any person without the prior written consent of TfNSW or except as it may be required to disclose by any law or order of any Government Agency or the rules of any stock exchange:

- (a) the existence of and contents of this deed poll and any other instruments entered into or to be entered into in connection with this deed poll;
- (b) the contents of any discussions between the parties relating to the Approved Purpose; or

- (c) the fact that any discussions between the parties relating to the Approved Purpose have taken place or will or may take place.

5.2 Recipient to maintain confidence

The Recipient must:

- (a) maintain the confidential nature of the Confidential Information;
- (b) not, without the prior written consent of TfNSW, disclose any of the Confidential Information to any person other than those of its Representatives who need it for the Approved Purpose;
- (c) not use or disclose or reproduce any of the Confidential Information for any purpose other than the Approved Purpose;
- (d) establish and maintain effective security measures to safeguard the Confidential Information from unauthorised access, use, copying or disclosure and use the same degree of care a prudent person would use to protect that person's confidential information; and
- (e) immediately notify TfNSW of any potential, suspected or actual unauthorised use, copying or disclosure of the Confidential Information.

5.3 Recipient to inform TfNSW before disclosure

Before disclosing any of the Confidential Information to any of its Representatives for the Approved Purpose, the Recipient must:

- (a) inform TfNSW of the name and title of the Representatives to whom it is to be disclosed;
- (b) ensure that each Representative is made fully aware of the confidential nature of all Confidential Information prior to obtaining access to it;
- (c) cause each Representative to sign an undertaking in the form set out in **attachment A**; and
- (d) deliver the signed undertaking to TfNSW.

5.4 Recipient's Representatives leaving its employ

The Recipient agrees to notify TfNSW promptly if any of its Representatives who have had access to the Confidential Information leave the employ or engagement of the Recipient.

5.5 Recipient's control of Confidential Information

The Recipient's obligation of non-disclosure under this deed poll includes keeping the Confidential Information out of any computer, database, or other electronic means of data or information storage except for a computer, database, or other electronic means of data or electronic storage exclusively controlled by the Recipient.

6. RECIPIENT'S REPRESENTATIVES

6.1 Recipient's responsibility for Representatives' conduct

The Recipient must procure that its Representatives (whether or not still employed or engaged by the Recipient) do not do or omit to do anything, which if done or omitted to be done by the Recipient, would be a breach of the Recipient's obligations under this deed poll.

6.2 Recipient to assist in TfNSW's action

The Recipient must give TfNSW all assistance it requires to take any action or bring any proceedings for breach of the undertaking delivered under clause 5.3 ("Recipient to inform TfNSW before disclosure").

7. ACKNOWLEDGEMENTS

7.1 Confidential Information belongs to TfNSW

The Recipient acknowledges that:

- (a) the Confidential Information constitutes valuable and proprietary information of TfNSW or its Representatives; and
- (b) this deed poll does not grant to the Recipient any licence or other right in relation to the Confidential Information except as expressly provided in this deed poll.

7.2 Injunctive relief

The Recipient acknowledges that damages are not a sufficient remedy for TfNSW and its Representatives for any breach of this deed poll and TfNSW is entitled to specific performance or injunctive relief (as appropriate) as a remedy for any breach or threatened breach by the Recipient, in addition to any other remedies available to it at law or in equity.

8. INDEMNITY

8.1 Recipient indemnifies TfNSW

The Recipient undertakes to indemnify TfNSW and its Representatives and all persons acting on TfNSW's behalf, against all liability or loss arising directly or indirectly from, and any costs, charges and expenses incurred in connection with:

- (a) any breach by the Recipient of this deed poll; or
- (b) any act or omission by any of its Representatives which, if done or omitted to be done by the Recipient, would be a breach of the Recipient's obligations under this deed poll.

8.2 No set-off

The Recipient undertakes to pay to TfNSW and its Representatives and all persons acting on TfNSW's behalf any sum due under clause 8.1 ("Recipient indemnifies TfNSW") without any deduction or set-off (and irrespective of any counterclaim) whatsoever.

9. EXCLUSIONS

9.1 Excluded Information

Clauses 5.2 ("Recipient to maintain confidence"), 5.3 ("Recipient to inform TfNSW before disclosure"), 5.4 ("Recipient's Representatives leaving its employ") and 5.5 ("Recipient's control of Confidential Information") do not apply to the Excluded Information.

9.2 Disclosure required by law

Subject to compliance with clause 9.3 ("Limitation of disclosure"), this deed poll does not apply to the disclosure of any Confidential Information to the extent that it is required to be disclosed by the Recipient under any law.

9.3 Limitation of disclosure

Before the Recipient discloses any Confidential Information under any law, order or rule of the kind referred to in clause 9.2 (“Supervening obligation”), the Recipient must provide TfNSW with:

- (a) sufficient notice to enable it to seek a protective order or other remedy; and
- (b) all assistance and co-operation which TfNSW considers necessary to prevent or minimise that disclosure of the Confidential Information.

10. RETURN OF CONFIDENTIAL INFORMATION

10.1 Return of Confidential Information

The Recipient must (at its own expense):

- (a) return to TfNSW or at the option and direction of TfNSW destroy all documents and other materials in any medium in the possession, power or control of the Recipient or any of its Representatives which contain or refer to any Confidential Information (whether or not those documents and other materials were created by TfNSW or its Representatives or any person acting on TfNSW’s behalf); and
- (b) delete any Confidential Information that has been entered into a computer, database or other electronic means of data or information storage,

on the earlier of:

- (c) demand by TfNSW; or
- (d) the time the documents and other materials are no longer required for the Approved Purpose.

10.2 No release from obligations

The return, destruction or deletion of the documents and other materials referred to in clause 10.1 (“Return of Confidential Information”) does not release the Recipient or its Representatives from their obligations under this deed poll.

11. PRIVACY

The Confidential Information may include Personal Information. In addition to any other obligations it may have under any law or under this deed poll, the Recipient agrees to:

- (a) take all necessary measures to ensure that Personal Information in its possession or control in connection with this deed poll is protected against loss and unauthorised access, use, modification or disclosure; and
- (b) comply with the Privacy and Personal Information Protection Act 1998 (NSW) as though the Recipient were a public sector agency as defined in that Act.

12. NOTICES

12.1 Form

Unless expressly stated otherwise in this deed poll, all notices, certificates, consents, approvals, waivers and other communications in connection with this deed poll (“notices”) must be in writing, signed by the sender (if an individual) or an Authorised Officer of the sender and marked for the attention of the person identified in the Details or, if the recipient has notified otherwise, then marked for attention in the way last notified.

12.2 Delivery

Notices must be:

- (a) left at the address set out or referred to in the Details;
- (b) sent by prepaid ordinary post (airmail if appropriate) to the address set out or referred to in the Details. or
- (c) given in any other way permitted by law.

However, if the intended recipient has notified a changed postal address then the communication must be to that address.

12.3 When effective

Notices take effect from the time they are received unless a later time is specified in the notice.

12.4 Receipt - post

If sent by post, notices are taken to be received three days after posting (or seven days after posting if sent to or from a place outside Australia).

13. GENERAL

13.1 Discretion in exercising rights

TfNSW may exercise a right or remedy or give or refuse its consent in any way it considers appropriate (including by imposing conditions), unless this deed poll expressly states otherwise.

13.2 Partial exercising of rights

If TfNSW does not exercise a right or remedy fully or at a given time, then it may still exercise it later.

13.3 No liability for loss

TfNSW is not liable for loss caused by the exercise or attempted exercise of, failure to exercise, or delay in exercising a right or remedy under this deed poll.

13.4 Approvals and consents

By giving its approval or consent TfNSW does not make or give any warranty or representation as to any circumstance relating to the subject matter of the consent or approval.

13.5 Remedies cumulative

The rights and remedies provided in this deed poll are in addition to other rights and remedies given by law independently of this deed poll.

13.6 Variation and waiver

A provision of this deed poll or a right created under it, may not be waived or varied except in writing.

13.7 Indemnities

The indemnities in this deed poll are continuing obligations, independent from the other obligations of the Recipient under this deed poll and continue after this deed poll ends. It is not necessary for TfNSW to incur expense or make payment before enforcing a right of indemnity under this deed poll.

13.8 Governing law

This deed poll is governed by the law in force in New South Wales. The Recipient submits to the exclusive jurisdiction of the courts of New South Wales.

ATTACHMENT A – (CLAUSE 5.3)

CONFIDENTIALITY UNDERTAKING

Individual's name: #insert full name of the employee of the Recipient#

Approved Purpose: #insert#

Confidentiality Deed Poll: Confidentiality Deed Poll in favour of Transport for NSW ("TfNSW") by Recipient

Recipient's Name: #insert name of Recipient#

I, agree for the benefit of TfNSW:

- (a) that the Confidentiality Information made available to me is confidential to TfNSW;
- (b) to keep the Confidential Information confidential;
- (c) only to use it for the Approved Purpose;
- (d) not to disclose any of the Confidential Information to any person other than:
 - (i) to those who have signed an undertaking in this form; and
 - (ii) who require it for the Approved Purpose,unless I have the prior written consent of TfNSW; and
- (e) that I am aware that damages are not a sufficient remedy for TfNSW for any breach of this undertaking and TfNSW is entitled to specific performance or injunctive relief (as appropriate) as a remedy for any breach or threatened breach by me of this undertaking, in addition to any other remedies available to TfNSW at law or in equity.

The Recipient has informed me of the confidentiality obligations under the Confidentiality Deed Poll and of my obligations to maintain confidence. I understand that the Confidential Information is TfNSW's information, know-how, processes and methods and any other information not in the public domain.

EXECUTED

.....
Signed

.....
Date

.....
Print name

NOTE: This Undertaking is a template only. It should be copied and filled in and signed by each employee of the Recipient's who will have access to the Confidential Information