**Deed of Guarantee and Undertaking**

[FOR USE WITH ECI HEAD CONTRACT 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. 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. GUARANTOR'S liability

The liability of the Guarantor under this Deed:

* + 1. will be no greater than the liability of the Contractor under the Contract and irrespective of whether that liability arises under a specific provision of this Deed, for breach of contract, negligence or otherwise; and
    2. will otherwise be absolute and will not be subject to:
       1. the execution of this Deed or any other instrument or document by any person other than the Guarantor; or
       2. the performance of any condition precedent or subsequent.

1. No reduction or release
   * 1. Subject to clause 3(a), 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 under or in connection with this Deed 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 liability of the Guarantor to the Commonwealth under this Deed will be the same 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. as at the date of this Deed, 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 Guarantor’s ability to perform its obligations under this Deed;
    4. as at the date of this Deed, all information relating to the Guarantor which is provided to the Commonwealth by the Guarantor 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 applying 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, unless the context otherwise requires:

* + 1. references to the "Contractor" shall be read as references to the Guarantor;
    2. references to the "Contract" shall be read as references to this Deed; and
    3. capitalised terms used in those provisions have the same meanings given to them in the Contract.

Schedule

|  |  |  |
| --- | --- | --- |
| Item 1 | Contractor: | ***[INSERT NAME AND ABN OF CONTRACTOR]*** |
| Item 2 | Guarantor: | ***[INSERT NAME AND ABN OF GUARANTOR]*** |
| Item 3 (Recital A) | Contract: | Early Contractor InvolvementHead Contract for ***[INSERT]*** dated ***[INSERT]*** |
| Item 4 | Applicable Contract Provisions: | Clauses 1.3(a), 1.3(b), 16.7, 16.8, 18.10, 20, 21 and 22 |

**Executed** as a Deed.

|  |  |  |  |
| --- | --- | --- | --- |
| **Signed sealed and delivered** for and on behalf of **the Commonwealth of Australia** in the presence of: |  |  |  |
|  |
| Signature of Witness |  |  | Signature of Authorised Officer |
| Name of Witness in full |  |  | Name and Position of Authorised Officer |

**[*INSERT APPROPRIATE SIGNING BLOCKS FOR CONTRACTOR AND GUARANTOR*]**