

Deed of Guarantee, Undertaking and Substitution

**[FOR USE WITH ECI HCI-2022 ONLY]**

**Deed** **made at** ………… **on** ………………………., 20……

**Parties: Commonwealth of Australia ("Commonwealth")**

The person named in Item 1 of the Schedule **("Contractor")**

The person named in Item 2 of the Schedule **("Guarantor")**

**Recitals**

* + - * 1. The Commonwealth has engaged the Contractor under the contract described in Item 3 of the Schedule ("**Contract**") to carry out certain activities ("**Contractor's Activities**").
        2. Under clause 4.4 of the Contract, the Contractor is required to provide this Deed to the Commonwealth.

**This Deed provides**

1. Guarantee
   * 1. The Guarantor unconditionally and irrevocably guarantees to the Commonwealth that the Contractor will perform and observe all of the Contractor’s obligations under the Contract and will discharge all of its liabilities under the Contract.
     2. In the event of default by the Contractor, the Guarantor covenants with the Commonwealth to perform and observe all of the Contractor’s obligations under the Contract and to discharge all of the Contractor’s liabilities under the Contract or to cause those obligations to be performed and observed or liabilities to be discharged.
2. Substitution
   * 1. The Commonwealth may at any time give a written notice to the Guarantor requiring it to undertake, carry out and complete the execution of the Contractor’s Activities insofar as the Contractor has failed to do so and the Contractor’s Activities remain to be completed.
     2. Without limiting paragraph (a), if the Contract has been:
        1. terminated by the Commonwealth under clause 14 of the Contract; or
        2. terminated by disclaimer or rescinded or discharged by Court order,

then the Commonwealth may give a notice to the Guarantor under paragraph (a) in which event the Guarantor will be:

* + - 1. where the Contract is terminated by the Commonwealth under clause 14 of the Contract, substituted for the Contractor as the party to the Contract; or
      2. if the Contract has been disclaimed, rescinded or otherwise discharged, deemed to have entered a new contract with the Commonwealth on the same terms and conditions as the Contract,

to the intent that the Guarantor will be subject to the obligations and liabilities and entitled to the rights of the Contractor (including liability in respect of any breach of the provisions of the Contract whether occurring before or after the substitution) in all respects as if:

* + - 1. the Guarantor had been named as the party to the Contract instead of the Contractor; and
      2. if the Contract has been disclaimed, rescinded or discharged, it had not been so disclaimed, rescinded or discharged.

1. Indemnity

The Guarantor, as a separate, additional and primary liability, unconditionally and irrevocably will indemnify the Commonwealth and keep it indemnified from and against all losses, damages, costs and expenses of any kind which may be suffered or incurred by the Commonwealth by reason or in consequence of:

* + 1. default by the Contractor in performing or observing its obligations or discharging its liabilities under the Contract;
    2. the Commonwealth attempting to enforce any of the Contractor’s obligations under the Contract; or
    3. the Commonwealth attempting to enforce or preserve any of its rights under this Deed.

1. Absolute liability

The liability of the Guarantor under this Deed will be absolute and will not be subject to the execution of this Deed or any other instrument or document by any person other than the Guarantor, and will not be subject to the performance of any condition precedent or subsequent.

1. No reduction or release
   * 1. The liability of the Guarantor under this Deed will not be affected by any act, omission, matter or thing that would otherwise operate in law or in equity to reduce or release the Guarantor from that liability.
     2. Without limitation, that liability will not be affected by:
        1. the granting by the Commonwealth to the Contractor of time, waiver, indulgence or concession or the making of any composition or compromise with the Contractor;
        2. the Commonwealth forbearing to enforce or neglecting to exercise any right against the Contractor;
        3. any laches, acquiescence or other act, neglect, default, omission or mistake by the Commonwealth;
        4. any variation of any of the obligations and liabilities under the Contract, made either with or without the knowledge of the Guarantor;
        5. the release of any of the obligations and liabilities under the Contract; or
        6. any failure by the Commonwealth to disclose to the Guarantor any fact, circumstance or event relating to the Contractor at any time prior to or during the currency of this Deed.
2. Payments without deduction

All payments by the Guarantor under this Deed are to be free of any set-off or counterclaim and without deduction or withholding.

1. Insolvency of Contractor

The Guarantor will not prove in the insolvency of the Contractor for any amount owing by the Contractor other than upon the basis that it irrevocably directs the payment of the proceeds of any such proof to the Commonwealth to the full extent of the amount then required to satisfy the obligations and liabilities under the Contract.

1. Claim on the Guarantor

The Commonwealth will not be required to make any claim or demand upon the Contractor or to enforce any right, power or remedy against the Contractor in respect of its obligations and liabilities under the Contract before making any claim or demand on the Guarantor under this Deed.

1. Severability

Any provision of this Deed which is illegal, void or unenforceable will be ineffective to the extent only of the illegality, voidness or unenforceability without invalidating the remaining provisions of this Deed.

1. Settlement conditional
   * 1. Any settlement between the Guarantor and the Commonwealth will be conditional upon any security or payment given or made to the Commonwealth by the Contractor, the Guarantor or any other person in relation to the obligations and liabilities under the Contract not being avoided, repaid or reduced by virtue of any provision or enactment relating to bankruptcy, insolvency or liquidation for the time being in force.
     2. In the event of any avoidance, repayment or reduction, the Commonwealth may recover the value or amount of the security or payment avoided, repaid or reduced from the Guarantor subsequently, as if the settlement or discharge had not occurred.
2. REPRESENTATIONS AND WARRANTIES
   1. Representations and Warranties to the Commonwealth

The Guarantor represents and warrants to the Commonwealth that:

* + 1. this Deed constitutes a valid and legally binding obligation of it in accordance with its terms;
    2. the execution, delivery and performance of this Deed by it does not breach any law, or any document or agreement to which it is a party or which is binding on it or any of its assets;
    3. no litigation, mediation, conciliation, criminal or administrative proceedings are current, pending or, to the knowledge of the Guarantor, threatened, which, if adversely determined, would or could have a material adverse effect on the business assets or financial condition of the Guarantor;
    4. all information to the Guarantor provided to the Commonwealth in connection with this Deed is true in all material respects and is not, by omission or otherwise, misleading in any material respect; and
    5. the Guarantor is not the trustee of any trust.
  1. Corporate representations and warranties

The Guarantor that is a corporation further represents and warrants to the Commonwealth that:

* + 1. it is duly registered and remains in existence;
    2. the execution, delivery and performance of this Deed does not violate its Constitution or any law apply to it; and
    3. it has taken all corporate and other action required to enter into this Deed and to authorise the execution and delivery of this Deed and the satisfaction of its obligations under this Deed.

1. Applicable Contract Provisions

The clauses of the Contract referred in Item 4 of the Schedule apply to this Deed as if they are provisions of this Deed, except that:

* + 1. references to the "Contractor" shall be read as references to the Guarantor; and
    2. for the purposes of clause 16.7(b), notices to the Guarantor under or in connection with this Deed will be given or served to the address or email address:
       1. specified in Item 5 of the Schedule; or
       2. last notified by the Guarantor to the Commonwealth.

1. Governing law and jurisdiction

This Deed will be governed by and construed in accordance with the laws applying in the place specified in Item 6 of the Schedule and the parties submit to the non-exclusive jurisdiction of its courts, and the courts competent to determine appeals from those courts, with respect to any proceedings that may at any time be brought under this Deed.

Schedule

|  |  |  |
| --- | --- | --- |
| Item 1 | Contractor: | ***[INSERT LEGAL NAME AND (IF APPLICABLE) ABN OF CONTRACTOR]*** |
| Item 2 | Guarantor: | ***[INSERT LEGAL NAME AND (IF APPLICABLE) ABN OF GUARANTOR]*** |
| Item 3 (Recital A) | Contract: | Early Contractor Involvement Head Contract (International) for ***[INSERT]*** dated ***[INSERT]*** |
| Item 4 (Clause 12) | Applicable Contract provisions: | Clauses 1.3(b), 1.3(d), 1.3(e), 16.7, 16.8, 18.4, 21, 22 (if it applies), 23 and 24 |
| Item 5  (Clause 12(b)(i)) | Address and email address for the giving or serving of notices upon the Guarantor: | Address (not PO Box): ***[INSERT]***  Email address: ***[INSERT]***  Attention: ***[INSERT]*** |
| Item 6 (Clause 13) | Governing law and jurisdiction: | ***[INSERT, TO BE THE SAME AS THE GOVERNING LAW SPECIFIED IN THE ECI HCI]*** |

**Executed** as a Deed.

|  |  |  |  |
| --- | --- | --- | --- |
| **Signed sealed and delivered** for and on behalf of **the Commonwealth of Australia** by a duly authorised officer in the presence of: |  |  |  |
|  |
| Signature of witness |  |  | Signature of Authorised Officer |
| Full name of witness |  |  | Name and Position of Authorised Officer |

**[*INSERT APPROPRIATE SIGNING BLOCKS FOR CONTRACTOR AND GUARANTOR, NOTING THAT LEGAL ADVICE SHOULD BE OBTAINED WITH REGARDS TO EXECUTION BY ENTITIES INCORPORATED OVERSEAS*]**