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Call-Off Schedule 3 (Guarantee)

Annex 1 – Form of Guarantee

[INSERT NAME OF THE GUARANTOR]

- AND -

[INSERT NAME OF THE BENEFICIARY]

DEED OF GUARANTEE

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DEED OF GUARANTEE

THIS DEED OF GUARANTEE is made the day of 20[]

PROVIDED BY:

[Insert the name of the Guarantor] [a company incorporated in England and Wales] with number [insert company no.] whose registered office is at [insert details of the Guarantor's registered office here] [OR] [a company incorporated under the laws of [insert country], registered in [insert country] with number [insert number] at [insert place of registration], whose principal office is at [insert office details] ("**Guarantor**")

WHEREAS:

- (A) A Financial Distress Event has occurred under the terms of the Call-Off Contract.
- (B) In connection with the Beneficiary's prior entry into, and in accordance with the terms of, the Call-Off Contract, the Guarantor has agreed to guarantee the Guaranteed Obligations.
- (C) It is the intention of the Parties that this document be executed and take effect as a deed.

The Guarantor hereby agrees for the benefit of the Beneficiary as follows:

1 DEFINITIONS AND INTERPRETATION

In this Deed of Guarantee:

- 1.1 unless defined elsewhere in this Deed of Guarantee or the context requires otherwise, defined terms shall have the same meaning as they have for the purposes of the Call-Off Contract;

- 1.2 the words and phrases below shall have the following meanings:

"Authority" has the meaning given to it in the Call-Off Contract;

"Beneficiary" means the Authority;

"Call-Off Contract" means the call-off contract for the carrying out of the Works and the provision of the Outputs between the Beneficiary and Supplier dated [insert Call-Off Contract Effective Date dd/mm/yyyy];

"Financial Distress Event" has the meaning given to it in the Call-Off Contract;

"Guaranteed Obligations" means all payment obligations and payment liabilities of the Supplier to the Beneficiary under or pursuant to the Call-Off Contract;

"Outputs" has the meaning given to it in the Call-Off Contract;

"Supplier" has the meaning given to it in the Call-Off Contract; and

"Works" has the meaning given to it in the Call-Off Contract;

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- 1.3 references to this Deed of Guarantee and any provisions of this Deed of Guarantee or to any other document or agreement (including to the Call-Off Contract) are to be construed as references to this Deed of Guarantee, those provisions or that document or agreement in force for the time being and as amended, varied, restated, supplemented, substituted or novated from time to time;
- 1.4 unless the context otherwise requires, words importing the singular are to include the plural and vice versa;
- 1.5 references to a person are to be construed to include that person's assignees or transferees or successors in title, whether direct or indirect;
- 1.6 the words "other" and "otherwise" are not to be construed as confining the meaning of any following words to the class of thing previously stated where a wider construction is possible;
- 1.7 unless the context otherwise requires, reference to a gender includes the other gender and the neuter;
- 1.8 unless the context otherwise requires, references to an Act of Parliament, statutory provision or statutory instrument include a reference to that Act of Parliament, statutory provision or statutory instrument as amended, extended or re-enacted from time to time and to any regulations made under it;
- 1.9 unless the context otherwise requires, any phrase introduced by the words "including", "includes", "in particular", "for example" or similar, shall be construed as illustrative and without limitation to the generality of the related general words;
- 1.10 references to Clauses and Schedules are, unless otherwise provided, references to Clauses of and Schedules to this Deed of Guarantee; and
- 1.11 references to liability are to include any liability whether actual, contingent, present or future.

2 GUARANTEE AND INDEMNITY

- 2.1 The Guarantor irrevocably and unconditionally:
 - (a) guarantees to the Beneficiary punctual performance by the Supplier of the Guaranteed Obligations;
 - (b) undertakes with the Beneficiary that whenever the Supplier does not pay any amount when expressed to be due under or in connection with the Call-Off Contract, it shall immediately on demand pay that amount as if it were the principal obligor; and
 - (c) agrees with the Beneficiary that if any obligation guaranteed by it is or becomes unenforceable, invalid or illegal, it will, as an independent and primary obligation, indemnify the Beneficiary immediately on demand against any cost, loss or liability it incurs as a result of the Supplier not paying any amount which would, but for such unenforceability, invalidity or illegality, have been payable by it under the Call-Off Contract on the date when it would have been due. Any references in this Deed of Guarantee to a "guarantee" or a "Guarantor" and any provisions of this Deed of

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Guarantee relating to a guarantee but not to a primary obligation shall be ignored for the purpose of interpreting the nature of the Guarantor's obligations under this Clause 2.1(c).

3 DEMANDS AND NOTICES

- 3.1 Any demand or notice served by the Beneficiary on the Guarantor under this Deed of Guarantee shall be in writing, addressed to:

[Insert Address of the Guarantor in England and Wales]

[Insert Facsimile Number]

For the Attention of [Insert details]

or such other address in England and Wales or facsimile number as the Guarantor has from time to time notified to the Beneficiary in writing in accordance with the terms of this Deed of Guarantee as being an address or facsimile number for the receipt of such demands or notices.

- 3.2 Any notice or demand served on the Guarantor or the Beneficiary under this Deed of Guarantee shall be deemed to have been served:

- (a) if delivered by hand, at the time of delivery; or
- (b) if posted, at 10.00 a.m. on the second Working Day after it was put into the post; or
- (c) if sent by facsimile, at the time of despatch, if despatched before 5.00 p.m. on any Working Day, and in any other case at 10.00 a.m. on the next Working Day.

- 3.3 In proving service of a notice or demand on the Guarantor or the Beneficiary it shall be sufficient to prove that delivery was made, or that the envelope containing the notice or demand was properly addressed and posted as a prepaid first class recorded delivery letter, or that the facsimile message was properly addressed and despatched, as the case may be.

- 3.4 Any notice purported to be served on the Beneficiary under this Deed of Guarantee shall only be valid when received in writing by the Beneficiary.

4 BENEFICIARY'S PROTECTIONS

- 4.1 The Guarantor shall not be discharged or released from this Deed of Guarantee by:

- (a) any arrangement made between the Supplier and the Beneficiary (whether or not such arrangement is made with or without the assent of the Guarantor);
- (b) any amendment to or termination of the Call-Off Contract or by any forbearance, indulgence, waiver or consent whether as to payment, time, performance or otherwise granted by the Beneficiary in relation thereto (whether or not such amendment, termination, forbearance, indulgence, waiver or consent is made with or without the assent of the Guarantor);

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- (c) any incapacity or lack of power, authority or legal personality of or dissolution or change in the members, name or status of the Supplier or any other person;
 - (d) any insolvency or similar proceedings; or
 - (e) the Beneficiary doing (or omitting to do) any other matter or thing which but for this provision might exonerate the Guarantor or would reduce, release or prejudice any of its obligations under this Deed of Guarantee (whether or not known to it or the Supplier).
- 4.2 This Deed of Guarantee shall be a continuing guarantee and will extend to the ultimate balance of sums payable by the Supplier to the Beneficiary in connection with the Guaranteed Obligations and accordingly:
- (a) it shall not be discharged, reduced or otherwise affected by any partial performance (except to the extent of such partial performance) by the Supplier of the Guaranteed Obligations or by any omission or delay on the part of the Beneficiary in exercising its rights under this Deed of Guarantee;
 - (b) it shall not be affected by any dissolution, amalgamation, reconstruction, reorganisation, change in status, function, control or ownership, insolvency, liquidation, administration, appointment of a receiver, voluntary arrangement, any legal limitation or other incapacity, of the Supplier, the Beneficiary, the Guarantor or any other person;
 - (c) if, for any reason, any of the Guaranteed Obligations shall prove to have been or shall become void or unenforceable against the Supplier for any reason whatsoever, the Guarantor shall nevertheless be liable in respect of that purported obligation or liability as if the same were fully valid and enforceable and the Guarantor were principal debtor in respect thereof; and
 - (d) the rights of the Beneficiary against the Guarantor under this Deed of Guarantee are in addition to, shall not be affected by and shall not prejudice, any other security, guarantee, indemnity or other rights or remedies available to the Beneficiary.
- 4.3 The Beneficiary shall be entitled to exercise its rights and to make demands on the Guarantor under this Deed of Guarantee as often as it wishes and the making of a demand (whether effective, partial or defective) in respect of the breach or non-performance by the Supplier of any Guaranteed Obligation shall not preclude the Beneficiary from making a further demand in respect of the same or some other default in respect of the same Guaranteed Obligation.
- 4.4 The Beneficiary shall not be obliged before taking steps to enforce this Deed of Guarantee against the Guarantor to obtain judgement against the Supplier or the Guarantor or any third party in any court, or to make or file any claim in a bankruptcy or liquidation of the Supplier or any third party, or to take any action whatsoever against the Supplier or the Guarantor or any third party or to resort to any other security or guarantee or other means of payment. No action (or inaction) by the Beneficiary in respect of any such security, guarantee or other means of payment shall prejudice or affect the liability of the Guarantor hereunder.

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- 4.5 The Beneficiary's rights under this Deed of Guarantee are cumulative and not exclusive of any rights provided by law and may be exercised from time to time and as often as the Beneficiary deems expedient.
- 4.6 Any waiver by the Beneficiary of any terms of this Deed of Guarantee, or of any Guaranteed Obligations shall only be effective if given in writing and then only for the purpose and upon the terms and conditions, if any, on which it is given.
- 4.7 Any release, discharge or settlement between the Guarantor and the Beneficiary shall be conditional upon no security, disposition or payment to the Beneficiary by the Guarantor or any other person being void, set aside or ordered to be refunded pursuant to any enactment or law relating to liquidation, administration or insolvency or for any other reason whatsoever and if such condition shall not be fulfilled the Beneficiary shall be entitled to enforce this Deed of Guarantee subsequently as if such release, discharge or settlement had not occurred and any such payment had not been made. The Beneficiary shall be entitled to retain this security after as well as before the payment, discharge or satisfaction of all monies, obligations and liabilities that are or may become due owing or incurred to the Beneficiary from the Guarantor for such period as the Beneficiary may determine.
- 4.8 The Guarantor shall afford any auditor of the Beneficiary appointed under the Call-Off Contract access to such records and accounts at the Guarantor's premises and/or provide such records and accounts or copies of the same, as may be required and agreed with any of the Beneficiary's auditors from time to time, in order that the Auditor may identify or investigate any circumstances which may impact upon the financial stability of the Guarantor.

5 GUARANTOR INTENT

- 5.1 Without prejudice to the generality of Clause 4 (Beneficiary's Protections), the Guarantor expressly confirms that it intends that this Deed of Guarantee:
- (a) shall extend from time to time to any (however fundamental) variation, increase, extension or addition of or to, the Call-Off Contract and any associated fees, costs and/or expenses; and
 - (b) shall not be affected by any act of, unenforceability, illegality or any obligation of, or any insolvency or other similar proceedings relating to, the Call-Off Contract.
- 5.2 This Deed of Guarantee is a continuing guarantee and will extend to the ultimate balance of sums payable by the Supplier to the Beneficiary under the Call-Off Contract, regardless of any intermediate payment or discharge in whole or in part.
- 5.3 The Guarantor waives any right it may have of first requiring the Beneficiary to proceed against or enforce any other rights or claim payment from any person before claiming from the Guarantor under this Deed of Guarantee. This waiver applies irrespective of any law or any provision of the Call-Off Contract to the contrary.



6 RIGHTS OF SUBROGATION

6.1 The Guarantor shall, at any time when there is any default in the performance of any of the Guaranteed Obligations by the Supplier and/or any default by the Guarantor in the performance of any of its obligations under this Deed of Guarantee, exercise any rights it may have:

- (a) of subrogation and indemnity;
- (b) to take the benefit of, share in or enforce any security or other guarantee or indemnity for the Supplier's obligations; and
- (c) to prove in the liquidation or insolvency of the Supplier,

only in accordance with the Beneficiary's written instructions and shall hold any amount recovered as a result of the exercise of such rights on trust for the Beneficiary and pay the same to the Beneficiary on first demand. The Guarantor hereby acknowledges that it has not taken any security from the Supplier and agrees not to do so until Beneficiary receives all monies payable hereunder and will hold any security taken in breach of this Clause on trust for the Beneficiary.

7 DEFERRAL OF RIGHTS

7.1 Until all amounts which may be or become payable by the Supplier under or in connection with the Call-Off Contract have been irrevocably paid in full, the Guarantor agrees that, without the prior written consent of the Beneficiary, it will not:

- (a) exercise any rights it may have to be indemnified by the Supplier;
- (b) claim any contribution from any other guarantor of the Supplier's obligations under the Call-Off Contract;
- (c) take the benefit (in whole or in part and whether by way of subrogation or otherwise) of any rights of the Beneficiary under the Call-Off Contract or of any other guarantee or security taken pursuant to, or in connection with, the Call-Off Contract;
- (d) bring legal or other proceedings for an order requiring the Supplier to make any payment, or perform any obligation, in respect of which the Guarantor has given a guarantee, undertaking or indemnity under Clause 2 (Guarantee and indemnity);
- (e) demand or accept repayment in whole or in part of any indebtedness now or hereafter due from the Supplier; or
- (f) claim any set-off or counterclaim against the Supplier.

7.2 If the Guarantor receives any payment or other benefit or exercises any set off or counterclaim or otherwise acts in breach of this Clause 7, anything so received and any benefit derived directly or indirectly by the Guarantor therefrom shall be held on trust for the Beneficiary and applied in or towards discharge of its obligations to the Beneficiary under this Deed of Guarantee.



8 REPRESENTATIONS AND WARRANTIES

The Guarantor hereby represents and warrants to the Beneficiary that:

- (a) the Guarantor is duly incorporated and is a validly existing company under the laws of its place of incorporation, has the capacity to sue or be sued in its own name and has power to carry on its business as now being conducted and to own its property and other assets;
- (b) the Guarantor has full power and authority to execute, deliver and perform its obligations under this Deed of Guarantee and no limitation on the powers of the Guarantor will be exceeded as a result of the Guarantor entering into this Deed of Guarantee;
- (c) the execution and delivery by the Guarantor of this Deed of Guarantee and the performance by the Guarantor of its obligations under this Deed of Guarantee have been duly authorised by all necessary corporate action and do not contravene or conflict with:
 - (i) the Guarantor's memorandum and articles of association or other equivalent constitutional documents;
 - (ii) any existing law, statute, rule or regulation or any judgment, decree or permit to which the Guarantor is subject; or
 - (iii) the terms of any agreement or other document to which the Guarantor is a Party or which is binding upon it or any of its assets;
- (d) all governmental and other authorisations, approvals, licences and consents, required or desirable, to enable it lawfully to enter into, exercise its rights and comply with its obligations under this Deed of Guarantee, and to make this Deed of Guarantee admissible in evidence in its jurisdiction of incorporation, have been obtained or effected and are in full force and effect;
- (e) this Deed of Guarantee is the legal, valid and binding obligation of the Guarantor and is enforceable against the Guarantor in accordance with its terms;
- (f) any unsecured and unsubordinated claims of the Beneficiary against it under this Deed of Guarantee rank at least pari passu with the claims of all its other unsecured and unsubordinated creditors, except for those creditors whose claims are mandatorily preferred by laws applying to companies generally;
- (g) no litigation, arbitration or administrative proceedings or investigations of, or before, any court, arbitral body or agency have (to the best of its knowledge and belief (having made due and careful enquiry)) been started or threatened against it, nor is there subsisting any unsatisfied judgement or award given against any of them by any court, arbitrator or other body; and
- (h) it has not taken any action nor (to the best of its knowledge and belief) have any steps been taken or legal proceedings been started or threatened against it for its

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winding-up, dissolution or re-organisation, for the enforcement of any security over its assets or for the appointment of a liquidator, supervisor, receiver, administrator, administrative receiver, compulsory manager, trustee or other similar officer of it or in respect of any of its assets.

9 PAYMENTS AND SET-OFF

- 9.1 All sums payable by the Guarantor under this Deed of Guarantee shall be paid without any set-off, lien or counterclaim, deduction or withholding, howsoever arising, except for those required by law, and if any deduction or withholding must be made by law, the Guarantor will pay that additional amount which is necessary to ensure that the Beneficiary receives a net amount equal to the full amount which it would have received if the payment had been made without the deduction or withholding.
- 9.2 The Guarantor shall pay interest on any amount due under this Deed of Guarantee at the applicable rate under the Late Payment of Commercial Debts (Interest) Act 1998, accruing on a daily basis from the due date up to the date of actual payment, whether before or after judgement.
- 9.3 The Guarantor will reimburse the Beneficiary for all legal and other costs (including VAT) incurred by the Beneficiary in connection with the enforcement of this Deed of Guarantee.

10 GUARANTOR'S ACKNOWLEDGEMENT

The Guarantor warrants, acknowledges and confirms to the Beneficiary that it has not entered into this Deed of Guarantee in reliance upon, nor has it been induced to enter into this Deed of Guarantee by any representation, warranty or undertaking made by or on behalf of the Beneficiary (whether express or implied and whether pursuant to statute or otherwise) which is not set out in this Deed of Guarantee.

11 ASSIGNMENT

- 11.1 The Beneficiary shall be entitled to assign or transfer the benefit of this Deed of Guarantee at any time to any person without the consent of the Guarantor being required and any such assignment or transfer shall not release the Guarantor from its liability under this Guarantee.
- 11.2 The Guarantor may not assign or transfer any of its rights and/or obligations under this Deed of Guarantee.

12 SEVERANCE

If any provision of this Deed of Guarantee is held invalid, illegal or unenforceable for any reason by any court of competent jurisdiction, such provision shall be severed and the remainder of the provisions hereof shall continue in full force and effect as if this Deed of Guarantee had been executed with the invalid, illegal or unenforceable provision eliminated.



13 THIRD PARTY RIGHTS

Other than the Beneficiary, a person who is not a Party to this Deed of Guarantee shall have no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Deed of Guarantee. This Clause does not affect any right or remedy of any person which exists or is available otherwise than pursuant to that Act.

14 SURVIVAL

This Deed of Guarantee shall survive termination or expiry of the Call-Off Contract.

15 AMENDMENTS AND WAIVERS

Any term of this Deed of Guarantee may be amended or waived only with the written consent of the Guarantor and the Beneficiary.

16 COUNTERPARTS

This Deed of Guarantee may be executed in any number of counterparts, and this has the same effect as if the signatures on the counterparts were on a single copy of this Deed of Guarantee.

17 GOVERNING LAW

- 17.1 This Deed of Guarantee and any non-contractual obligations arising out of or in connection with it shall be governed by and construed in all respects in accordance with English law.
- 17.2 The Guarantor irrevocably agrees for the benefit of the Beneficiary that the courts of England shall have jurisdiction to hear and determine any suit, action or proceedings and to settle any dispute which may arise out of or in connection with this Deed of Guarantee and for such purposes hereby irrevocably submits to the jurisdiction of such courts.
- 17.3 Nothing contained in this Clause shall limit the rights of the Beneficiary to take proceedings against the Guarantor in any other court of competent jurisdiction, nor shall the taking of any such proceedings in one or more jurisdictions preclude the taking of proceedings in any other jurisdiction, whether concurrently or not (unless precluded by applicable law).
- 17.4 The Guarantor irrevocably waives any objection which it may have now or in the future to the courts of England being nominated for the purpose of this Clause on the ground of venue or otherwise and agrees not to claim that any such court is not a convenient or appropriate forum.
- 17.5 [The Guarantor hereby irrevocably designates, appoints and empowers [the Supplier] [a suitable alternative to be agreed if the Supplier's registered office is not in England or Wales] either at its registered office or on facsimile number [insert fax no.] from time to time to act as its authorised agent to receive notices, demands, service of process and any other legal summons in England and Wales for the purposes of any legal action or proceeding brought or to be brought by the Beneficiary in respect of this Deed of Guarantee. The Guarantor hereby



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irrevocably consents to the service of notices and demands, service of process or any other legal summons served in such way.]

IN WITNESS whereof the Guarantor has caused this instrument to be executed and delivered as a Deed the day and year first before written.

EXECUTED as a DEED by

[Insert name of the Guarantor] acting by [Insert/print names]

Director

Director/Secretary

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