

ICT SERVICES AGREEMENT SCHEDULES

SCHEDULE 10

GUARANTEE

CONTENTS

Section A:	Product Description
Section B:	Guidance
Section C:	Pro-forma/Example schedule

Section A

Product Description

1. PRODUCT TITLE

ICT Services Agreement - Schedule 10 (Guarantee).

2. PURPOSE OF PRODUCT

- The schedule sets out the standard terms and conditions of the Guarantee to be entered into by an institution guaranteeing the obligations of the Contractor under the Agreement (typically this will be the Contractor's parent company or the ultimate holding company of the Contractor's group).
- A guarantee will not be required in all projects and is unlikely to be required unless the project is complex and/or high value or there are particular concerns regarding the creditworthiness of the Contractor.

3. COMPOSITION

The guarantee will usually be an "all obligations" guarantee covering both the financial and performance obligations of the Contractor under the Agreement. The type of guarantee that is appropriate will depend on the assessment of the technical ability and creditworthiness of the bidders (full guidance on carrying out this assessment is given in Section B).

4. DERIVATION

The guarantee will be on standard terms and conditions depending on the nature of the guarantee required.

5. RELATED CLAUSES & SCHEDULES

Clauses: See guidance to clause 1 (Condition Precedent),

46 (Guarantee)

See guidance to clause 53 and clause 53.2 (Insurance)

55.1.5.8, 55.1.5.10 and 55.1.5.11 (Termination Rights)

Definitions: "Guarantee", "Guarantor"

6. ALLOCATION

The requirement for a guarantee should be assessed early on in the procurement and a standard form guarantee circulated to bidders at the dialogue stage (if appropriate). Please note that EU procurement rules stipulate that a bidders' creditworthiness and technical capacity may only be evaluated at the pre-qualification stage as criteria for shortlisting the bidders. The financial standing of a bidder is not permitted as a criteria for the evaluation of bidders during the contract award process.

7. QUALITY/REVIEW

- Where a guarantee is required, the Authority should resist substantive changes to the standard form guarantee and should not make any changes without seeking financial and legal advice as to the implications.
- Authority expertise: technical, commercial/procurement, financial, legal.

Section B

Guidance

1. INTRODUCTION

- 1.1 This section B sets out guidance in relation to assessing the creditworthiness and technical capacity of the Contractor and determining: (i) whether a guarantee is required; and (ii) if a guarantee is required, what the extent and scope of that guarantee should be. The different forms and effects of various types of guarantee are also considered.
- 1.2 It is important that the Authority approaches the question of a guarantee on the basis that it should only be sought if required, rather than on the basis that it should be sought in all cases unless it is proven that it is not required.
- 1.3 It should be noted that this guidance refers to 'Contractor' rather than 'bidder' for ease of reference. In practice however, the evaluation of each Contractor's creditworthiness must be undertaken at the qualification stage under EU procurement law. Authorities are not permitted to use financial standing as a criteria for evaluating each of the bidders during the contract award process (i.e. during the ITT stage). The Authority must therefore satisfy itself that it has carried out sufficient due diligence in respect of the financial standing of each of the bidders to determine whether it will be necessary to obtain a guarantee from each if it were to succeed in the competition.

2. PRINCIPLES

The objective is to contract with suppliers who are financially and technically capable of performing their obligations under the Agreement and will remain so throughout the term of the Agreement. To achieve this three questions need to be answered:

- 2.1 **Who is the Contractor?** The person with whom the Agreement is entered into, the Contractor, needs to be identified.
- 2.2 **Does the Contractor have the financial and technical capability to perform the contract?** This question needs to be answered on the assumption that the delivery of the Services is not trouble free. Does the Contractor need the financial and technical support of the group of companies of which it is a member and, if so, how is that to be achieved?

- 2.3 **How could the answers to the above questions change during the course of the Agreement?** If the relative financial position of the Contractor and/or any member of the group providing credit support changes for the worse, how will this be monitored and, given that the Agreement has already been let, what form of additional protection will the Authority seek and will it be available?

The answers to these questions will influence the way in which the transaction is structured, the extent to which guarantees are required and from whom, and what ongoing covenants the Contractor and any guarantors have to provide.

3. THE ASSESSMENT PROCESS

- 3.1 The most important question is to identify the Contractor. The Contractor is the legal entity with which the Authority is entering into an agreement for the provision of services. It is essential to ensure that the party that enters into the formal legal documentation is the entity that has previously been identified as the Contractor and in respect of which the issue of credit has been considered.
- 3.2 The Contractor should be identified by ascertaining the following information about the Contractor:
- 3.2.1 Company name (assuming that it is a single corporate entity);
 - 3.2.2 Jurisdiction in which the company is incorporated, generally this will be England and Wales; and
 - 3.2.3 Company registration number, this is a unique number by which English and Welsh companies are identifiable irrespective of changes of name (for companies incorporated in England and Wales this information can be obtained from www.companieshouse.gov.uk).
- 3.3 If the counterparty offered by a Contractor is a company incorporated in the United Kingdom or Ireland, the registration requirements are essentially the same, but bear in mind that the legal systems of Scotland, Northern Ireland and the Republic of Ireland are distinct from those in England and Wales and local legal advice will be required.
- 3.4 If a Contractor is incorporated anywhere outside the United Kingdom then specialist advice needs to be taken, if only to confirm the legal status and powers of the company to enter into the proposed transaction. Legal advice will also be required

where an entity other than a single company registered under the relevant Companies Acts is offered as the Contractor, for instance, a partnership of companies or an industrial and provident society.

- 3.5 The next stage is to make an assessment of the technical and financial capabilities of the Contractor. The first step is to obtain the latest audited accounts of the Contractor. If the accounts were drawn up to a date more than six months previously, then a request should be made for updated financial statements. Concern should arise if the filing or production of accounts are late. The second step is to assess the Contractor in the context of its group. This means identifying the ultimate holding company of the Contractor and the extent of its operations other than through the Contractor in the UK, in Europe and elsewhere.
- 3.6 Depending on the scope and extent of the Services, it may be readily apparent that the Contractor is either itself financially and technically capable of providing those services; or, alternatively, can only do so with the support, financial and/or technical of other companies within its group.
- 3.7 The following tests should be applied to the Contractor itself, ignoring any assets and expertise of the group of which it forms part. These tests are only an initial indication as to whether there is likely to be a credit issue
 - 3.7.1 How long has the Contractor been trading at or about its current level of activity? If the Contractor has been trading at or about its current level for less than five years, then an explanation should be sought regarding its establishment and whether its trading activities were previously carried on by a predecessor within the same group.
 - 3.7.2 Is the Contractor profitable in its own right, has it been profitable for the last three years, if not, why not?
 - 3.7.3 Are the profits, turnover and the net worth (shareholders funds) of the Contractor commensurate with the obligations that it is assuming under the proposed Agreement? There should be concern if the revenues from the proposed Agreement would amount to more than [20%] of the total revenues of the Contractor in the previous full year for which accounts exist. This is because, if performance of the Agreement forms a high proportion of the total activity of the Contractor, then problems or lack of profitability of the

Agreement could tempt the group of which the Contractor forms part to abandon the Contractor without thereby damaging any other party of their business activities.

3.7.4 What is the ratio of shareholders' funds to debt on the balance sheet of the Contractor? Two of debt to one of shareholders' funds would be reasonable, any major deviation from that would call for an explanation.

3.8 Having looked at the financial position of the Contractor, a further assessment of its technical capabilities needs to be made. Are the key individuals to be involved in the Agreement employees of the Contractor or of some other group member or the parent company? Is any key technology or finance being provided from a group company rather than the Contractor? There will be an assessment of the extent to which the Contractor is dependent upon sub-contractors for delivery of the Agreement, in relation to technologies, personnel and resources. The general appraisal of the dependence of the Contractor on sub-contractors will, however, generally have treated the Contractor and its group companies as a single entity, while, from a credit perspective, it is necessary to assess the Contractor as a stand alone entity and to determine the extent to which companies that are members of its group need to be tied in legally to support the Contractor.

3.9 If you cannot confirm that the Contractor has the necessary financial and technical expertise *itself*, to fulfil its obligations under the Agreement, then you will need to consider how support should be provided to the Contractor from other group members.

3.10 In making an assessment of the Contractor, it is essential that only the assets and capabilities of that entity are considered. If assets and expertise are in subsidiaries of the Contractor then that needs to be noted. Making a credit assessment is a specialised discipline and the pointers set out above are no substitute for an informed credit report which should be obtained from a specialist provider before signature of the Agreement.

4. CREDIT SUPPORT AND GUARANTEES

4.1 If the Contractor has insufficient financial and technical resources to be able to perform its obligations under the Agreement and to cope with possible problems, then credit support should be sought from other companies in its group. Where technical

resources are only available from sub-contractors outside the Contractor's group, then those key sub-contractors will need to be assessed for creditworthiness in the same way as a Contractor and appropriate direct agreements taken from them to protect the Authority in the event of Contractor default. Protecting the Authority by taking direct agreements from sub-contractors is outside the scope of this part of the guidance.

- 4.2 Support for a Contractor from members of its group will generally be by way of some form of guarantee of the obligations of the Contractor or an indemnity to the Authority in the event of the Contractor failing or being unable to perform its obligations under the Agreement.
- 4.3 A guarantee has three main purposes:
 - 4.3.1 first, to prevent the "group" from allowing the Contractor to default on the Agreement without there being consequences for the rest of the group;
 - 4.3.2 second, to make the group financially responsible for any payments required to be made by the Contractor to the Authority under the Agreement whether by way of penalties, damages or otherwise; and
 - 4.3.3 third, if the Contractor fails, in the sense of becoming insolvent, whether because of events stemming from the Agreement or otherwise, the group will take responsibility for completion of the Agreement.
- 4.4 A full guarantee will, therefore, need to include three obligations on the guarantor:
 - 4.4.1 to pay any financial obligations of the Contractor to the Authority that are not met on demand;
 - 4.4.2 to indemnify the Authority against the consequences of default by the Contractor under the Agreement; and
 - 4.4.3 for the guarantor to procure performance by the Contractor of its obligations under the Agreement and for the guarantor to assume those obligations as principal following termination of the Agreement, whether by the Authority or because the Agreement is disclaimed as an onerous contract by a liquidator of the Contractor.

- 4.5 The identity of the guarantor or guarantors should be assessed in the same way as the assessment as to whether the Contractor is financially and technically capable of performing its obligations under the Agreement.
- 4.6 In UK law a guarantor will need to identify some form of corporate benefit from the provision of a guarantee. Directors owe certain fiduciary duties to the company, one of which is that they must act in the best interests of the company at all times. It flows from this principle that there must be some degree of corporate benefit for the company granting the guarantee. In the context of intra-group guarantees this is of particular importance as the directors must have regard to the benefits derived by the guarantor itself and not just the group of companies. Commercial benefit is generally more easily demonstrated in the case of guarantees granted by a parent to a subsidiary rather than guarantees given to sister companies. If a guarantor believes that there is insufficient corporate benefit to provide security, it may still do so, provided that:
- 4.6.1 the company's shareholders unanimously direct the security to be given; and
 - 4.6.2 the company itself is not insolvent either at the time of giving the security, or immediately following the giving of the security.

In most cases it will be prudent for the Authority to seek evidence from the guarantor that the granting of security has been considered and approved by the board of directors, or in the absence of corporate benefit, a resolution of the shareholders ratifying the decision to grant security as outlined above.

- 4.7 In assessing the extent and nature of the guarantees that are required, the following points may be helpful:
- 4.7.1 a starting point should be the ultimate holding company of the Contractor, for which it will be necessary to understand the group structure. This will be the case even if the ultimate holding company is incorporated outside the UK, although there will probably be pressure to accept a guarantee from a company that is not itself a quoted company;
 - 4.7.2 consider how a guarantee would be enforced where the guarantor is not a UK incorporated company and/or does not have substantial assets in the UK. In practice this will mean taking legal advice on the methods of enforcement outside the UK;

- 4.7.3 consider taking guarantees from more than one entity, for instance, an ultimate holding company that is non UK incorporated and a substantial UK trading subsidiary other than the Contractor; and
- 4.7.4 consider whether it might be preferable to make another company, other than the Contractor either the sole counterparty to the Agreement or jointly and severally liable with the Contractor. If the other company becomes the counterparty, then the Contractor could act as sub-contractor and also provide a guarantee.

4.8 Three warnings

- 4.8.1 When assessing creditworthiness, bear in mind that a guarantee only gives rise to an unsecured claim against the guarantor unless security is taken over "real" assets: cash, real property or shares in subsidiaries. If things start to go wrong with a group financially, creditors are likely to close in and secured creditors are likely to benefit more than unsecured in any resulting insolvency.
- 4.8.2 Insolvency laws and laws relating to guarantees are different outside the UK, for instance, where a guarantee is obtained from a US corporation, it could be rendered worthless and unenforceable under Chapter 11 of the US Bankruptcy code, local law advice is therefore essential both to ensure that the guarantee is enforceable and also to understand the limits and potential difficulties in enforcement.
- 4.8.3 If a guarantor is incorporated outside the United Kingdom it is advisable to obtain evidence to ensure that the signatories to the guarantee have the requisite authority to execute the Agreement on behalf of the guarantor. Alternatively if the guarantor does not have an authorised signatory in the UK it may be necessary for the guarantor to execute the guarantee under power(s) of attorney granted to one or more of its senior managers. Further specialist advice may be needed in order to verify the evidence produced to the Authority or to verify the power of attorney.

5. CONTINUING MONITORING

- 5.1 Having satisfied yourself as to the credit position at the date on which the Agreement is let, and obtained such guarantees as are required to support the Contractor, you will need to consider how you will monitor the continuing financial health of the Contractor and any guarantor. If your monitoring highlights that the financial health of either the Contractor or the guarantor is deteriorating, you must consider what remedies you will employ to protect the Authority's position. Schedule 7.4 (Financial Distress) sets out a detailed mechanism for monitoring the financial standing of the Contractor and could be expanded to cover a Guarantor if appropriate.
- 5.2 For substantial projects it is usual for the Authority to make available the resources necessary to operate a sophisticated performance monitoring regime which observes the financial status of the Contractor and any guarantor (see schedule 7.4 (Financial Distress)). Such arrangements will include regular bespoke reporting obligations on the Contractor and multi level risk analysis with escalating monitoring and financial security requirements placed on the Contractor. Such an approach is not generally appropriate, for smaller projects where the Authority will not be prepared to take on the burden of managing detailed reporting requirements.
- 5.3 Most groups of companies will have borrowings supported by undertakings given to their banks regarding the financial strength of the group. A simple approach would be to request copies of these covenants and, provided they are appropriate, to incorporate them as obligations owed to the Authority under the Agreement or in the guarantee. These covenants are likely to include obligations to submit financial information and to maintain certain financial ratios. Once an initial decision has been taken by the Authority to let the contract and the credit support required at that stage has been put in place, the Authority's principal interest in monitoring is to identify deterioration and, consequently, it is less interested in the absolute level of the covenants and more in any change. The aim should be to have a seat at the table with the group's banks if the group seek a relaxation of the covenants or if the group is otherwise in financial difficulty.
- 5.4 If the group holding company is not a guarantor, then any change in the net assets or activity of the Contractor or guarantors should lead to a requirement to provide additional credit support in the form of security or guarantees. The Authority should seek a twofold protection, namely:

- 5.4.1 an obligation on the Contractor and guarantors not to make any disposal of any material part of their undertaking or business; and
- 5.4.2 an obligation not to allow their tangible net worth or earnings to decline below a certain level, alternatively there could be a more general prohibition on "material adverse change".

These obligations would be supported by covenants to provide information and certification that no breach has occurred, as one would expect in the "banking" financial covenants referred to in the previous paragraph.

- 5.5 If the ultimate holding company is not a guarantor, it might be possible to obtain a letter of "comfort" or "support" in respect of the continued solvency and substance of the Contractor and guarantors. This letter could be legally binding and might include an obligation not to permit the Contractor to become insolvent. Such an undertaking may be more acceptable than a guarantee obligation, but it is, equally, less easily enforced and provides less protection to the Authority.
- 5.6 Banking covenants suffer from the disadvantage that they tend to concentrate on financial issues and whereas an Authority also has concerns over the technical capabilities of the Contractor. It might be appropriate to include covenants regarding the continued employment of key individuals or the holding of resources within the guarantor and/or Contractor.
- 5.7 A more difficult question is as to the consequences of a breach of the financial covenants or the occurrence of a material adverse change in the position of a Contractor or guarantor. The options include:
 - 5.7.1 termination of the Agreement - which may be regarded as an over reaction and/or an unacceptable consequence for the Contractor;
 - 5.7.2 requiring additional credit support in the form of guarantees or security over real assets, a group that is in financial difficulties may have problems providing additional security; or
 - 5.7.3 increased monitoring and taking steps to reduce the Authority's exposure.
- 5.8 The issue of identifying appropriate remedies is coupled with the consequences of termination of the Agreement and any remedies should seek to improve the

Authority's position in the event of a termination (see guidance to schedule 8.5 (Exit Management)). Section C has a series of escalating sanctions, but the suitability of these, in each case, will need to be considered against an assessment of what best protects the Authority on termination of the Agreement. The aim should be to ensure that the Authority is protected both legally and practically. If the Contractor and its group defaulted or collapsed with no warning, it should not be assumed that the warning signs of deterioration will be revealed by monitoring or that appropriate and effective action can or will be taken to mitigate the Authority's exposure at that stage. Having analysed the Authority's strategy in the case of a sudden and unexpected collapse, consideration can be given as to how monitoring could be used to assist in improving that protection.

6. ALTERNATIVE APPROACHES

Assessing the creditworthiness of a Contractor is part of an overall assessment of the value for money provided by the Agreement. There will be circumstances when either a Contractor will not or cannot provide the credit support that the Authority requires but, credit apart, would be the preferred supplier. In these circumstances the concerns regarding credit need to be recorded and consideration given to reducing the exposure of the Authority to a possible default by the Contractor. Areas that can be addressed in this context will include:

- 6.1 addressing the consequences of a Contractor default on the Authority and ensuring that access to equipment, intellectual property rights and sub-contractors is not dependent upon the continued solvency or existence of the Contractor; and/or
- 6.2 using the payment mechanism to ensure that funds will always be owed by the Authority to the Contractor (and can be withheld on insolvency to meet losses and expenses of the Authority). Alternatively the Authority could ensure that it has the benefit of a bank guarantee or bond to make certain that payment is made of a specified sum, in lieu of withholding.

Section C

Pro-forma/Example schedule

[Insert the name of the Guarantor]

- and -

[Insert the name of the Beneficiary]

DEED OF GUARANTEE

CONTENTS

1.	DEFINITIONS AND INTERPRETATION	16
2.	GUARANTEE AND INDEMNITY	18
3.	OBLIGATION TO ENTER INTO A NEW CONTRACT	19
4.	DEMANDS AND NOTICES.....	19
5.	BENEFICIARY'S PROTECTIONS	20
6.	RIGHTS OF SUBROGATION.....	22
7.	REPRESENTATIONS AND WARRANTIES	23
8.	PAYMENTS AND SET-OFF	24
9.	GUARANTOR'S ACKNOWLEDGEMENT.....	24
10.	ASSIGNMENT.....	24
11.	SEVERANCE.....	25
12.	THIRD PARTY RIGHTS.....	25
13.	GOVERNING LAW.....	25

THIS DEED OF GUARANTEE is made the day of 200[]

BETWEEN:

- (1) *[Insert the name of the Guarantor]* [a company incorporated in England and Wales with number [] whose registered office is at *[insert details of the Guarantor's registered office here]*] [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**"); in favour of
- (2) *[Insert the name of the public sector party to the Guaranteed Agreement]* whose principal office is at [] ("**Beneficiary**")

WHEREAS:

[(A) It is a condition of the Beneficiary entering into the Guaranteed Agreement that the Guarantor executes and delivers this Deed of Guarantee to the Beneficiary.]

[Guidance: Please refer to the guidance regarding the use of conditions precedent found at clause 1.7 of the Agreement.]

(B) The Guarantor has agreed, in consideration of the Beneficiary entering into the Guaranteed Agreement with the Contractor, to guarantee the due performance by the Contractor of all of the Contractor's obligations under the Guaranteed Agreement.

(C) It is the intention of the parties that this document be executed and take effect as a deed.

Now in consideration of the Beneficiary entering into the Guaranteed Agreement, the Guarantor hereby agrees with 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 Guaranteed Agreement;

- 1.2 the words and phrases below shall have the following meanings:
- 1.2.1 "**Guaranteed Agreement**" means the [*Guidance: set out details and brief description of the Agreement*] made between the Beneficiary and the Contractor on [*Guidance: set out date of the Agreement*]; and
- 1.2.2 "**Guaranteed Obligations**" means all obligations of the Contractor to the Beneficiary under the Guaranteed Agreement together with all obligations owed by the Contractor to the Beneficiary that are supplemental to, incurred under, ancillary to or calculated by reference to the Guaranteed Agreement.
- 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 Guaranteed Agreement) 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, 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 guarantees and undertakes to the Beneficiary to procure that the Contractor duly and punctually performs all of the Guaranteed Obligations now or hereafter due, owing or incurred by the Contractor to the Beneficiary.
- 2.2 The Guarantor irrevocably and unconditionally undertakes upon demand to pay to the Beneficiary all monies and liabilities which are now or at any time hereafter shall have become payable by the Contractor to the Beneficiary under the Guaranteed Agreement or in respect of the Guaranteed Obligations.
- 2.3 If at any time the Contractor shall fail to perform any of the Guaranteed Obligations, the Guarantor, as primary obligor, irrevocably and unconditionally undertakes to the Beneficiary that, upon first demand by the Beneficiary it shall, at the cost and expense of the Guarantor:
- 2.3.1 fully, punctually and specifically perform such Guaranteed Obligations as if it were itself a direct and primary obligor to the Beneficiary in respect of the Guaranteed Obligations and liable as if the Guaranteed Agreement had been entered into directly by the Guarantor and the Beneficiary; and
- 2.3.2 indemnify and keep the Beneficiary indemnified against all losses, damages, costs and expenses (including VAT thereon, and including, without limitation, all court costs and all legal fees on a solicitor and own client basis, together with any disbursements,) of whatever nature which may result or which such Beneficiary may suffer, incur or sustain arising in any way whatsoever out of a failure by the Contractor to perform the Guaranteed Obligations save that, subject to the other provisions of this Deed of Guarantee, this shall not be construed as imposing greater obligations or liabilities on the Guarantor than are purported to be imposed on the Contractor under the Guaranteed Agreement.

2.4 As a separate and independent obligation, the Guarantor irrevocably and unconditionally undertakes to indemnify and keep the Beneficiary indemnified on demand against all losses, damages, costs and expenses (including VAT thereon, and including, without limitation, all legal costs and expenses), of whatever nature, whether arising under statute, contract or at common law, which such Beneficiary may suffer or incur if any obligation guaranteed by the Guarantor is or becomes unenforceable, invalid or illegal as if the obligation guaranteed had not become unenforceable, invalid or illegal provided that the Guarantor's liability shall be no greater than the Contractor's liability would have been if the obligation guaranteed had not become unenforceable, invalid or illegal.

3. OBLIGATION TO ENTER INTO A NEW CONTRACT

If the Guaranteed Agreement is terminated for any reason, whether by the Beneficiary or the Contractor, or if the Guaranteed Agreement is disclaimed by a liquidator of the Contractor or the obligations of the Contractor are declared to be void or voidable for any reason, then the Guarantor will, at the request of the Beneficiary enter into a contract with the Beneficiary in terms mutatis mutandis the same as the Guaranteed Agreement and the obligations of the Guarantor under such substitute agreement shall be the same as if the Guarantor had been original obligor under the Guaranteed Agreement or under an agreement entered into on the same terms and at the same time as the Guaranteed Agreement with the Beneficiary.

4. DEMANDS AND NOTICES

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

4.1.1 [Address of the Guarantor in England and Wales]

4.1.2 [Facsimile Number]

4.1.3 [For the Attention of]

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.

- 4.2 Any notice or demand served on the Guarantor or the Beneficiary under this Deed of Guarantee shall be deemed to have been served:
- 4.2.1 if delivered by hand, at the time of delivery; or
 - 4.2.2 if posted, at 10.00 a.m. on the second Working Day after it was put into the post; or
 - 4.2.3 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.
- 4.3 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.
- 4.4 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.

5. BENEFICIARY'S PROTECTIONS

- 5.1 The Guarantor shall not be discharged or released from this Deed of Guarantee by any arrangement made between the Contractor and the Beneficiary (whether or not such arrangement is made with or without the assent of the Guarantor) or by any amendment to or termination of the Guaranteed Agreement or by any forbearance or indulgence whether as to payment, time, performance or otherwise granted by the Beneficiary in relation thereto (whether or not such amendment, termination, forbearance or indulgence is made with or without the assent of the Guarantor) or by the Beneficiary doing (or omitting to do) any other matter or thing which but for this provision might exonerate the Guarantor.
- 5.2 This Deed of Guarantee shall be a continuing security for the Guaranteed Obligations and accordingly:
- 5.2.1 it shall not be discharged by any partial performance (except to the extent of such partial performance) by the Contractor 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;

5.2.2 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 or other incapacity, of the Contractor, the Beneficiary, the Guarantor or any other person;

5.2.3 if, for any reason, any of the Guaranteed Obligations shall prove to have been or shall become void or unenforceable against the Contractor 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

5.2.4 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.

5.3 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 Contractor 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.

5.4 The Beneficiary shall not be obliged before taking steps to enforce this Deed of Guarantee against the Guarantor to obtain judgment against the Contractor or the Guarantor or any third party in any court, or to make or file any claim in a bankruptcy or liquidation of the Contractor or any third party, or to take any action whatsoever against the Contractor 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.

- 5.5 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.
- 5.6 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.
- 5.7 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.

6. RIGHTS OF SUBROGATION

The Guarantor shall, at any time when there is any default in the performance of any of the Guaranteed Obligations by the Contractor 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:

- 6.1 of subrogation and indemnity;
- 6.2 to take the benefit of, share in or enforce any security or other guarantee or indemnity for the Contractor's obligations; and
- 6.3 to prove in the liquidation or insolvency of the Contractor,

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 Contractor and agrees not to do so until Beneficiary receives all

moneys payable hereunder and will hold any security taken in breach of this clause on trust for the Beneficiary.

7. REPRESENTATIONS AND WARRANTIES

The Guarantor hereby represents and warrants to the Beneficiary that:

- 7.1 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;
- 7.2 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;
- 7.3 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 including, without limitation entry into and performance of a contract pursuant to clause 3 have been duly authorised by all necessary corporate action and do not contravene or conflict with:
 - 7.3.1 the Guarantor's memorandum and articles of association or other equivalent constitutional documents;
 - 7.3.2 any existing law, statute, rule or regulation or any judgment, decree or permit to which the Guarantor is subject; or
 - 7.3.3 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;
- 7.4 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; and

7.5 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.

8. PAYMENTS AND SET-OFF

8.1 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.

8.2 The Guarantor shall pay interest on any amount due under this Deed of Guarantee from the day after the date on which payment was due up to and including the date of payment in full (as well after as before any judgment) calculated from day to day at a rate per annum equal to [4%] above the base rate of the Bank of England from time to time in force.

8.3 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.

9. 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.

10. ASSIGNMENT

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. 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.

12. THIRD PARTY RIGHTS

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.

13. GOVERNING LAW

13.1 This Deed of Guarantee shall be governed by and construed in all respects in accordance with English law.

13.2 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.

13.3 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).

13.4 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.

13.5 *[Provision dealing with the appointment of English process agent by a non English incorporated Guarantor]* [The Guarantor hereby irrevocably designates, appoints and empowers [the Contractor] *[a suitable alternative to be agreed if the*

Contractor'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 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