

NEC4

Term Maintenance Contract

Annex 23 – Form of ultimate holding company guarantee DN581359

Commercial and Procurement Team

Somerset County Council

County Hall

Taunton

TA1 4DY

commercialandprocurement@somerset.gov.uk

DATED

PARENT COMPANY GUARANTEE

between

[Guarantor]

and

[Employer]

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This deed is dated

202[]

Parties

- (1) [FULL COMPANY NAME] incorporated and registered in England and Wales with company number [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS] (**Guarantor**)
- (2) SOMERSET [COUNTY] COUNCIL whose office is at County Hall, Taunton, Somerset, TA1 4DY (**Employer**)

BACKGROUND

- (A) By an agreement dated [DATE] (**Agreement**) the Employer agreed to engage [INSERT NAME] (**Contractor**) to provide highway maintenance services.
- (B) It is a condition of the Agreement that the Contractor procures the execution and delivery to the Employer of a parent company guarantee substantially in the form of this guarantee.
- (C) The Guarantor has agreed to guarantee the due performance of the Agreement by the Contractor.

Agreed terms

1. Interpretation

The following definitions and rules of interpretation apply in this guarantee.

1.1 Definitions:

Business Day: a day, other than a Saturday, Sunday or public holiday in England, when banks in London are open for business.

control: has the meaning given in section 1124 of the Corporation Tax Act 2010, and **controls**, **controlled** and the expression **change of control** shall be construed accordingly.

Guaranteed Obligations: has the meaning given in clause 2.1(a) (*Guarantee*).

VAT: value added tax chargeable in the UK.

1.2 Clause headings shall not affect the interpretation of this guarantee.

- 1.3 A **person** includes a natural person, corporate or unincorporated body (whether or not having separate legal personality).
- 1.4 A reference to a **company** shall include any company, corporation or other body corporate, wherever and however incorporated or established.
- 1.5 Unless the context otherwise requires, words in the singular shall include the plural and in the plural include the singular.
- 1.6 A reference to **writing** or **written** email.
- 1.7 A reference to **this guarantee** or to any other agreement or document is a reference to this guarantee or such other guarantee or document, in each case as varied from time to time.
- 1.8 References to clauses are to the clauses of this guarantee.
- 1.9 Any words following the terms **including, include, in particular, for example** or any similar expression shall be construed as illustrative and shall not limit the sense of the words, description, definition, phrase or term preceding those terms.

2. Guarantee and indemnity

- 2.1 The Guarantor:
- (a) guarantees to the Employer and its successors, transferees and assignees the due and punctual performance of all of the Contractor's present and future obligations under and in connection with the Agreement if and when they become due and performable in accordance with the terms of the Agreement (**Guaranteed Obligations**);
 - (b) shall pay to the Employer from time to time on demand all monies (together with interest on such sum accrued before and after the date of demand until the date of payment) which have become payable by the Contractor to the Employer under the Agreement but which has not been paid at the time the demand is made; and
 - (c) shall, if the Contractor fails to perform in full and on time any of its obligations, duties and undertakings under the Agreement, immediately on demand perform or procure performance of the same at its own cost and expenses.
- 2.2 The Guarantor, as principal obligor and as a separate and independent obligation and liability from its obligations and liabilities under clause 2.1 agrees to indemnify and keep indemnified the Employer in full and on demand from

and against all and any losses, costs and expenses suffered or incurred by the Employer arising out of, or in connection with:

- (a) any failure by the Contractor to perform or discharge the Guaranteed Obligations; or
- (b) any of the Guaranteed Obligations being or becoming totally or partially unenforceable by reason of illegality, capacity, lack or exceeding of powers, ineffectiveness of execution or any other matter,

but the Guarantor's liability under this clause 2.2 shall be no greater than the Contractor's liability under the Agreement was (or would have been, had the relevant obligation been fully enforceable).

3. Employer protections

3.1 **Continuing guarantee.** This guarantee is and shall, at all times, be a continuing security until the Guaranteed Obligations have been satisfied or performed in full, and is not revocable and is in addition to and not in substitution for and shall not merge with any other right, remedy, guarantee or security which the Employer may at any time hold for the performance of such obligations and may be enforced without first having recourse to any such security.

3.2 **Preservation of Guarantor's liability.** The Guarantor's liability under this guarantee shall not be reduced, discharged or otherwise adversely affected by:

- (a) any arrangement made between the Contractor and the Employer;
- (b) any alteration in the obligations undertaken by the Contractor whether by way of any addendum or variation referred to in clause 4 (*Addendum or variation to the agreement*) or otherwise;
- (c) any waiver or forbearance by the Employer whether as to payment, time, performance or otherwise;
- (d) the taking, variation, renewal or release of, the enforcement or neglect to perfect or enforce any right, guarantee, remedy or security from or against the Contractor or any other person;
- (e) any unenforceability, illegality or invalidity of any of the provisions of the Agreement or any of the Contractor's obligations under the Agreement, so that this guarantee shall be construed as if there were no such unenforceability, illegality or invalidity;
- (f) any legal limitation, disability, incapacity or other circumstances relating to the Contractor, or any other person; or
- (g) the dissolution, amalgamation, reconstruction, reorganisation, change in status, function, control or ownership, insolvency, liquidation or the

appointment of an administrator or receiver of the Contractor or any other person.

- 3.3 **Immediate demand.** The Guarantor waives any right it may have to require the Employer (or any trustee or agent on its behalf) to proceed against or enforce any other right or claim for payment against any person before claiming from the Guarantor under this guarantee.
- 3.4 **Deferral of rights.** Until all amounts which may be or become payable under the Agreement or this guarantee have been irrevocably paid in full, the Guarantor shall not, as a result of this guarantee or any payment performance under this guarantee:
- (a) be subrogated to any right or security of the Employer;
 - (b) claim or prove in competition with the Employer against the Contractor or any other person;
 - (c) demand or accept repayment of any monies or claim any right of contribution, set-off or indemnity, and

any sums received by the Guarantor in breach of this clause 3.4 (*Deferral of rights*) shall be held by the Guarantor in trust for and shall be promptly paid to the Employer.

- 3.5 **Guarantee additional to all other security.** This guarantee is in addition to and shall not affect nor be affected by or merge with any other judgment, security, right or remedy obtained or held by the Employer from time to time in respect of the discharge and performance of the Guaranteed Obligations by the Contractor.

4. **Addendum or variation to the Agreement**

The Guarantor authorises the Contractor and the Employer to make any addendum or variation to the Agreement, the due and punctual performance of which addendum and variation shall, subject to the terms of this guarantee and, amongst other things, be guaranteed by the Guarantor in accordance with the terms of this guarantee.

5. **Payment**

- 5.1 All sums payable by the guarantor under this guarantee shall be paid in full to the Employer in the currency in which the Guaranteed Obligations are payable:
- (a) without any set-off, condition or counterclaim whatsoever; and
 - (b) free and clear of any deductions or withholdings whatsoever except as may be required by law or regulation which is binding on the Guarantor.

- 5.2 If any deductions or withholding is required by any law or regulation to be made by the Guarantor, the amount of the payment due from the Guarantor shall be increased to an amount which (after making any deduction or withholding) leaves an amount equal to the payment which would have been due if no deduction or withholding had been required.
- 5.3 The Guarantor shall promptly deliver or procure delivery to the Employer of all receipts issued to it evidencing each deduction or withholding which it has made.
- 5.4 The Guarantor shall not and may not direct the application by the Employer of any sums received by the Employer from the Guarantor under any of the terms in this guarantee.
- 5.5 The Guarantor shall pay interest on any sum due under this guarantee, calculated as follows:
- (a) **Rate.** 4% a year above the Bank of England's base rate from time to time, but at 4% for any period when that base rate is below 0%.
 - (b) **Period.** From when the overdue sum became due, until it is repaid.
- 5.6 The Employer shall not be entitled to recover any amount in respect of interest under both this guarantee and any arrangements entered into between the Contractor and the Employer in respect of any failure by the Contractor to make any payment in respect of the Guaranteed Obligations.

6. Costs

- 6.1 The Guarantor shall, on a full indemnity basis pay to the Employer on demand the amount of all costs and expenses (including legal and out-of-pocket expenses and any VAT on those costs and expenses) which the Employer incurs in connection with:
- (a) the preservation, or exercise and enforcement, of any rights under or in connection with this guarantee or any attempt to do so; and
 - (b) any discharge or release of this guarantee.
- 6.2 Each party shall pay its own costs in connection with the execution of this guarantee.

7. Conditional discharge

- 7.1 Any release, discharge or settlement between the Guarantor and the Employer in relation to this guarantee shall be conditional on no right, security, disposition or payment to the Employer by the Guarantor, the Contractor or any other person being avoided, set aside or ordered to be refunded pursuant to any

enactment or law relating to breach of duty by any person, bankruptcy, liquidation, administration, protection from creditors generally or insolvency for any other reason.

- 7.2 If any such right, security, disposition or payment as referred to in clause 7.1 (*Conditional discharge*) is avoided, set aside or ordered to be refunded, the Employer shall be entitled subsequently to enforce this guarantee against the Guarantor as if such release, discharge or settlement had not occurred and any such security, disposition or payment has not been made.

8. Representations and warranties

- 8.1 The Guarantor represents and warrants to the Employer:

- (a) that it is duly incorporated with limited liability and validly existing under the laws of England;
- (b) that it has full power under its constitution or equivalent constitutional documents in the jurisdiction in which it is established to enter into this guarantee;
- (c) that it has full power to perform the obligations expressed to be assumed by it or contemplated by this guarantee;
- (d) that it has been duly authorised to enter into this guarantee;
- (e) that it has taken all necessary corporate action to authorise the execution, delivery and performance of this guarantee;
- (f) that this guarantee when executed and delivered will constitute a legally binding obligation on it enforceable in accordance with its terms;
- (g) that all necessary consents and authorisations for the giving and implementation of this guarantee have been obtained;
- (h) its entry into and performance of its obligations under this guarantee will not constitute any breach of or default under any contractual, government or public obligation binding on it; and
- (i) it is not engaged in any litigation or arbitration proceedings that might affect its capacity or ability to perform its obligations under this guarantee and to the best of its knowledge no such legal or arbitration proceedings have been threatened or are pending against it.

9. General

- 9.1 **Announcements.** No party shall make, or permit any person to make, any public announcement concerning the existence, subject matter or terms of this guarantee, the wider transactions contemplated by it, or the relationship between the parties, without the prior written consent of the other party (such

consent not to be unreasonably withheld or delayed), except as required by law, any governmental or regulatory authority (including, without limitation, any relevant securities exchange), or any court or other authority of competent jurisdiction.

- 9.2 **Assignment.** The Employer shall be entitled by notice in writing to the Guarantor to assign the benefit of this guarantee at any time to any person without the consent of the Guarantor being required and any such assignment shall not release the Guarantor from liability under this guarantee.
- 9.3 **Further assurance.** Each party shall, and shall use all reasonable endeavours to procure that any necessary third party shall, promptly execute and deliver such documents and perform such acts as may be required for the purpose of giving full effect to this guarantee.
- 9.4 **Variation.** No variation of this guarantee shall be effective unless it is in writing and signed by the parties (or their authorised representatives).

9.5 Notices

- (a) Any notice given to a party under or in connection with this guarantee shall be in writing and shall be:
- (i) delivered by hand or by pre-paid first-class post or other next working day delivery service at its registered office (if a company) or its principal place of business (in any other case); or
 - (ii) sent by email to the following addresses:
 - (A) Employer email address: [TO BE INSERTED]
 - (B) Contractor email address: [TO BE INSERTED]
- (b) Any notice shall be deemed to have been received:
- (i) if delivered by hand, at the time the notice is left at the proper address;
 - (ii) if sent by pre-paid first-class post or other next working day delivery service, at 9.00 am on the second Business Day after posting; or
 - (iii) if sent by email, at the time of transmission, or, if this time falls outside business hours in the place of receipt, when business hours resume. In this clause 9.5(b)(iii), business hours means 9.00am to 5.00pm Monday to Friday on a day that is not a public holiday in the place of receipt.
- (c) This clause 9.3 (*Notices*) does not apply to the service of any proceedings or other documents in any legal action or, where applicable, any arbitration or other method of dispute resolution.

9.6 Entire agreement

- (a) This guarantee constitutes the entire agreement between the parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter.
- (b) Each party agrees that it shall have no remedies in respect of any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this guarantee. Each party agrees that it shall have no claim for innocent or negligent misrepresentation or negligent misstatement based on any statement in this guarantee.

9.7 **Waiver.** No failure or delay by a party to exercise any right or remedy provided under this guarantee or by law shall constitute a waiver of that or any other right or remedy, nor shall it prevent or restrict the further exercise of that or any other right or remedy. No single or partial exercise of such right or remedy shall prevent or restrict the further exercise of that or any other right or remedy.

9.8 Severance

- (a) If any provision or part-provision of this guarantee is or becomes invalid, illegal or unenforceable, it shall be deemed deleted, but that shall not affect the validity and enforceability of the rest of this guarantee.
- (b) If any provision or part-provision of this guarantee is deemed deleted under clause 9.8(a) (*Deemed deletion*) the parties shall negotiate in good faith to agree a replacement provision that, to the greatest extent possible, achieves the intended commercial result of the original provision.

9.9 **Counterparts.** This guarantee may be executed in any number of counterparts, each of which shall constitute a duplicate original, but all the counterparts shall together constitute the one deed.

10. Governing law

This guarantee and any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with it or its subject matter or formation shall be governed by and construed in accordance with the law of England and Wales.

This deed has been entered into on the date stated at the beginning of it.

Executed as deed by [NAME OF **Guarantor**] acting
by [NAME OF FIRST DIRECTOR], a director, and
[NAME OF SECOND DIRECTOR/SECRETARY], [a
director OR its secretary]

.....

[SIGNATURE OF FIRST
DIRECTOR]

Director

.....

[SIGNATURE OF
SECOND DIRECTOR OR
SECRETARY]

Director OR Secretary

OR

Executed as deed by [NAME OF **Guarantor**] acting
by [NAME OF DIRECTOR] a director, in the presence
of:

.....

[SIGNATURE OF
DIRECTOR]

Director

.....

[SIGNATURE OF WITNESS]

[NAME, ADDRESS [AND OCCUPATION] OF
WITNESS]

Executed as deed by SOMERSET [COUNTY]
COUNCIL

whose COMMON SEAL was affixed in the presence
of:

.....

Authorised signatory