

SCHEDULE 19**DEFFORM 24**

(Edn 10/14)

THIS DEED OF GUARANTEE AND INDEMNITY GIVEN BY A PARENT COMPANY IN RESPECT OF A SUBSIDIARY

is made the [] day of [] 20[]

BETWEEN:

(1) [Insert the name of the name of the Guarantor] [[a company incorporated in England and Wales with number [] whose registered office is at []] or [a company incorporated under the laws of [insert country] registered in [insert country] with number [] at [insert place of registration] whose principal office is at []] (“the **Guarantor**”); in favour of

(2) THE SECRETARY OF STATE FOR DEFENCE (“the **Authority**”)

WHEREAS:

(A) The Authority proposes to award contract number [insert number] (“the **Contract**”) to [insert contractor’s full corporate name] [insert company registration number] whose registered office is at [insert details] (“the **Contractor**”).

(B) It is a condition precedent of the Authority entering into the Contract with the Contractor that the Guarantor must first execute and deliver this Deed of Guarantee and Indemnity to the Authority.

Now in consideration of the Authority entering into the Contract, the Guarantor hereby irrevocably and unconditionally agrees with the Authority as follows:

1. The Guarantor shall provide all resources and facilities whether financial or otherwise to enable the Contractor duly to fulfil its obligations in and arising from the Contract subsisting between the Authority and the Contractor at the date of this deed or which shall be entered into at any time after the date of this deed between the Authority and the Contractor (the **'Indemnified Obligations'**);

2. If:

a) the Contractor shall fail in any respect duly to perform and observe, or shall otherwise be in breach of, any of the Indemnified Obligations; or

b) any of the Indemnified Obligations are or become void, voidable, unenforceable or otherwise ineffective; or

c) the Contract is terminated owing to a breach or an event of default on the part of the Contractor; or

d) a receiver, administrative receiver, administrator, liquidator or similar officer is appointed over any or all of the Contractor's undertaking or assets;

then, forthwith on demand from the Authority the Guarantor shall, as a primary obligation, indemnify the Authority against all losses, claims, liabilities, damages, expenses and costs which may be incurred, met or suffered by the Authority and which arise from or in connection with (whether directly or indirectly) any such matters save that, subject to the other provisions of this deed, the liability of the Guarantor under this clause shall not exceed the liability of the Contractor to the Authority under the Contract.

3. The Guarantor irrevocably and unconditionally undertakes that all sums received or recovered by the Authority:

a) by way of dividend, composition or payment arising from the liquidation, bankruptcy or otherwise of the Contractor may be taken and applied by the Authority in part satisfaction of the losses, claims, liabilities, damages, expenses and costs referred to in paragraph 2 above, and the Guarantor's obligations under this deed shall stand good in respect of the balance;

b) under this deed, may be credited to a suspense account and held in such account for so long as the Authority thinks fit pending the application of such monies towards the payment of the Indemnified Obligations;

c) from the Contractor in respect of any of the Indemnified Obligations, may be applied by the Authority in any manner and in any order towards any debts owed by the Contractor to the Authority (whether or not relating to the Indemnified Obligations) as the Authority may determine (notwithstanding any appropriation or purported appropriation by any person);

4. The Guarantor shall have no right to be subrogated to the Authority and shall not make any claim against the Contractor (unless instructed so to do by the Authority, in which event the Guarantor shall make such a claim) in respect of the Guarantor's performance under this deed, until the Authority has received payment in full of its claim against the Contractor;

5. This deed shall not be affected by any insolvency (including, without limitation, winding up, administration, receivership or administrative receivership), amalgamation, reconstruction, change of name, ownership, control or status or any legal limitation relating to, by or of the Contractor or any other person or, where the Contractor is a partnership, by any change in the partners;

6. The Guarantor shall not be discharged or released from its obligations under this deed:

a) by any arrangement or agreement made between the Authority and the Contractor or a receiver, administrative receiver, administrator, liquidator or similar officer of the Contractor: or

b) by any renegotiation, substitution, alteration, amendment or variation (however fundamental) and whether or not to the Guarantor's disadvantage, to or of, the obligations imposed upon the Contractor or any other person; or

c) by any forbearance granted by the Authority to the Contractor or any other person as to payment, time, performance or otherwise; or

d) by any release or variation (however fundamental) of, any invalidity in, or any failure to take, perfect or enforce any other indemnity, guarantee or security in respect of the obligations to which this deed relates; or

e) by any other matter or thing which but for this provision might exonerate the Guarantor and this notwithstanding that such arrangement, agreement, renegotiation, substitution, alteration, amendment, variation, forbearance, matter or thing may have been made, granted or happened without the Guarantor's knowledge or assent;

7. No failure to exercise or any delay in exercising on the Authority's part any right or remedy under this deed or under the Contract or any other agreement shall operate as a waiver of such right or remedy;

8. Any certificate or determination by the Authority of the amount due under this deed or under the Contract shall be, in the absence of manifest error, conclusive evidence of the matters to which it relates;

9. No settlement or discharge between the Authority and the Guarantor or the Contractor shall be effective if any payment to the Authority in respect of the Contractor's or the Guarantor's obligations to the Authority is avoided or reduced by virtue of any provisions or enactments relating to bankruptcy, insolvency, liquidation or similar laws of general application from time to time and if such payment is so avoided or reduced, the Authority shall be entitled to recover from the Guarantor the amount of such payment as if such settlement or discharge had not occurred;

10. The Authority shall not be obliged, before exercising any of its rights under this deed, to take any action against, or make any demand from, the Contractor or any other person;

11. The Guarantor's obligations under this deed are continuing obligations and shall not be considered satisfied, settled or terminated by the Authority giving any approvals, or taking delivery of any goods, or accepting any performance under the contract and no single, cumulative or partial exercise by the Authority of any right or remedy under or arising from this deed shall prevent any further exercise;

12. All payments under this deed shall be made without set-off, counter-claim or other deduction;

13. The Guarantor shall be bound by all court judgments or arbitration awards relating to the contract or any dispute or matter between the Authority and the Contractor;

14. This deed shall be governed by and construed in accordance with English law. The parties irrevocably submit to English jurisdiction to the exclusion of all foreign jurisdiction, save that foreign jurisdictions may apply solely for the purposes of giving effect to this paragraph and for the enforcement of any judgment, order or award given under English jurisdiction.

[The following clause should only be used where the Guarantor is a company incorporated outside of England and Wales]

15. The Guarantor irrevocably appoints Messrs [insert name and address of firm of Solicitors in England or Wales], Solicitors as its agents to accept on its behalf service of all process and

other documents of whatever description to be served on the Guarantor in connection with this Deed or any related matter.

Delivered as a deed on the date of this document.

Executed as a deed by [insert corporate name].

in the presence of Director

..... Director or Company Secretary

Explanatory Notes

1. These explanatory notes are to assist in the completion of the DEFFORM 24 and should not be included in your completed Deed of Guarantee and Indemnity.
2. DEFFORM 24 is a Deed of Guarantee and Indemnity given by a Parent Company in respect of a Subsidiary. It is designed to cover a specific single contract entered into with the MOD by the subsidiary. The purpose of obtaining a Parent Company guarantee and indemnity is to ensure that the company is in a position to be able to execute the contract properly and, failing that, the MOD is reimbursed for any extra expenditure it may incur in making arrangements to have the contract completed elsewhere.
3. Where the company is able to offer a guarantee and indemnity from a parent (holding) company, commercial officers should ensure that they seek the guarantee and indemnity from the ultimate parent (holding) company in the group, rather than an intermediate parent (holding) company, or any other intermediate parent (holding) company where such exists. In such cases the MOD will wish to be satisfied as to the parent (holding) company's ability to provide the cover required, having regard to its financial resources and prospects. You should always ask Cost Assurance and Analysis Service - Industry Analysis (CAAS IA) to advise on this. Where the proposed contract is large, this may entail the holding company agreeing to a separate assessment by CAAS IA. In order to assure consistency throughout the MOD only this DEFFORM can be used as a Deed of Guarantee and Indemnity being given by a Parent Company.

Guidance On Completion

4. The specimen wording of the DEFFORM should be suitable for most circumstances and should not be changed at the request of a Guarantor. You must seek Central Legal Services – Commercial Law (CLS-CL) advice if the Guarantor requests a revision to the template DEFFORM or if the proposed Guarantor is a company registered outside England and Wales. In the latter case, you will need to seek legal advice to confirm both that the proposed Guarantor has power (under its own corporate rules and the laws of its home country) to enter into the deed and that it has executed the deed in a manner that makes it legally binding on the Guarantor.

Introductory Paragraph

5. Insert the contractor's name and, if applicable, registration number of the contractor (unless the contractor is a UK partnership or an overseas company it will be shown on the company letterhead) and the contract / tender details and dates and edit as appropriate.

Paragraph 1

6. Covers the Guarantor's obligations to the MOD to provide all resources and facilities (financial or otherwise) to enable the contractor to meet its obligations under the contract.

Paragraph 2

7. Covers the circumstances under which the guarantee and indemnity may be activated. This also requires the Guarantor to indemnify the MOD on demand against all losses and costs which the MOD has incurred as a result of these circumstances. However, the MOD cannot claim more under this paragraph from the Guarantor than they could claim from the contractor

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under the contract. If the contract contains a Limitation of Contractor's Liability, this will automatically apply to the indemnity under paragraph 2 of DEFFORM 24.

Paragraph 3

8. Covers the way in which any sums received by the MOD from either the contractor and / or the Guarantor may be used.

Paragraph 4

9. Covers the essential requirement of subrogation (the substitution in law of one party for another as the creditor). This will normally ensure that the Guarantor fulfils its obligations to the MOD before it takes any action to recover any claims of its own from the contractor. However, it also provides for the Guarantor to claim its right of subrogation if instructed to do so by the MOD, if that avenue would mean that it is able to recover money from a contractor in liquidation, which would then enable the Guarantor to meet the MOD claim.

Paragraph 5

10. Maintains the validity of this guarantee and indemnity even if the contractor changes its name, status and even ownership or control etc.

Paragraph 6

11. Prevents the Guarantor from subsequently avoiding its responsibilities even if there have been any amendments to the underlying contract.

Paragraph 7

12. Safeguards the MOD in the event of the MOD's failure or delay to call on the guarantee and indemnity.

Paragraph 8

13. The MOD may self-certify the amount of any demand for payment under the guarantee and indemnity. The Guarantor may only challenge this in cases of "manifest error".

Paragraph 9

14. Covers the scenario where the MOD may have received payment in settlement of a dispute but that payment then becomes void (e.g. if the payee soon thereafter becomes insolvent). The Guarantor still remains liable for the amount of the voided payment.

Paragraph 10

15. Confirms that MOD may seek recompense from the Guarantor without first having to attempt to make recovery from the contractor.

Paragraph 11

16. Confirms that the MOD taking delivery of goods, accepting performance under the contract or making any claim under the deed, does not relieve the Guarantor from its ongoing liability under the deed. This is to prevent accidental waiver of the MOD's rights.

Paragraph 12

17. This is self explanatory.

Paragraph 13

18. Prevents the Guarantor from claiming that it may not be bound by an arbitrator's decision against a contractor, which could force the MOD to litigate the same point a second time with the possibility that a different court may reach a different conclusion.

Paragraph 14

19. Confirms that English law applies to the indemnity, no matter which national law may apply to any contract. Also, if the contractor is not subject to English law, the MOD may use the contractor's national law in order to enforce any claim that may be agreed.

Paragraph 15

20. Delete this clause if the Guarantor is an English company (i.e. a company incorporated in England or Wales). If the Guarantor is a foreign company, then the paragraph should be retained. In either case you should delete the introductory words in bold.

Execution

Insert the full corporate name of the Guarantor in the execution clause, where indicated. For the deed to be effective it is essential that it is signed by two directors of the Guarantor or by one director and the company secretary. It is now not strictly necessary for the Guarantor to apply its corporate seal - although the MOD may request it.