



PORT MACQUARIE  
HASTINGS  
C O U N C I L

# Formal Instrument of Agreement

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<b>Contract Name</b>	<b>Construction of Comboyne Road Embankment Restorations</b>
<b>Contract No.</b>	<b>T-22-31</b>
<b>Parties</b>	<b>PORT MACQUARIE-HASTINGS COUNCIL ABN 11 236 901 601  PJ Warner Australia Pty Ltd ABN: 59 084 076 853</b>

## FORMAL INSTRUMENT OF AGREEMENT

**PARTIES**                    **PORT MACQUARIE-HASTINGS COUNCIL ABN 11 236 901 602** 17 Burrawan Street, Port Macquarie NSW 2444 (**Principal**).

**PJ Warner Australia Pty Ltd ABN 59 084 076 853** of 67 Mustang Drive RUTHERFORD, NSW 2320 (**Contractor**).

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### BACKGROUND

- A.     The Principal is seeking to engage a suitable contractor for the provision of construction services to remediate a number of embankment slips on Comboyne Road. (**Project**).
- B.     The Contractor has made an offer to the Principal to carry out and perform works in connection with the Project.
- C.     The Principal has accepted the Contractor's offer to carry out the Works.
- D.     The parties' agreement is constituted and governed by the terms of this contract.

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### OPERATIVE PROVISIONS

#### 1.     **Contract Documents**

The following documents constitute the Contract:

- (a)    this Formal Instrument of Agreement
- (b)    T-22-31 Letter of Award dated 29 May 2023
- (c)    the GC21 (Edition2) General Conditions of Contract
- (d)    the GC21 Contract Information
- (e)    Annexures to the Contract as follows:
  - (i)    Annexure A: T-22-31 Volume 3 Specification Version 2 including attachments:
    - 1.    Attachment 1 - Project Drawings
    - 2.    Attachment 2 - Project Specifications
    - 3.    Attachment 3 - Other Contract Documents; and
    - 4.    Attachment 4 - Documents for Information.
  - (ii)   Annexure B: Tender Addendums:
    - 1.    Addendum 1 - Upload of Specification Attachments
    - 2.    Addendum 2 - Revised Specification and inclusion of tender briefing notes; and
    - 3.    Addendum 3 - Amendments to detailed design documents.
  - (iii)   Annexure C: Post tender correspondence:
    - 1.    Request for Clarification No.1 - Confirmation of COVID Policy and Insurance.

(iv) Annexure D: Contractors tender including program and schedule of prices.

## **2. MISCELLANEOUS**

### **2.1 Entire Agreement**

The Contract contains the entire, final and concluded bargain of the parties. No party can rely on an earlier written document or anything said or done by or on behalf of another party before this document was executed.

### **2.2 Prior Works**

Any Works performed by the Contractor prior to the execution of this Formal Instrument of Agreement form part of the Works under the Contract and will be subject to the terms of the Contract.

### **2.3 Interpretation**

In this Formal Instrument of Agreement terms have the meaning given by the Contract Conditions, unless the context clearly indicates otherwise.

**EXECUTED AS A DEED**

**SIGNED** for and on behalf of **Port Macquarie-Hastings Council** in accordance with s683 of the *Local Government Act 1993 (NSW)*:

[Redacted Signature]

Dr Clare Allen (Jun 13, 2023 20:03 GMT+10).....

.....

**Chief Executive Officer, or**

**Delegated Officer**

In the presence of:

.....

Witness signature

.....

Witness Name

**SIGNED** for and on behalf of the **Contractor** in accordance with Section 126(1) of the Corporations Act 2001 (Cth), A company's power to make, vary, ratify or discharge a contract may be exercised by an individual acting with the company's express or implied authority and on behalf of the company. The power may be exercised without using a common seal. (2) This section does not affect the operation of a law that requires a particular procedure to be complied with in relation to the contract.

[Redacted Signature]

Dane Warner (Jun 13, 2023 16:47 GMT+10).....

Signature

Dane Warner.....

Name

Managing Director.....

Position



# Contract Information

The Contract Information is part of the Contract. Refer to clauses 78 & 79 for the interpretation and definition of words and phrases.

## Item **Contract**

### 1 **Contract name**

The Contract name is: Construction of Comboyne Road Embankment Restorations

The Contract number is: RFT-22-31

### 2 **Site**

*Defined in clause 79*

The Site is: Defined in Volume 2 Preliminaries, Section 5.1

The Works are: As outlined in Volume 3 Specification

## Principal's details

### 4 **Principal**

The Principal is: Port Macquarie Hastings Council *Defined in clause 79*

### 5 **Principal's Authorised Person**

*Mentioned in clause 2*

The *Principal's Authorised Person* is: James Prosser

### 6 **Notices to the Principal**

*Mentioned in clause 11*

Notices must go to the *Principal's Authorised Person* named above, at the address or number shown here.

Office address:  
(for delivery by hand) Port Macquarie Hastings Council  
17 Burawan Street  
Port Macquarie NSW 2444

Postal address:  
(for delivery by post) PO Box 84  
Port Macquarie NSW 2444

e-mail address: James.Prosser@pmhc.nsw.gov.au

### 7 **Principal's Senior executive**

*Mentioned in clauses 69 & 70*

The Principal's senior executive is:	Chris Favaloro Group Manager Organisational Project Delivery
Office address: (for delivery by hand)	as shown in Contract Information Item 6
Postal address: (for delivery by post)	as shown in Contract Information Item 6
e-mail address:	Chris.Favaloro@pmhc.nsw.gov.au»

## Contractor's details

### 8 Contractor

*(item completed after tenders close)*

The Contractor is:	PJ Warner Australia Pty Ltd T/A Warner Company ..... ABN ...59 084 076 853
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### 9 Contractor's Authorised Person

*(item completed after tenders close)*

*Mentioned in clause 2*

The Contractor's Authorised Person is:	Matt Le Bas .....
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### 10 Notices to the Contractor

*(item completed after tenders close)*

*Mentioned in clause 11*

Notices must go to the Contractor's Authorised Person named above, at the address or number shown here.

Office address: (for delivery by hand)	67 Mustang Drive Rutherford NSW 2320 Australia
Postal address: (for delivery by post)	67 Mustang Drive Rutherford NSW 2320 Australia
e-mail address:	████████████████████

### 11 Contractor's senior executive

*(item completed after tenders close)*

*Mentioned in clause 70*

The Contractor's senior executive is:	Dane Warner
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Office address:  
(for delivery by hand) as shown in Contract Information Item 10  
.....

Postal address:  
(for delivery by post) as shown in Contract Information Item 10  
.....  
.....

e-mail address: [REDACTED]

## Dates and times

### 12 Date of Contract

*(item may be completed after tenders close)*

*Defined in clause 79*

The Date of Contract is: 01/06/2023

### 13 Times for Site access and Completion

*Site access: Mentioned in clause 34*

*Contractual Completion Date and Completion: Mentioned in clause 65*

Time periods for Site access and for calculating *Contractual Completion Dates* are as shown.

Description	Time Period for giving Site access	Time Period for Completion
The whole of the Works:	the latter of, the release by the Principal of the Hold Points listed in clause 9 of Volume 2 Preliminaries and 14 days after the Date of Contract	As defined in the Tenderer's Submission -

## Statutory and Government requirements

### 14 Fees, charges, consents and approvals

*Mentioned in clause 12*

Approvals that have been obtained or will be obtained, and fees and charges that have been paid or will be paid, by the Principal are: Review of Environmental Factors, Volume 3, Section 5.4

### 15 Compliance with NSW Government guidelines

#### A - Work Health and Safety (WHS)

*Mentioned in clause 15*

Is the Contractor required to implement a Corporate WHS Management System acceptable to the Principal? (Yes/No) Yes



Is the Contractor required to submit a WHS Management Plan in accordance with the *WHS Regulation 2017* (NSW)? (Yes/No)

Yes

If required, the WHS Management Plan must be provided:

As per clause 5.7 of Volume 2 Preliminaries

## B - Dealing with Modern Slavery

*Mentioned in clause 13*

Is the Contractor required to comply with the requirements of Schedule 17 (Modern Slavery)?

Yes

## C - Quality Management

*Mentioned in clause 15*

Is the Contractor required to implement a certified Quality Management System? (Yes/No)

Yes

Is the Contractor required to submit a Quality Management Plan? (Yes/No)

Yes

If required, the Quality Management Plan must be provided:

As per clause 4.1 of Volume 2 Preliminaries

## D - Environmental Management

*Mentioned in clause 15*

Is the Contractor required to implement an accredited Environmental Management System? (Yes/No)

Yes

Is the Contractor required to submit an Environmental Management Plan? (Yes/No)

Yes

If required, the Environmental Management Plan must be provided:

As per clause 6.1 of Volume 2 Preliminaries

## E – Skills, Training and Diversity in Construction

*Mentioned in clause 15*

Is the Contractor required to meet and report on its commitment with regard to Apprenticeship Targets?

No

(Yes/ Not applicable)

Is the Contractor required to meet and report on its additional commitments under the Infrastructure Skills Legacy Program Targets?

(Yes/ Not applicable)

Not applicable

**F - Aboriginal Participation***(APP Contract Value may be inserted after tenders close) Mentioned in clause 15*

The requirements of the Aboriginal Procurement Policy apply to the Contract (Yes/No):

No

The APP Contract Value for Aboriginal Participation in this Contract is:

Not applicable

An Aboriginal Participation Plan must be provided:

Not applicable

A final Aboriginal Participation Report must be provided:

Not applicable

**16 Requirements for Commonwealth Funded projects****A – Commonwealth Building Code 2016***Mentioned in clause 13.15*

Is the Contractor required to comply with the Commonwealth Building Code 2016?

No

**B - Australian Government Work Health and Safety Accreditation Scheme***Mentioned in clause 17*

Is the Contractor required to maintain accreditation under the Australian Government Work Health and Safety Accreditation Scheme?

No

**17 Principal contractor**

Is the Contractor appointed as principal contractor? (Yes/No)

Yes

*Mentioned in clause 16***18 Working hours and working days***Mentioned in clause 18*

Working hours and working days are:

As detailed in clause 5.9 of Volume 2 Preliminaries

## Liability

### 19 Limitation of liability

Subject to clause 26.9, the limit of the Contractor's liability to the Principal in respect of any one occurrence in connection with loss or liability other than personal injury or death is:

*Mentioned in clause 26.8*

Notwithstanding anything contained in this Contract to the contrary, the maximum aggregate liability of the Contractor for any and all claims in respect of this Contract is limited to the Contract Price payable to the Contractor, except to the extent that such liability is met under an insurance policy maintained by the Contractor under this Contract

### 20 Proportionate liability

Is proportionate liability excluded from the Contract? (Yes/No)

*Mentioned in clause 26.12*

Yes

## Insurance

### 21 Works insurance

*Mentioned in clauses 27.1 & 27.2*

The party responsible for effecting Works insurance is:

The Contractor

Minimum cover is:

the *Contract Price* at the date of Award plus [REDACTED]

Period of cover is:

From the *Date of Contract* until 12 months after *Completion* of all the *Works*

### 22 Public liability insurance

*Mentioned in clauses 27.1 & 27.2*

The party responsible for effecting public liability insurance is:

The Contractor

Minimum cover is:

[REDACTED]

Period of cover is:

From the *Date of Contract* until 12 months after *Completion* of all the *Works* .

### 23 Workers compensation insurance

Minimum cover is:

as required by law.

Period of cover is:

until issue of the *Final Payment Schedule*.**24 Professional indemnity insurance***Mentioned in clause 27.3.2*

Is a professional indemnity insurance policy to be held by the Contractor? (Yes/No)

No

Minimum cover is:

[REDACTED] of the *Contract Price*, whichever is the greater, to a maximum of \$ [REDACTED]

Period of cover is:

From the *Date of Contract* until 12 months after *Completion* of all the *Works***25 Marine liability insurance***Mentioned in clause 27.3.3*

Is a Marine Liability insurance policy to be held by the Contractor? (Yes/No)

No

Minimum cover is:

[REDACTED] for any one occurrence.

Period of cover is:

the whole of the period of use of waterborne craft of 8 or more metres in length on work in connection with the Contract.

**25A Motor vehicle 3rd party property damage insurance***Mentioned in clause 27.3.4*

Is motor vehicle 3rd party property damage insurance to be held by the Contractor?? (Yes/No)

Yes

Minimum cover is:

[REDACTED]  
From the *Date of Contract* until 12 months after *Completion*

Period of cover is:

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**Contract Documents****26 Other Contract Documents***(item completed after tenders close)**Mentioned in clause 7.1.5*Other *Contract Documents* (not listed in clause 7) are:

1. the *Letter of Award*, and any formal agreement or deed constituting the Contract; and
2. the following written communications between the parties:

- Contract documents listed in the Instrument of Agreement

## Principal's Documents

### 27 Copies of Principal's Documents

*Mentioned in clause 7.4*

The number of copies of the *Principal's Documents* to be provided to the Contractor is:

1 electronic copy

## Contractor's Documents

### 28 Copies of Contractor's Documents

*Mentioned in clause 40.1*

The number of copies of the *Contractor's Documents* to be provided to the Principal is:

1 electronic copy in a format acceptable to the Principal

## Subcontract work

### 29 Inclusion of consistent requirements in Subcontracts

*Mentioned in clause 28.4*

The Subcontract value requiring inclusion of the provisions set out in Schedule 9 (Subcontract requirements) is:

\$100,000.00.

### 30 Payment period for Subcontracts

*Mentioned in clause 28.4.2*

The maximum period before payment, for Subcontracts less than the value stated in Contract Information item 29, is:

20 Business Days.

### 31 Preferred Subcontractors

*Mentioned in clause 29.3*

The *Preferred Subcontractors* referred to in clause 29 are:

Class of work	Subcontractors
»	

### 32 Subcontractor's warranty

*Mentioned in clause 30.1*

Trades or areas of work requiring a Subcontractor's warranty are:

»  
("Not required" applies if not filled in).

## Undertakings

### 33 Completion Undertaking

*Mentioned in clause 33.1*

#### A - For Contractors with 'Best Practice Accreditation'

Companies selected to tender for the Contract from the NSW Government Contractor Prequalification and Best Practice Accreditation Scheme, SCM1461 (applies to selected works valued under \$9 million (ex GST)).

The amount of the *Completion Undertaking* is:

As for item 33B

#### B - For All Other Contractors

The amount of the *Completion Undertaking* is:

2.5% of the *Contract Price* at the Date of Contract

### 34 Post-Completion Undertaking

*Mentioned in clause 33.1*

The Amount of *Post-Completion Undertaking* is:

2.5% of the *Contract Price* at the Date of Contract

### 35 Return of Post-Completion Undertaking

*Mentioned in clause 33.2.2*

The period at the end of which the *Post-Completion Undertaking* must be returned is:

12 months

## Site information

### 36 Site information

*Mentioned in clause 36*

*Information contained in the documents identified in Contract Information items 36A and 36B does **NOT** form part of the Contract.*

#### A - Documents not guaranteed for completeness

Documents which contain information that is not part of the Contract and are not guaranteed for completeness are:

- 12da and CAD files issued under Volume 3 Section 5.5

#### B - Documents not guaranteed for accuracy, quality or completeness

Documents which contain information that is not part of the Contract and are not guaranteed for accuracy, quality or completeness are:

- Geotechnical Reports
- Recover Reports issued under Volume 3 Section 5.5

**37 Site Conditions***Mentioned in clause 37.2*

Is the Contractor to bear the full risk, including cost and time implications, of encountering and dealing with materially adverse *Site Conditions* other than carrying out *Variations* instructed by the Principal? (Yes/No)

No

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## Design and documentation

**38 Scope of design activities****A - Design by the Contractor***Mentioned in clause 39*

*Items 38A.1, and 38A.2 allow the Principal, at its discretion, to provide information to tenderers of aspects of design, without altering the Contractor's obligations, under clause 39.1, to complete the Principal's design.*

*The parts of the Works listed in these items do not describe all the Works required to be designed and completed by the Contractor. Notwithstanding that items of work may be required, the Principal may not identify all or any items.*

.1 Identified items and components of the Works for which the Contractor is responsible for developing the preliminary design provided by the Principal (clause 39.1.2):

Nil

.2 Identified items and components of the Works which the Contractor must fully design (clause 39.1.3):

Nil

.3 Items, services and components of the Works in respect of which the Contractor may depart from the design provided by the Principal (clause 39.7):

Nil

**B –National Construction Code***Mentioned in clauses 39 & 43*

Does the National Construction Code apply? (Yes/No)

Yes

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## Innovation

**39 Innovation***Mentioned in clause 41.5*

The percentage of financial benefit to be allocated to the Contractor is:



## Payments

### 40 Contract Price at the Date of Contract

*(item completed after tenders close)*

*Mentioned in clause 55.1*

The *Contract Price* at the Date of Contract is:

\$4,835,967.00 excluding GST

### Basis of payment

The basis of payment is:

(Lump sum / *Schedule of Rates* / Lump sum with *Rate Items*)

Lump Sum with rate items

### 41 Rise or fall adjustments

*Mentioned in clause 55.2*

Are rise or fall adjustments applicable to the Contract (excluding *Daywork*)? (Yes/No)

No

### 42 Provisional Sums

*Mentioned in clause 55.4*

*Provisional Sum* items referred to in clause 55.4 are:

Not applicable

### 43 Provisional Sum margin

*Mentioned in clause 55.4*

The *Provisional Sum* margin includes profit and off site overheads:

Not applicable

The *Provisional Sum* margin is:

Not applicable

### 44 Contractor's Margin

*Mentioned in clauses 47 and 79*

The *Contractor's Margin* includes profit and off-site overheads:

and on-site overheads including attendance and administration.

The percentage for *Contractor's Margin* is:

10%

### 45 Amount of Prepayment

*Mentioned in clause 57.1.1*

The amount of *Prepayment* is:

Nil

### 46 Payment Claims

*Mentioned in clauses 56 & 58*



The date in the month for making *Payment Claims* is:

the last *Business Day* prior to the end of each calendar month for Works up to the 25<sup>th</sup> *Calendar Day* of each month.

The person authorised to deal with *Payment Claims* is:

*Principal's Authorised Person*

The address for submission of *Payment Claims* is:

the address shown in Contract Information item 6

The party responsible for issuing the tax invoice for a *Payment Claim* (after a *Payment Schedule* has been issued by the Principal) is:  
(the Principal / the Contractor)

the Contractor

## 47 Completion Amount

*Mentioned in clause 60*

The *Completion Amount* is:

Nil

The *Completion Amount* is payable after:

Not applicable

(*Completion* of the whole of the Works/ *Completion of Milestone* »)

## 48 Interest on late payments

*Mentioned in clause 62*

The rate of interest per annum is:

4%

# Delay Costs

## 49 Delay Costs and liquidated damages

*Mentioned in clauses 34 & 51*

### A – Delay Costs

#### A1 - Delay Costs for delay in access to the Site

The rate in item 49A1 applies only if the Principal fails to give initial access to the Site as required by clause 34. The rate does not apply where the Principal fails to give Site access for a *Milestone* by the required time, unless that *Milestone* is the first to proceed after the Contractor has established on the Site.

The rate per day for *Delay Costs* due to the Principal's failure to give the Contractor initial access to the Site in accordance with clause 34 is:

Nil

#### A2 - Delay Costs for delay other than in access to the Site

The rate or rates in item 49A2 apply when the rate in item 49A1 is not applicable, in accordance with clause 51.

The rate per day for *Delay Costs* payable when *Completion* of the whole of the Works is delayed is:

\$4,600/day

The rates per day for *Delay Costs* payable when there are delays to *Completion of Milestones*\* are:

Not applicable

*\*The rate for each Milestone is separate and distinct from the others.*

## B - Liquidated damages

*Mentioned in clauses 51.8 and 51.9*

Do liquidated damages apply to this Contract? (Yes/No)

Yes

The rate per day for liquidated damages for the whole of the Works only applies where there are no rates specified for *Milestones* and is:

\$ 2,000/day

The rates per day for liquidated damages for *Milestones*\* are:

Not applicable

*\*The rate for each Milestone is separate and distinct from the others.*

## Engagement of Valuer

### 50 Engagement of Valuer

#### A - Engagement of Valuer

*Mentioned in clause 35*

Must a Valuer be engaged? (Yes/No)

No

#### B - Person to select the Valuer

*Mentioned in clause 35*

The person is:

Not applicable

Telephone number:

Not applicable

Email/ website:

Not applicable

#### C - Litigation Threshold

*Mentioned in clause 35*

The threshold amount for litigation following a Valuer's determination is:

Not applicable

## Expert Determination

### 51 Time to refer Issue to Expert Determination

*Mentioned in clause 70.3*

The time within which either party may refer an *Issue to Expert Determination* is:

28 days after becoming entitled under clause 70.2

## 52 Expert Determination representative

*Mentioned in clause 71*

The representative of the Principal for all of the purposes in clause 71, and under Schedule 5 (Expert Determination Procedure) is:

the Principal's senior executive shown in Contract Information item 7 until the Principal notifies otherwise

Office address:  
(for delivery by hand)

as shown in Contract Information item 7

Postal address:  
(for delivery by post)

as shown in Contract Information item 7

e-mail address:

as shown in Contract Information item 7

## 53 Person to nominate an Expert

*Mentioned in clause 71*

The person is:

Chief Executive Officer  
Resolution Institute  
Suite 602, Level 6 Tower B, Zenith  
Centre,  
821-842 Pacific Highway  
Chatswood NSW 2067

Telephone number:

(02) 9239 0700

Email/ website:

<https://www.resolution.institute>

## 54 Threshold amount for litigation

*Mentioned in clause 71*

The threshold amount for litigation following an *Expert's* determination is:

\$500,000.

