

**TRANSPORT**



**ATTACHMENT 6-C**

**To Exhibit 6.0 (Governance Model)**

**DISPUTE RESOLUTION PROCEDURES**

**26 SEPTEMBER 2014**

**VERSION 1.0**

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## **Exhibit 6 Attachment C: Dispute Resolution Procedures**

### **1. Expert Determination**

- 1.1** If a Dispute is referred to expert determination under clause 38.4 of the Agreement, the expert is to be agreed between the Parties. If the Parties cannot agree within 28 days of the date of the Referral Notice, the expert is to be nominated on the application of either Party by the Chief Executive Officer, Australian Commercial Disputes Centre of NSW.
- 1.2** The expert nominated must be a person who is an experienced Australian legal practitioner or a person with practical experience in the technology that is the subject matter of the Dispute, unless otherwise agreed. The expert must not be:
- (a) an employee of the Parties;
  - (b) a person who has been connected with this Agreement or has a conflict of interest, as the case may be; or
  - (c) a person who the Parties have not been able to agree on.
- 1.3** The expert may appoint any person that the expert believes will be able to provide the specialist skills that are necessary to make a determination, including an Australian legal practitioner. The expert must consult with both Parties prior to appointing such person.
- 1.4** When the person to be the expert has been agreed or nominated, Transport, on behalf of both Parties, must engage the expert by letter of engagement (and provide a copy to the Supplier) setting out:
- (a) the issue referred to the expert for determination;
  - (b) the expert's fees;
  - (c) the procedure for the determination set out in this Exhibit; and
  - (d) any other matter which is relevant to the engagement.

### **2. Submissions**

- 2.1** The procedure for submissions to the expert is as follows:
- (a) The Party that issued the Referral Notice must make a submission in respect of the issue, within 30 Business Days after the date of the letter of engagement referred to in clause 1.4 of this Exhibit.
  - (b) The other Party must respond within 30 Business Days after receiving a copy of that submission. That response may include cross-claims.
  - (c) The Party referred to in clause 2.1(a) may reply to the response, but must do so within 20 Business Days after receiving the response, and must not raise new matters.

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- (d) The other Party may comment on the reply, but must do so within 20 Business Days after receiving the reply, and must not raise new matters.
- (e) The expert must ignore any submission, response, reply, or comment not made within the time given in this clause 2.1, unless Transport and the Supplier agree otherwise.
- (f) The expert may request further information from either Party. The request must be in writing, with a time limit for the response. The expert must send a copy of the request and response to the other Party, and give the other Party a reasonable opportunity to comment on the response.
- (g) All submissions, responses, replies, requests and comments must be in writing. If a Party gives information to the expert, it must at the same time give a copy to the other Party.

### 3. Conference

- 3.1 The expert must arrange at least one conference with both Parties. The request must be in writing, setting out the matters to be discussed.
- 3.2 Each Party is entitled to be represented at any preliminary conference before the expert by its legal representatives and other authorised representatives, with information and knowledge of the issues.
- 3.3 The expert is not bound by the rules of evidence and may receive information in any manner the expert sees fit, but must observe the requirements of procedural fairness. Consultation between the expert and a Party must only take place in the presence of the other Party, unless a Party fails to attend a conference or meeting which has been convened by the expert and of which prior notice has been given. Any Party providing information to the expert must provide that information to the other Party.
- 3.4 The Parties agree that such a conference is considered not to be a hearing that would give anything under this Exhibit the character of arbitration.
- 3.5 In answer to any issue referred to the expert by a Party, the other Party can raise any defence, set-off or counter-claim.

### 4. Questions to be determined by the Expert

- 4.1 The expert must determine for each issue the following questions (to the extent that they are applicable to the issue):
  - (a) is there an event, act or omission that gives the claimant a right to compensation under the Agreement:
    - (i) for damages for breach of the Agreement, or
    - (ii) otherwise in law?
  - (b) if so:
    - (i) what is the event, act or omission?
    - (ii) on what date did the event, act or omission occur?

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- (iii) what is the legal right which gives rise to the liability to compensation?
  - (iv) is that right extinguished, barred or reduced by any provision of the Agreement, estoppel, waiver, accord and satisfaction, set-off, cross-claim, or other legal right?
- (c) in the light of the answers to clauses 4.1(a) and (b):
- (i) What compensation, if any, is due from one Party to the other and when did it fall due?
  - (ii) What interest, if any, is due when the expert determines that compensation?
- 4.2** The expert must determine for each issue any other questions required by the Parties, having regard to the nature of the issue.
- 4.3** The Parties must share equally the fees of the expert, any other costs associated with the process, including room hire expenses, transcript expenses and the like and the fees of any person appointed by the expert under clause 1.3 of this Exhibit for the determination, and bear their own expenses.
- 4.4** If the expert determines that one Party must pay the other an amount exceeding the amount specified in clause 38.4(e)(i) of the Agreement (calculating the amount without including interest on it and after allowing for set-offs), then either Party may commence litigation, but only within 56 days after receiving the determination.
- 4.5** Unless a Party has a right to commence litigation or otherwise resolve the Dispute under the Agreement:
- (a) in the absence of a manifest error the Parties must treat each determination of the expert as final and binding and give effect to it; and
  - (b) if the expert determines that one Party owes the other money, that Party must pay the money within 20 Business Days.

## 5. Role of Expert

- 5.1** The expert must:
- (a) act as an expert and not as an arbitrator, adjudicator or as expert witness;
  - (b) make its determination on the basis of the submissions of the Parties, including documents and witness statements, and the expert's own expertise;
  - (c) act impartially, free of bias and with no vested interest in the outcome of the Dispute;
  - (d) adopt procedures for the expert determination suitable to the circumstances of the Dispute so as to provide for an expeditious cost effective and fair means for the determination of the Dispute; and
  - (e) issue a certificate in a form the expert considers appropriate, stating the expert's determination and giving reasons, within 45 Business Days after the later of the dates on which a response is received under clauses 2.1(b), (c) or (d) of this Exhibit.

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- 5.2** If a certificate issued by the expert contains a clerical mistake, an error arising from an accidental slip or omission, a material miscalculation of figures, a mistake in the description of any person, matter or thing, or a defect of form, then the expert must correct the certificate and give notice to the Parties of such correction.

## **6. Confidentiality**

- 6.1** Each Party involved in the expert determination process, including the expert, the Parties, their advisors and representatives, shall maintain the confidentiality of the expert determination process and may not use or disclose to anyone outside of the expert determination process the expert's determination, or any information received or obtained in the course of the expert determination process, including the existence of that information, except to the extent:
- (a) the Parties have otherwise agreed in writing;
  - (b) the information is already in the public domain;
  - (c) disclosure is required to a Party's insurers, auditors, accountants or other professional advisers;
  - (d) disclosure is required for the purposes of any legal proceedings relating to the Dispute or the expert's determination; or
  - (e) disclosure is otherwise required by law.