Deed of Guarantee, Undertaking and Substitution

**[FOR USE WITH MASCI-2023 ONLY]**

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

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

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

**The person named in Item 3 of the Schedule ("Guarantor")**

**Recitals**

* + - * 1. The Contractor has engaged the Subcontractor under the subcontract described in Item 4 of the Schedule (**"Subcontract"**) to carry out certain activities (**"Subcontractor's Activities"**).
        2. Under clause 4.4 of the Subcontract, the Subcontractor is required to provide this Deed to the Contractor.

**This Deed provides**

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 terminated by disclaimer or rescinded or discharged by Court order,

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

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 if the Subcontract has been disclaimed, rescinded or otherwise discharged, deemed to have entered a new subcontract with the Contractor on the same terms and conditions as the Subcontract,

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

* + - 1. the Guarantor had been named as the party to the Subcontract instead of the Subcontractor; and
      2. if the Subcontract 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 Contractor and keep it indemnified from and against all losses, damages, costs and expenses of any kind which may be suffered or incurred by the Contractor by reason or in consequence of:

* + 1. default by the Subcontractor in performing or observing its obligations or discharging its liabilities under the Subcontract;
    2. the Contractor attempting to enforce any of the Subcontractor’s obligations under the Subcontract; or
    3. the Contractor 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 Contractor to the Subcontractor of time, waiver, indulgence or concession or the making of any composition or compromise with the Subcontractor;
        2. the Contractor forbearing to enforce or neglecting to exercise any right against the Subcontractor;
        3. any laches, acquiescence or other act, neglect, default, omission or mistake by the Contractor;
        4. any variation of any of the obligations and liabilities under the Subcontract, made either with or without the knowledge of the Guarantor;
        5. the release of any of the obligations and liabilities under the Subcontract; or
        6. any failure by the Contractor to disclose to the Guarantor any fact, circumstance or event relating to the Subcontractor 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 Subcontractor

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

1. Claim on the Guarantor

The Contractor will not be required to make any claim or demand upon the Subcontractor or to enforce any right, power or remedy against the Subcontractor in respect of its obligations and liabilities under the Subcontract 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 Contractor will be conditional upon any security or payment given or made to the Contractor by the Subcontractor, the Guarantor or any other person in relation to the obligations and liabilities under the Subcontract 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 Contractor 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 Contractor

The Guarantor represents and warrants to the Contractor 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 relating to the Guarantor provided to the Contractor 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 Contractor 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 Subcontract Provisions

The clauses of the Subcontract referred in Item 5 of the Schedule apply to this Deed as if they are provisions of this Deed, except that:

* + 1. references to the "Subcontractor" 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 6 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 7 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**

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| --- | --- | --- |
| Item 1: | Contractor | ***[INSERT NAME AND ABN OF CONTRACTOR]*** |
| Item 2: | Subcontractor | ***[INSERT NAME AND ABN OF SUBCONTRACTOR]*** |
| Item 3: | Guarantor | ***[INSERT NAME AND ABN OF GUARANTOR]*** |
| Item 4: | Subcontract  (Recital A) | Major Works Subcontract (International) MASCI-2023for ***[INSERT]*** dated ***[INSERT]*** |
| Item 5: | Applicable Contract provisions (Clause 12) | Clauses 1.3(a), 1.3(b), 1.3(e), 16.7, 16.8, 18.4, 21, 22 (if it applies), 23 and 24 |
| Item 6: | 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 7: | Governing law and jurisdiction | ***[INSERT, TO BE THE SAME AS THE GOVERNING LAW SPECIFIED IN THE MASCI]*** |

**Executed** as a Deed.

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