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DEED OF GUARANTEE AND INDEMNITY

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Applicant’s Name

A.C.N. XXX XXX XXX

“Applicant”

AND:

Guarantor’s Name

A.C.N.No. XXX XXX XXX

“Guarantor”

Deed of Guarantee and Indemnity

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# **Recitals**

**A**. The Applicant has applied for registration as a prequalified contractor within DIT’s prequalification system.

**B** In order to satisfy the pre-registration requirements the Applicant must procure from the Guarantor a guarantee and indemnity in respect of the Applicant’s Obligations.

**C** At the request of the Applicant, the Guarantor has agreed to enter into this Deed of Guarantee and Indemnity to provide a guarantee and indemnity in respect of the Applicant’s Obligations.

# **Agreed Terms**

# **Defined Terms & Interpretation**

* 1. **Defined Terms**

In this Deed:

**Applicant** means the company named in Schedule 1.

**Applicant’s Obligations** means the due and punctual observance and performance by the Applicant of all its liabilities, obligations and agreements (whether monetary or non-monetary, present or future, contingent, prospective or actual) to the State pursuant to or in connection with the Contracts.

**Business Day** means any day that is not a Saturday or Sunday or a public holiday in Adelaide, South Australia.

**Commencement Date** means the date on which the Applicant is registered as a prequalified contractor in DIT’s prequalification system.

**Contract** means each agreement (whether existing or future) entered into during the Prequalification Period between the Applicant and the State (each as amended or varied from time to time) and **Contracts** means all of them.

**Guarantee and Indemnity** means the guarantee and indemnity given by the Guarantor under this Deed.

**DIT** means the Department for Infrastructure and Transport being a department or administrative unit of the State which is responsible for the administration of this Deed.

**Deed** means this Deed of Guarantee and Indemnity.

**Guarantor** means the company named in Schedule 1.

**Insolvency** in respect of a body corporate includes where:

1. an administrator is appointed to the body corporate or action is taken to make such an appointment;
2. the body corporate resolves to be wound up;
3. an application is made to a court for an order or an order is made that the body corporate be wound up (whether on grounds of insolvency or otherwise);
4. the body corporate ceases to carry on business;
5. a receiver or a receiver and manager of property of the body corporate is appointed whether by a court or otherwise;
6. an application is made to a court for an order appointing a liquidator or provisional liquidator in respect of the body corporate or one of them is appointed, whether or not under an order;
7. the body corporate enters into a compromise or arrangement with its creditors or a class of them;
8. the body corporate is or states that it is unable to pay its debts when they fall due; or
9. any event that is analogous or having substantially similar effect to any of the events described above,

and ‘insolvent’ will be construed accordingly.

**Machinery of Government** means a change to the structure, function or operations of the South Australian Government as a result of any government reorganisation, restructuring or other organisational or functional change.

**Prequalification Period** means the period of 3 years commencing on the Commencement Date plus if the Applicant’s registration as prequalified contractor in DIT’s prequalification system is extended beyond that period, any extended period.

**Security** means any mortgage, pledge, lien, charge or other security and any guarantee, suretyship, or other obligation whereby a responsibility is assumed for any obligation or indebtedness or the insolvency or financial condition of any other person.

**State** means the Crown in the right of the State of South Australia and includes:

1. the Minister for Transport and Infrastructure;
2. the Commissioner of Highways; or
3. the Rail Commissioner,

and their administrators, substitutes, successors and permitted assigns arising from a Machinery of Government change.

* 1. **Interpretation**

In this Deed unless the context otherwise requires:

* + 1. words denoting the singular number include the plural and vice versa;
    2. words denoting individuals include corporations and vice versa;
    3. words denoting any gender any gender includes all genders;
    4. headings are for convenience only and will not affect interpretation;
    5. the words “include” and “including” are to be construed as without limitation;
    6. reference to clauses and schedules are references to clauses and schedules of or to this Deed; and
    7. references to any agreement or document include that agreement or document as amended, novated, supplemented or replaced from time to time.

# **State**

This Deed is a deed poll. The State has the benefit of this Deed even though it is not a party to this Deed. The Guarantor agrees that any minister, agency or instrumentality of the Crown in right of the State of South Australia may enforce this Deed on behalf of the State.

# **Guarantee**

* 1. The Guarantor unconditionally and irrevocably guarantees to the State the performance by the Applicant of all of the Applicant’s Obligations.
  2. If the Applicant fails to execute and perform any of the Applicant’s Obligations, the Guarantor must, if required to do so by the State, complete or cause to be completed the Applicant’s Obligations in accordance with the relevant Contract(s).

# **Indemnity**

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

* 1. default by the Applicant in performing or observing the Applicant’s Obligations;
  2. the State attempting to enforce the Applicant’s Obligations; or
  3. the State attempting to enforce or preserve any of its rights under this Deed.

# **Nature of Guarantee and Indemnity**

The Guarantee and Indemnity:

* 1. is a separate, additional and principal obligation and will not be treated as ancillary or collateral to any other right or obligation however created or arising;
  2. may be enforced against the Guarantor without the State first being required to exhaust any remedy it may have against the Applicant or to enforce any Security it may hold with respect to the Applicant’s Obligations;
  3. is a continuing guarantee and indemnity for the whole of the Applicant’s Obligations under each and every Contract including:
     1. any Contract entered during the Prequalification Period (including any extension of that period);
     2. any change in the Applicant’s Obligations as a result of any amendment, supplement, renewal or replacement of any of the Contracts or the occurrence of any other thing,

and regardless of whether the Guarantor is aware of, or has consented to, or has been given notice of, such Contract, extension period, amendment, supplement, renewal, replacement or other thing and irrespective of any rule of law or equity to the contrary;

* 1. will be irrevocable and will remain in full force and effect until all of the Applicant’s Obligations under all of the Contracts are discharged; and
  2. will not be considered as wholly or partially discharged by the performance at any time of the Applicant’s Obligations under any Contract(s) or by any settlement of account or by any other matter or thing whatsoever and will apply to the present and future scope of the Applicant’s Obligations.

# **Guarantor’s Liability is absolute**

The liability of the Guarantor is 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 affected by any act, omission, matter or thing which but for this provision might operate in law or in equity to reduce, release or otherwise exonerate the Guarantor from its obligations in whole or in part. Without limiting the generality of the foregoing, that liability will not be affected by:

* 1. the grant to the Applicant or any other person of any time waiver or other indulgence or concession or the discharge or release of any other Security held by the State with respect to the Applicant’s Obligations in any Contract(s);
  2. any transaction or arrangement that may take place between the State and the Applicant, the Guarantor or any other person;
  3. the Insolvency of the Applicant;
  4. the State exercising or refraining from exercising any other Security or any of the rights, powers or remedies conferred on it by law or by any Contract(s) or any other agreement with any person or taking or failing to take any other Security;
  5. any variation (including a variation which increases the Applicant’s Obligations), extinguishment, unenforceability, failure, loss, release, discharge, abandonment or transfer either in whole or in part of any Contract(s) or any Security or in the future held by the State from the Applicant, the Guarantor or any other person;
  6. the Applicant’s Obligations in any Contract(s) or any part of them being or becoming wholly or partially illegal, void, voidable or unenforceable;
  7. any failure by the Applicant or the State to disclose to the Guarantor that any Contract has been entered or that the Prequalification Period has been extended;
  8. any failure by the State to give notice to the Guarantor of any default by the Applicant under any Contract(s);
  9. any failure by the Applicant or the State to disclose to the Guarantor any other fact, circumstance or event relating to the Applicant or the Applicant’s Obligations at any time prior to or during the currency of this Deed; or
  10. any legal limitation, disability, incapacity or other circumstances related to the Applicant in any Contract(s).

# **Limitation of Liability**

* 1. Notwithstanding any other provision of this Deed save as provided for in clause 7.2, the aggregate of the liability of the Guarantor to the State under this Deed in respect of any Contract shall not exceed the liability of the Applicant to the State arising out of or in connection with that Contract assuming (for the purposes of determining the Guarantor’s liability under this Deed) that none of the Applicant’s Obligations are void, voidable, invalid, illegal or otherwise unenforceable for any reason.
  2. Nothing in this clause 7 shall restrict the amount of any award for costs that may be made in favour of the State in the event of proceedings taken in relation to this Deed.

# **Payment**

* 1. The Guarantor must pay any amount due under this Deed within thirty (30) Business Days of demand by or on behalf of the State.
  2. All payments by the Guarantor under this Deed are to be free of any set-off or counterclaim and without deduction or withholding.

# **Joint and Several Guarantee**

Where the Guarantee and Indemnity is given by more than one entity the obligations on the part of the Guarantor contained in this Deed take effect as joint and several obligations and references to the Guarantor take effect as references to those persons or any of them. None of them will be released from liability under the Deed by reason of any other Guarantor not executing this Deed or this Deed ceasing to be binding as a continuing security on any other Guarantor and the release by the State of any Guarantor from the Guarantee and Indemnity will not affect the liability of the Guarantor.

# **Representations and Warranties to the State**

The Guarantor represents and warrants to the State that:

* 1. it is a corporation and it is duly registered and remains in existence;
  2. it is not the trustee of any trust; [\**if the Guarantor is the trustee of a trust, this clause is to be removed and clause 11 (Guarantor as Trustee) is to be used]*]
  3. the execution, delivery and performance of this Deed by it does not breach its Constitution or any law, or any document or agreement to which it is a party or which is binding on it or any of its assets;
  4. this Deed constitutes a valid and legally binding obligation of it in accordance with its terms;
  5. no litigation, mediation, conciliation, criminal or administrative proceedings are current, pending or, to its knowledge, threatened, which, if adversely determined, would or could have a material adverse effect on its business assets or financial condition;
  6. all information provided by it or the Applicant to the State in connection with this Deed is true in all material respects and is not, by omission or otherwise, misleading in any material respect; and
  7. 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.

*[Clause below is to be used where the trustee acts as trustee of a trust. Clause 10.2 is also to be deleted.]*

# ***Guarantor as Trustee***

*If the Guarantor is acting as trustee of a trust, then in relation to this Deed:*

* 1. *the Guarantor enters this Deed and is liable both personally and in its capacity as a trustee of that trust;*
  2. *it must not assign, transfer, mortgage, charge, release, waive, encumber or compromise its right of indemnity out of the assets of that trust (but, for the avoidance of doubt, may apply its right of indemnity out of the assets of the trust to any of its liabilities including those arising in relation to this Deed);*
  3. *it must not retire, resign nor by act or omission effect or facilitate a change to its status as the sole trustee of that trust; and*
  4. *it represents and warrants that:*
     1. *such trust has been duly established and currently exists;*
     2. *it is the duly appointed, current and only trustee of that trust;*
     3. *as trustee it has the power to enter into and perform its obligations under this Deed;*
     4. *it has an unqualified right of indemnity out of the assets of that trust in respect of its obligations;*
     5. *it either has no conflict of interest affecting it as trustee (and/or its directors, if any) or such conflict is otherwise overcome by the terms of the relevant trust agreement; and*
     6. *no breach of the relevant trust agreement exists or would arise.*

# **Notices**

* 1. Any demand or notice will be made in writing signed by an officer or agent of the State and may be served on the Guarantor either by hand, by post or by email. It will be presumed that a person who signs a demand or notice on behalf of the State is duly authorised to do so in the absence of proof to the contrary.
  2. Any demand or notice may be addressed to the relevant address or email address specified for the Guarantor in Schedule 1 to this Deed or last notified in writing to the State.
  3. The State’s address for the purposes of this Deed is as stated in Schedule 1 to this Deed or such other address notified by the State in writing to the Guarantor.
  4. A notice of demand given to the Guarantor in accordance with this clause is treated as having been given and received:
     1. on the day of delivery if delivered before 5.00 pm on a Business Day, otherwise on the next Business Day;
     2. if sent by post, on the third Business Day after posting; and
     3. if transmitted by email before 5.00 pm on a Business Day and the sender does not receive a transmission error message, on the day of transmission, otherwise on the next Business Day.

# **Waivers, Remedies are cumulative**

* 1. No failure to exercise and no delay in exercising on the part of the State any right to remedy under this Deed will operate as a waiver. No single or partial exercise of any right or remedy will preclude any other or further exercise of that or another right or remedy.
  2. The rights and remedies provided to the State in this Deed are cumulative and are not exclusive of any rights or remedies provided by law.

# **Governing Law and Jurisdiction**

This Deed is governed by the laws of the State of South Australia. The courts of South Australia have exclusive jurisdiction to determine any proceeding in relation to this Deed. Any proceeding brought in a Federal Court must be instituted in the Adelaide Registry of that Federal Court. The Guarantor undertakes not to apply to transfer any proceedings to another registry of the Federal Court.

# **Severability of Provisions**

Any provisions in this Deed which is held by a Court to be illegal, void, prohibited or unenforceable in any jurisdiction will as to that jurisdiction be ineffective to the extent only of the illegality, prohibition, voidness or unenforceability without invalidating the remaining provisions of the Deed or affecting the validity of that provision in any other jurisdiction.

# **Costs of this Deed**

Each party must pay its own costs arising from the preparation, negotiation and execution of this Deed.

**Execution**

**EXECUTED** as a Deed

**Executed** by the Applicant:

Applicant’s Name Pty Ltd

(A.C.N. XXX XXX XXX)

in accordance with Section 127(1) of

the Corporations Act by Authority of

two Directors or a Director and the

Company Secretary:

--------------------------------------------------- ---------------------------------------------------

Director Signature Director / Company Secretary Signature

--------------------------------------------------- ---------------------------------------------------

Print Name Print name

--------------------------------------------------- ---------------------------------------------------

Date Date

**Executed** by Guarantor:

Guarantor’s Name Pty Ltd

(A.C.N. XXX XXX XXX)

in accordance with Section 127(1) of

the Corporations Act by Authority of

two Directors or a Director and the

Company Secretary:

--------------------------------------------------- ---------------------------------------------------

Director Signature Director / Company Secretary Signature

--------------------------------------------------- ---------------------------------------------------

Print Name Print name

--------------------------------------------------- ---------------------------------------------------

Date Date

Director/Secretary

# **Schedule 1 – Addresses for Notices**

|  |  |
| --- | --- |
| The State: | Department for Infrastructure and Transport  83 Pirie Street,  Adelaide SA 5000  Attention: Executive Director, Commercial and Contract Management |
| The Applicant: | Applicant’s Name Pty Ltd  Applicant’s Address,  CITY STATE POSTCODE,  Email: [Applicant@email.com.au](mailto:Contractor@email.com.au)  Attention: Applicant’s Representative |
| The Guarantor: | Guarantor’s Name Pty Ltd  Guarantor’s Address,  CITY STATE POSTCODE  Email: Guarantor@email.com.au  Attention: Guarantor’s Representative |