

UNDERTAKING TO PROVIDE GUARANTEE AND INDEMNITY

This letter confirms that [XXXX] is a wholly owned subsidiary of [YYYY].
[YYYY] hereby undertakes to provide to the Department of Infrastructure, Energy and Resources a guarantee and indemnity in the terms of the attached 'Deed of Guarantee and Indemnity' in the event that [XXXX] is awarded a contract arising from the contractor's prequalification status. In that event, [YYYY] confirms that it will be a party to, and execute, that contract in its capacity as covenantor.

Yours faithfully

[YYYY]

Details

| Parties | Principal, Covenantor | |
|--------------------------|------------------------------|--|
| Principal | Name | The Crown in Right of Tasmania represented by the Department of Infrastructure, Energy and Resources (“Principal”) |
| | Address | 10 Murray Street, Hobart in Tasmania |
| | Telephone | |
| | Fax | |
| | Attention | |
| Covenantor | Name | (“Covenantor”) |
| | Incorporated in | |
| | ACN/ABN | |
| | Address | |
| | Telephone | |
| | Fax | |
| | Attention | |
| Recitals | A | At the request of the Covenantor the Principal has agreed to enter into the Contract with the Contractor. |
| | B | The Principal agreed to enter into the Contract on condition that the Covenantor enter into this Deed. |
| Date of agreement | See Signing page | |

General terms

1 Definitions and interpretation

“**Business Day**” means a day other than a Saturday, Sunday or statutory public holiday in Hobart;

“**Contract**” means the Contract between the Principal and the Contractor for the Project;

“**Contractor**” means _____ ;

“**Project**” means _____ .

1.1 Interpretation

In this Deed, unless the contrary intention is expressed:

- (a) a reference to this Deed includes its schedules, appendices, annexures and attachments, and any variation or replacement of any of it;
- (b) a reference to a statute, ordinance, code or other legislative instrument includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- (c) the singular includes the plural and conversely;
- (d) a reference to a gender includes reference to each other gender;
- (e) a reference to a person includes:
 - (i) an individual, a firm, a body corporate, an unincorporated association or a statutory or responsible authority or other authority, as constituted from time to time; and
 - (ii) the person’s executors, administrators, successors and permitted assigns;
- (f) an agreement, representation or warranty by, or for, two or more persons binds, or is for their benefit, together and separately;
- (g) a covenant forbidding a person from doing something, also forbids that person from authorising or allowing another person to do it;
- (h) a reference to anything (including an amount) is a reference to all or any part of it, and a reference to a group of persons is a reference to any one or more of them;

- (i) a reference to a clause, paragraph, schedule, annexure or appendix, is a reference to a clause, paragraph, schedule, annexure or appendix in or to it;
- (j) a reference to “writing” includes a reference to printing, typing, lithography, photography and other methods of representing or reproducing words, figures, diagrams and symbols in a tangible and visible form;
- (k) a reference to a day is to be interpreted as the period of time starting at midnight and ending twenty-four (24) hours later;
- (l) a reference to a month or a year means a calendar month or a calendar year respectively;
- (m) words or phrases derived from a defined word have a corresponding meaning to the defined word;
- (n) a term of inclusion is not to be interpreted to be a term of limitation;
- (o) all references to monetary sums are to Australian currency;
- (p) a reference to the payment of money within a specified time, means the full crediting and clearance of any cheque or electronic transfer into the payee’s account within that time;
- (q) it operates under Tasmanian time;
- (r) if the day on or by which an act, matter or thing is to be done under it is not a Business Day, then that act, matter or thing must be done no later than the next Business Day;
- (s) an uncertainty or ambiguity in the meaning of a provision is not to be interpreted against a party only because that party prepared the provision; and
- (t) headings are included for convenience only, do not form part of it, and are not to be used in its interpretation.

2 Guarantee obligations

The Covenantor guarantees to the Principal the due and punctual performance and observance of all of the Contractor’s obligations under or in connection with the Contract.

3 Guarantee payments

Without limitation to clause 2, the Covenantor guarantees to the Principal the due and punctual payment of all debts and damages due and payable or from time to time to become due and payable to the Principal under or in connection with the Contract.

4 Guarantee performance

If the Contractor makes default in the performance or observance of any of the Contractor's obligations under the Contract, the Covenantor must on demand from time to time by the Principal immediately perform or procure the performance of all of the Contractor's obligations in the same manner as, and to the extent that, the Contractor is required to perform them.

5 Indemnity

The Covenantor must:

- (a) indemnify the Principal against all damage, expense, loss or liability (including legal expenses on a full indemnity basis) which the Principal suffers or incurs in respect of a failure by the Contractor to do what the Contract states it must do, including any damage, expense, loss or liability incurred by the Principal:
 - (i) to the extent that it is caused or contributed to by the Contractor's failure to perform any of the Contractor's obligations under the Contract;
 - (ii) because the Contract is void, voidable or otherwise unenforceable against the Contractor; or
 - (iii) because of the winding up of the Contractor; and
- (b) pay the amount of any such damage, expense, loss or liability on demand to the Principal.

6 Continuing obligations

The Covenantor's obligations under this Deed are continuing obligations, separate and independent from each other and survive the termination of the Contract.

7 Liability continues

The Covenantor will remain liable to the Principal notwithstanding that:

- (a) as a consequence of any breach or non-observance by the Contractor, the Principal has exercised any of its rights under the Contract; or
- (b) the Contractor may be wound up.

8 Unconditional liability

The liability of the Covenantor is absolute and unconditional and is not affected by any act, omission, matter or thing which, but for this clause, might operate to release or otherwise exonerate the Covenantor from any

of its obligations including any one or more of the following (whether occurring with or without the consent of any person):

- (a) the grant to the Contractor or the Covenantor of any time, waiver or other indulgence or concession or any whole or partial discharge or release of the Contractor or the Covenantor;
- (b) any transaction or arrangement that may take place between the Principal and the Contractor or the Covenantor in respect of the work under the Contract;
- (c) the winding up, liquidation of, or the appointment of an administrator to, the Contractor or the Covenantor;
- (d) the amendment, or assignment by a party, of the Contract;
- (e) the failure by the Principal to give notice to the Covenantor of any default by the Contractor;
- (f) any legal limitation, disability, incapacity or other circumstance related to the Contractor or the Covenantor; or
- (g) any failure or delay by the Principal in exercising any rights under the Contract.

9 Enforcement

The Principal and the Covenantor acknowledge and agree that the Covenantor's obligations under the Contract may be enforced against the Covenantor without the Principal being required to make any demand or exercise any remedy it may have against the Contractor.

10 Continuing obligations

The Covenantor's obligations under the Contract continue notwithstanding any settlement of account, intervening payment or other matter whatever and are irrevocable until discharged.

11 Binding obligations

Any certificate, expert determination, judgment, order, arbitral award or mediation or settlement agreement binding upon the Contractor is also binding upon the Covenantor.

12 Security

The Covenantor must hold on trust for the Principal any security that the Covenantor holds from the Contractor, to secure the liability of the Covenantor to the Principal under the Contract but only to the extent that the security secures any liability of the Contractor to the Covenantor in respect of the Contract.

13 No subrogation

The Covenantor must not:

- (a) be subrogated to the Principal's rights against the Contractor or any other surety or any security of the Principal;
- (b) have or exercise any rights as surety; or
- (c) prove in the winding up of:
 - (i) the Contractor; or
 - (ii) any other surety for the Contractor's obligations under the Contract,

in competition with the Principal unless the amount the Principal is entitled to will not be reduced as a result.

14 Prove in winding up

In respect of any winding up of the Contractor and until the discharge of the Covenantor's obligations under the Contract:

- (a) the Covenantor irrevocably authorises the Principal (but without any obligation on the part of the Principal) to prove in the Contractor's winding up for all moneys and damages owed (actually or contingently) by the Contractor to the Covenantor;
- (b) if any dividends are received by the Covenantor from the Contractor's winding up it must immediately pay them to the Principal and until it does so it must hold them upon trust for the Principal; and
- (c) the Principal may retain any dividends from the Contractor's winding up or moneys received from the Covenantor under sub-clause (b) and apply them towards satisfaction of the Covenantor's indebtedness to the Principal under the Contract.

15 Warranties

The Covenantor represents and warrants to the Principal that:

- (a) it has full legal capacity and power:
 - (i) to own its property and assets and to carry on its business; and
 - (ii) to enter into this Deed and to perform its obligations under this Deed;
- (b) it has taken all corporate action that is necessary to authorise its entry into this Deed and to perform its obligations under this Deed;

- (c) this Deed constitutes legal, valid and binding obligations enforceable against the Covenantor in accordance with its terms (except to the extent limited by equitable principles and laws affecting creditors' rights generally);
- (d) neither its execution of this Deed nor the carrying out of its obligations under this Deed, does or will:
 - (i) contravene any law to which it or any of its property is subject or any order of any authority or other person that is binding on it or any of its property;
 - (ii) contravene any undertaking or instrument binding on it or any of its property; or
 - (iii) contravene its constitution;
- (e) no litigation, arbitration, mediation, conciliation or administrative proceedings are taking place, pending or threatened against it which (if adversely decided) could have a material adverse effect on the Covenantor's business, assets or financial condition or its ability to perform its obligations under this Deed;
- (f) no controller (as defined in the *Corporations Act 2001* (Cwlth)) is currently appointed in relation to any of its property;
- (g) it is not entering into this Deed as trustee of any trust or settlement;
- (h) the Covenantor's payment obligations pursuant to this Deed rank at least equally with all of the Covenantor's other unsecured and unsubordinated payment obligations (whether present or future, actual or contingent) other than obligations that are mandatorily preferred by law; and
- (i) the Covenantor and its property are free of any right of immunity from set-off, proceedings or execution in respect of its obligations under this Deed.

16 Reliance on warranties

The Covenantor acknowledges that the Principal has executed the Contract in reliance on the representations and warranties that are made in clause 15.

17 Concurrent rights

The Principal may exercise a right under this Deed at its discretion and separately or concurrently with another right.

18 No representation by Crown

The Covenantor acknowledges that it has not entered into the Contract in reliance on or as a result of, any statement or conduct of any kind of or on behalf of the Principal or the Tasmanian Government or any Tasmanian governmental agency.

19 Maximum liability

The maximum liability of the Covenantor under this Deed is no greater than the maximum liability of the Contractor to the Principal under the Contract or, where for any reason the Contract is void, voidable or otherwise unenforceable against the Contractor, the maximum liability which the Contractor would have had to the Principal but for the Contract being void, voidable or otherwise unenforceable.

20 Governing law and jurisdiction

20.1 Law of Tasmania

The law of Tasmania governs this Agreement, and the parties submit to the jurisdiction of the Courts of Tasmania.

20.2 Proceedings issued under or about this Agreement

Any proceedings issued against the Crown under, or about, this Agreement, must be instituted either:

- (a) in a Tasmanian court; or
- (b) in the Federal Court, from the Tasmanian Registry of that court.

21 Notices

21.1 How to give notice

Notices under this Agreement must be in writing and may be delivered by hand, or sent by mail, fax or email to the addresses set out in the Details, or any other addresses notified from time to time. However, notices changing an address or notices under clause 12 may not be given by email.

21.2 Receipt of notice

A notice or bill is taken to be received:

- (a) if hand delivered, on the day of delivery;
- (b) if sent by mail, on the third Business Day after mailing;
- (c) if sent by fax, on production of a transmission report from the machine from which it was sent if completion is within ordinary business hours in the place where the recipient's facsimile machine is located, but if not, then at 9.00am on the next Business Day; and

- (d) if sent by email, at the time it was received by the recipient.

21.3 Sufficiency of notice etc

A notice or other communication to be given or made under this Agreement, is sufficient if:

- (a) in the case of the Crown, it is under the hand of the Crown (by the Minister responsible for the Department or a duly authorised officer of the Department), the Delegate, or the Crown's solicitors; and
- (b) in the case of the Contractor, it is under the hand of the contractor or its agent or solicitors.

Executed as a Deed.

Signing page

Dated:

20

Signed Sealed and Delivered for)
The Crown in Right of Tasmania)
by [redacted] being and as the Minister)
for [redacted] in the presence of:)
)

.....

.....
Signature of witness

.....
Name of witness (block letters)

.....
Address of witness

.....
Occupation

Signed by [redacted] being and as a)
[redacted] under an Instrument of)
Delegation dated [redacted] [redacted])
[redacted] in the presence of:)
)
)

.....

.....
Signature of witness

.....
Name of witness (block letters)

.....
Address of witness

.....
Occupation)

Signed for and on behalf of **The**)
Crown in Right of Tasmania by)
[redacted] being a duly authorised)
person in the presence of:)
)

.....

.....
Signature of witness

.....
Name of witness (block letters)

.....
Address of witness

.....
Occupation

The Common Seal of [redacted] (ACN [redacted]) fixed in the presence of:)
)
)
.....)
Director

.....
Director/Secretary

The Common Seal of [redacted] (ACN [redacted]) fixed in the presence of:)
)
)
.....)
Sole Director/Sole Secretary

.....
(Print full name)

Executed for and on behalf of [redacted] (ACN [redacted]) in accordance with section 127(1) of the *Corporations Act 2001* (Cwlth):)
)
)

.....
Director

.....
Director/Secretary

Executed for and on behalf of [redacted] (ACN [redacted]) in accordance with section 127(1) of the *Corporations Act 2001* (Cwlth):)
)
)

.....
Sole Director/Sole Secretary

.....
(Print full name)

Signed by [redacted] in the presence of:)
)
)

.....
Signature

.....
Signature of witness

.....
Name of witness (block letters)

.....
Address of witness

.....
Occupation

Signed for and on behalf of [redacted])
(a partnership) by [redacted] (Partner))
who, by executing this Agreement,)
warrants authority to do so on)
behalf of all the partners, in the)
presence of:)

.....
Signature

.....
Signature of witness

.....
Name of witness (block letters)

.....
Address of witness

.....
Occupation

The Common Seal of [redacted] **Inc**)
(ABN [redacted]) fixed in the presence)
of:)
)

.....
Committee Member

.....
Committee Member/Public Officer



Agreement

Dated 200

The Crown in Right of Tasmania (“Crown”)

and

(“ ”)

The Crown Solicitor of Tasmania
GPO Box 825
Hobart 7001
Phone: (03) 6233 3409
Fax: (03) 6233 2874
Email: crown.solicitor@justice.tas.gov.au

Agreement

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