

## ANNEX E- FORM OF JOINT AND SEVERAL GUARANTEE

Dated [●] [200\_]

- (1) THE GUARANTORS NAMED HEREIN
- (2) AUTORIDAD DEL CANAL DE PANAMÁ

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JOINT AND SEVERAL GUARANTEE IN RESPECT OF  
THE THIRD SET OF LOCKS CONTRACT  
relating to the realization of the Panama Canal Expansion  
Program

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**THIS GUARANTEE** is dated [●] and made between:

- (1) [●] a company incorporated in [●] [relevant Member company details] [ address],)
  - (2) [●] a company incorporated in [●] [relevant Member company details] [ address]
  - (3) [●] a company incorporated in [●] [relevant Member company details] [ address]
  - (4) [●] a company incorporated in [●] [relevant Member company details] [ address]
  - (5) [●] a company incorporated in [●] [relevant Member company details] [ address]
  - (6) [ADD FOR EACH MEMBER]
- (each, a "**Guarantor**" and, collectively, the "**Guarantors**"); and

- (2) **AUTORIDAD DEL CANAL DE PANAMÁ** an autonomous entity of the Panamanian Government established under Title XIV of the Panamanian National Constitution whose principal place of business is at Edificio de la Administración, Altos de Balboa, Balboa, Republic of Panamá (which term shall include permitted assigns) ("**Employer**").

## **BACKGROUND:**

- (A) The Guarantors (including [●] [Name of Lead Member], as Lead Member) and the Employer have entered into a contract, on a joint and several basis, for the design and construction of a third set of locks dated [●] (as amended, modified or supplemented, "**Contract**"), agreed and undertook to design and construct certain works in relation to the Panama Canal expansion project ("**Works**").
- (B) Pursuant to Sub-Clause 1.7 of the Contract, the Guarantors have requested, and the Employer has consented, to the assignment of the whole of the Contract to [●] [Name of Contractor Project Company], who shall, subject to the terms of the Contract, become the Contractor thereunder (such Contractor Project Company, the "**New Contractor**").
- (C) The Guarantors are the Shareholders in and collectively own directly one hundred percent (100%) of the Share Capital of the New Contractor.
- (D) The Guarantors are obligated, pursuant to sub-paragraph (e) of Sub-Clauses 1.7.2 of the Contract, to execute and deliver this Guarantee to the Employer.
- (E) The Guarantors have, jointly and severally, agreed to guarantee the obligations of the New Contractor as the Contractor under the Contract on the terms set out in this Guarantee.

## **1. GUARANTEE AND INDEMNITY**

### **1.1 Each of the Guarantors, jointly and severally:**

- (a) as primary obligor and not as surety, unconditionally, jointly and severally guarantees to the Employer the due and punctual performance by the New Contractor of each and all the obligations, warranties, duties and undertakings of the Contractor under and pursuant to the Contract according to the terms of the Contract; and
- (b) if the New Contractor is in breach of any of its obligations, warranties, duties and undertakings as set out in sub-paragraph (a), shall upon demand by the Employer from time to time, forthwith perform the obligations, warranties, duties and undertakings of which the New Contractor is in breach in the same manner that the Contractor is required

to perform such obligations, warranties, duties and undertakings according to the terms of the Contract.

- 1.2 Each of the Guarantors, jointly and severally, unconditionally agrees, as a separate and distinct obligation to its obligations set out in paragraph 1.1, to indemnify on demand the Employer against all losses, damages, costs and expenses which the Employer may suffer or incur arising out of or in any way in connection with (a) any breach by the Contractor of any of its obligations, warranties, duties and undertakings under the Contract, or (b) any proceedings taken by the Employer for the enforcement of any claim under this Guarantee or the Contract.

## **2. PROTECTIVE CLAUSES**

- 2.1 This Guarantee cannot be revoked without the prior written consent of the Employer, and none of the Guarantors shall in any way be released or discharged or otherwise absolved of liability hereunder by reason of, and each of the Guarantors hereby waives notice of, any of the following:

- (a) any suspension of the Works or the Maintenance Services (as defined in the Contract) or variation to or amendment of the Works or the Contract;
- (b) any extension of time for performance by the Contractor under the Contract;
- (c) any adjustment to the amounts payable to the Contractor under the Contract;
- (d) the termination of the Contractor's right to complete the Contract, or the Contract;
- (e) any forbearance, variation or waiver of any right or remedy the Employer may have against the Contractor or any Member or negligence by the Employer in enforcing any right or remedy afforded under the Contract or granting of time, indulgence or concession;
- (f) any bond, security, insurance, surety or guarantee (other than this Guarantee) held or obtained by the Employer, including any actions taken pursuant to such instruments, in respect of the obligations of the Contractor or any Member under the Contract, or any release or waiver thereof;
- (g) any act or omission of the Contractor or any Member pursuant to any other arrangement with the Guarantor, any change in the relationship between the Guarantor and the Contractor and/or any Member or dispute or disagreement between them under or in relation to the Contract or otherwise;
- (h) any change in status or constitution of the Contractor, any Member, the Guarantor or the Employer;
- (i) the issuance of the Performance Certificate (as defined in the Contract) or any other certificate under the Contract;
- (j) any breach of the Contract by or other default of the Employer;
- (k) the Contract or any provision thereof being or becoming illegal, invalid, void, voidable or unenforceable including (without limitation) any liquidated damages under the Contract;

- (l) the Dissolution (as defined in [paragraph 8.4](#)) of the Contractor, any Member, or the Guarantor;
  - (m) the taking over of the Contract by any other guarantor, surety or any other person;
  - (n) the Employer's step-in rights under any Subcontractor warranty; and/or
  - (o) any other matter or thing which may otherwise create a defense, whether legal or equitable, whereby the obligations of the Guarantor hereunder might be discharged or affected.
- 2.2 Each of the Guarantors authorizes the Contractor and the Employer to make any addendum, variation or amendment to the Contract or the Works without reference to it or any other e Guarantor, and agrees that this Guarantee shall apply to such addendum, variation or amendment.
- 2.3 The obligations of each of the Guarantors hereunder are primary and not by way of surety and none of the Guarantors shall be entitled as against the Employer to any right of set off or counterclaim whatsoever and howsoever arising. The Employer shall not be obliged to take any action in any court or arbitral proceedings against the Contractor or any Member, to make any claim against or any demand of the Contractor or any Member, to enforce any bond, security, insurance, surety or guarantee (other than this Guarantee) held by it in respect of the obligations of the Contractor under the Contract or to exercise levy or enforce any distress, diligence or other process of execution against the Contractor or any Member. In the event that the Employer brings proceedings (including any counterclaims) against the Contractor each of the Guarantors will be bound absolutely by any findings of fact, interim or final award or judgment made by an arbitrator or arbitrators or court in such proceedings or counterclaims or any decision of the DAB where such decision has become final and binding under the Contract.
- 2.4 Each of the Guarantor's obligations under this Guarantee are continuing and accordingly shall remain in full force and effect (notwithstanding any intermediate satisfaction by the Contractor, any Member, any of the Guarantors or any other person) until all obligations, warranties, duties and undertakings now or hereafter to be carried out or performed by the Contractor under the Contract shall 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, otherwise prejudice or affect or be prejudiced by any other right, remedy, guarantee, indemnity, insurance, surety 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 right, remedy, guarantee, indemnity or security. Accordingly this Guarantee may be enforced notwithstanding the existence of all or any of the same and also notwithstanding the Employer at any time, releasing or abstaining from perfecting or enforcing or otherwise dealing or omitting to deal with all or any of the same.
- 2.5 None of the Guarantors shall have any greater liability to the Employer under the Guarantee than such Guarantor would have had to the Employer had such Guarantor been an original party to the Contract in place of the New Contractor; provided that this paragraph 2.5 shall not limit or otherwise modify any of the Guarantors' liability to the Employer under paragraph 1.2 (b).
- 3. PAYMENTS**
- 3.1 In relation to a demand under paragraph 1.1 (b) where the relevant obligation, warranty, undertaking or duty is to pay a sum of money or a demand under any other provision of this

Guarantee, the Guarantors shall have fourteen (14) days from the date of demand to make payment in full to the Employer. The Guarantors shall pay interest on any amount due under this Guarantee from the date of demand to the date of full payment (as well as before any judgment) calculated on a daily basis at the rate of two (2) percent per annum in excess of LIBOR (as defined in clause 3.2), or the highest rate allowed by law, whichever is less.

- 3.2 Determinations of interest rate and amounts under this Guarantee shall be made by the Employer, which determinations shall be conclusive and binding hereunder in the absence of manifest error. For purposes of this Guarantee, "LIBOR" shall mean a rate per annum (calculated on the basis of a 360 day year and actual days elapsed) equal to (a) the average (rounded upwards, if necessary, to the nearest 1/16 of 1%) of the offered rates which appear on the Telerate Page 3750 (or any replacement page), British Bankers Association Interest Settlement Rates (or such other generally accepted system for the purpose of displaying rates of leading reference banks in the London interbank market, as designated by the Employer) as of 11:00 A.M. (London time) for deposits in U.S. dollars for a period equal to the relevant period for calculation of interest hereunder on the day two Business Days prior to the first day of such period, or (b) if fewer than two such offered rates appear which are relevant to the applicable period, the average (rounded upwards, if necessary, to the nearest 1/16 of 1%) of the rates at which the Employer in its reasonable discretion shall determine at approximately 11:00 A.M. (London time) on the day that is two Business Days preceding such period are the applicable rates offered for US Dollar deposits by at least two prime banks in the London interbank market for a period comparable to such period.
- 3.3 If at any time any applicable law, regulation or regulatory requirement or any governmental authority requires any of the Guarantors to make any deduction or withholding in respect of taxes or other governmental levies or duties from any payment due under this Guarantee, the sum due from the Guarantors in respect of such payment shall be increased to the extent necessary to ensure that after the making of such deduction or withholding, the Employer receives on the due date for such payment net sum equal to the sum which it would have received had no such deduction or withholding been required to be made and the Guarantors, jointly and severally, shall on demand indemnify the Employer against any losses or costs which it has incurred by reason of failure by any of the Guarantors to make any such deduction or withholding or by reason of any increased payment not being made on the due date for such payment. Each of the Guarantors shall promptly deliver to the Employer any receipts certificates or other proof evidencing the amounts (if any) paid or payable in respect of any deduction or withholding as aforesaid.

#### **4. REPRESENTATIONS AND WARRANTIES**

- 4.1 (a) Until all obligations, warranties, duties and undertakings now or hereafter to be carried out or performed by the Contractor under the Contract shall have been satisfied or performed in full, none of the Guarantors shall as result of this Guarantee or any payment or performance under this Guarantee be subrogated to any right or security of the Employer or claim or prove in competition with the Employer against the Contractor, any Member or any other person or demand or accept repayment of any monies from the Contractor or claim any right of contribution, set-off or indemnity from the Contractor or any Member and any sums received by any of the Guarantors or the amount of any set-off exercised by any of the Guarantors in breach of this provision shall be held by such Guarantor in trust for and shall be promptly paid to the Employer.
- (b) None of the Guarantors shall hold any security from the New Contractor or the Contractor in respect of this Guarantee and any such security which is held in breach of

this provision shall be held by the Guarantor in trust for and shall promptly be transferred to the Employer.

- (c) Until all obligations, warranties, duties and undertakings now or hereafter to be carried out or performed by the Contractor under the Contract shall have been satisfied or performed in full, if (notwithstanding the provisions of sub-paragraphs 4.1 (a) and 4.1 (b)), any of the Guarantors has any rights of subrogation against the New Contractor or the Contractor or any rights to prove in a Dissolution (as defined in [paragraph 8.4](#)) of the New Contractor or the Contractor, such Guarantor agrees to exercise such rights in accordance with the directions of the Employer.
5. (a) Each of the Guarantors warrants and undertakes that it is duly incorporated and validly existing under the laws of its respective jurisdiction of incorporation or formation, as the case may be, and that this Guarantee is its legally binding obligation, enforceable in accordance with its terms, and that all necessary governmental and other consents and authorizations for the giving, validity, enforceability and implementation of this Guarantee and the transactions contemplated by it have been obtained and are in full force and effect.
- (b) Each of the Guarantors warrants and undertakes to the Employer that it shall take all necessary action directly or indirectly to perform the obligations expressed to be assumed by it or contemplated by this Guarantee and to implement the provisions of this Guarantee.
- (c) Each of the Guarantors warrants and undertakes to the Employer that it has not entered into this Guarantee in reliance upon, nor was it induced to enter into this Guarantee by any representation, warranty or undertaking made by or on behalf of the Employer (whether express or implied and whether pursuant to statute or otherwise).

## 6. ASSIGNMENT

- 6.1 No party hereto shall assign any or all of its right, title and interest in and to this Guarantee without, in the case of any assignment by the Employer, the Lead Member's, or, in the case of any assignment by any of the Guarantors, the Employer's, prior written consent.

## 7. NOTICES

- 7.1 All documents and notices arising out of or in connection with this Guarantee shall be served upon each of the Guarantor at the address specified in the Schedule attached hereto.
- 7.2 Any Guarantor may change its nominated address for service of documents or notices to another address in the same country as the address stated herein but only by prior written notice to the Employer. All documents and notices served by the Employer shall be in writing and in English.

## 8. MISCELLANEOUS

- 8.1 The Employer's rights under this Guarantee are cumulative and are in addition to and not in substitution for any rights provided by law or the Contract or any other guarantee, surety, bond, insurance or security that the Employer may have or hold in relation to the Contract, and the Employer may exercise its rights under this Guarantee from time to time without first having recourse to any such right, guarantee, surety, bond, insurance or security.

- 8.2 Any waiver by the Employer of the terms of this Guarantee or any consent or approval given by the Employer 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.
- 8.3 If at any time any one or more of the provisions of this Guarantee is or becomes illegal, invalid or otherwise unenforceable in any respect, such provision or provisions will be ineffective to the extent only of such illegality, invalidity or unenforceability and such illegality, invalidity or unenforceability will not invalidate any other provision of this Guarantee.
- 8.4 In this Guarantee "Dissolution" of a person includes the bankruptcy, insolvency, liquidation, amalgamation, reconstruction, reorganization, administration, administrative or other receivership or dissolution of that person, and any equivalent or analogous proceedings by whatever name known and in whatever jurisdiction, and any step taken (including, without limitation, the presentation of a petition or the passing of a resolution) for or with a view to any of the foregoing.
- 8.5 Where applicable, words and expressions used in this Guarantee shall have the meaning assigned to them in the Contract, as the case may be. The singular will include the plural and vice versa unless the context otherwise clearly requires. All references to the Contract shall be deemed to include any amendment, variation or supplemental agreement thereto. Headings are inserted for convenience only and are to be ignored for the purposes of construction. For the avoidance of doubt, all references to the Contractor shall be deemed to mean the Contractor from and after the date of assignment of the Contract to the Contractor Project Company.
- 8.6 This Guarantee constitutes the entire agreement between the Employer and each of the Guarantors, and it may not be modified except by written agreement of the Employer and each of the Guarantors.
- 8.7 Nothing herein shall prejudice the rights (including any step-in rights) of the Employer under any subcontractor warranty.

## **9. DISPUTE RESOLUTION**

- 9.1 This Guarantee shall be governed by and construed in accordance with the laws of the Republic of Panama.
- 9.2 Any dispute arising out of under or in connection with this Guarantee or out of the subject matter of this Guarantee shall be finally settled by international arbitration in law (within the meaning of Panamanian law). Unless otherwise agreed by the Parties:
- (a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce (the "Rules");
  - (b) in addition to the Rules, the arbitration shall be conducted according to the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration;
  - (c) the dispute shall be settled by three arbitrators who shall all be licensed lawyers appointed in accordance with these Rules;
  - (d) the arbitration shall be decided in law (within the meaning of Panamanian law) and conducted in the English language;

- (e) the venue of the arbitration shall be Miami, Florida - United States of America; and
- (f) the arbitration agreement and the arbitration shall be governed by the United States Federal Arbitration Act, 9 U.S.C. §§ 1 et seq.

Arbitration may be commenced prior to or after completion of the Works.

## 10. EXECUTION

**In Witness** whereof the parties hereto have caused this Guarantee to be executed the day and year before written by their duly authorised representatives.

SIGNED by:

Name:  
Position:  
Address:  
Date:

for and on behalf of the Employer in the presence of

Witness:  
Name:  
Address:  
Date:

SIGNED for and on behalf of the Guarantor:

SIGNED by:

Name:  
Position:  
Address:  
Date:

for and on behalf of the Guarantors and for and on behalf of [insert name of Member], as Guarantor in the presence of

Witness:  
Name:  
Address:

Date:

SIGNED by:

Name:  
Position:  
Address:  
Date:

for and on behalf of the Guarantors and for and on behalf of [insert name of Member], as Guarantor in the presence of

Witness:  
Name:  
Address:

Date:

[Insert such number of execution blocks as

required to enable all Members to sign the Guarantee. The Guarantee is to be signed by each Member on its own behalf and on behalf of the [Original Contractor]

## **SCHEDULE**

### **NOTICE ADDRESSES FOR GUARANTORS**

If to [name of Guarantor], at:

[specify address]

If to [name of Guarantor], at:

[specify address]

If to [name of Guarantor], at:

[specify address]

If to [name of Guarantor], at:

[specify address]

If to [name of Guarantor], at:

[specify address]

*[specify for each Guarantor its addresses for notices]*