

**ANNEX G**

**DATED**

**200[•]**

(1) [•]

(2) [•]

(3) [•]

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**SUBCONTRACTOR WARRANTY**

in respect of the lock gate fabrication in respect of the Third Set  
of Locks Contract for the Panama Canal Expansion Program

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**DATE:**

200

**PARTIES:**

- (1) [●] of/whose registered office is at [●] ("**Employer**");
- (2) [●] of/whose registered office is at [●] ("**Contractor**"); and
- (3) [●] of/whose registered office is at [●] ("**Subcontractor**").

**WHEREAS:**

- A. By the Subcontract the Subcontractor has been appointed by the Contractor to undertake the Subcontract Works.
- B. The Subcontractor has agreed to enter into this Agreement.

**OPERATIVE PROVISIONS:**

**1. Definitions and Interpretations**

1.1 In this Agreement the following expressions shall have the following meanings:

- 1.1.1 "**Construction Contract**": the Contract between the Employer and the Contractor for the design, construction and completion of the Works;
- 1.1.2 "**Panama Canal Expansion Program**": the Canal expansion program (which includes the Works) as more particularly described on the Employer's webpage [www.pancanal.com/eng/plan/documentos/propuesta/acp-expansion-proposal.pdf](http://www.pancanal.com/eng/plan/documentos/propuesta/acp-expansion-proposal.pdf).
- 1.1.3 "**Payment Bond**": the Payment Bond referred to in the Construction Contract.
- 1.1.4 "**Prohibited Materials**": materials or products which at the date of specification or use (given the state of knowledge generally within the construction industry at that time) are known or reasonably thought to be:
  - (a) deleterious or likely to become deleterious;
  - (b) deleterious if used under certain physical or atmospheric conditions; or
  - (c) likely to degrade prematurely or require an undue level of maintenance within the context of the life expectancy of the Works or part thereof.

A "deleterious" material or product is a material or product which by itself or combined with other materials or products:

- (a) poses a threat to the health and safety of those involved in the construction or use of the Works or part thereof; or
- (b) poses a threat to the structural integrity durability or performance of the whole or part of the Works or the structure of which the Works form part; or
- (c) will on a balance of probabilities reduce the life expectancy of the Works or part thereof; or
- (d) will on a balance of probabilities adversely affect the ability of the Employer to insure the structure of which the Works form part or materially increase the cost of such insurance;

1.1.5 **"Subcontract"**: the Subcontract dated [●] between the Contractor and the Subcontractor, a copy of which is annexed hereto as the Schedule;

1.1.6 **"Subcontractor's Documents"**: the calculations, computer programmes and other software, drawings, design information, manuals, models, design documents and other documents of a technical nature (if any) supplied by the Subcontractor under the Subcontract;

1.1.7 **"Subcontract Works"**: the Works to be performed by the Subcontractor under the Subcontract;

1.1.8 **"Works"**: the Works referred to in the Construction Contract;

1.2 In this Agreement, unless the context otherwise requires:

- (a) references in the singular number shall include references in the plural number and vice versa, words denoting natural persons shall include corporations and any other legal entity and vice versa, and words denoting any gender shall include every gender;
- (b) references to the word "including" are to be construed without limitation;
- (c) a reference to a particular Clause, paragraph or schedule shall be a reference to that clause, paragraph or schedule in this Agreement;
- (d) the headings are inserted for convenience only and are to be ignored for the purposes of construction;

- (e) a reference to any Statute or Statutory Instrument shall be construed as including a reference to any modification, extension or re-enactment thereof from time to time.
- 1.3 The words in this Agreement shall bear their natural meaning. The Parties have had the opportunity to take legal advice on this Agreement and no term shall be construed contra proferentem.
2. **Subcontractor's Warranty**
- 2.1 **The Subcontractor:**
- (a) covenants with the Employer that it has performed and/or will perform its obligations under the Subcontract in accordance with all the terms and conditions thereof provided that the responsibilities and duties of the Subcontractor to the Employer under this Agreement shall be no greater than the Subcontractor would owe to the Employer if the Employer had been named as joint employer under the Subcontract (excluding rights of set-off or counterclaim); and
- (b) agrees that the rights established in Article 1343 of the Panama Civil Code shall apply as if the Employer was the Contractor under the Subcontract.
3. **Employer's use of Subcontractor's Documents**
- 3.1 The Subcontractor shall be deemed (by signing this Agreement) to give to the Employer a worldwide, irrevocable, non-terminable, transferable, non-exclusive, royalty-free licence to copy, use and communicate the Subcontractor's Documents and any data or information contained therein (together with the right to sub-license), including making and using modifications of them. This licence shall:
- (a) entitle the Employer, his agents, servants and any other person authorised by the Employer to copy, use and communicate the Subcontractor's Documents for the purposes of completing, operating, testing, maintaining, altering, adjusting, repairing and demolishing the Works and/or for the purposes of the Panama Canal Expansion Program; and
- (b) in the case of Subcontractor's Documents which are in the form of computer programmes and other software, permit their use on any computer on the Site and other places as envisaged by the Contract, including replacements of any computers supplied by the Contractor.

- 3.2 The Subcontractor's Documents and other design documents made by (or on behalf of) the Subcontractor shall not, without the Contractor's consent, be used, copied or communicated to a third party by (or on behalf of) the Employer for purposes other than those permitted under this clause and those undertaken for the purposes of the Employer exercising any of its rights or performing any of its obligations under the Construction Contract.
- 3.3 In the event that the Subcontractor's Documents include third party computer programmes and/or software or any hardware equipment supplied by the Subcontractor as part of the Subcontract Works requires the use of third party computer software, the Subcontractor shall provide with such documents or with the Subcontract Works a full site licence from the relevant third party owner for the use, copying and communication of such programs or software by the Employer and his agents and servants and any other persons authorised by the Employer as permitted under this clause. Each such licence shall be valid for not less than five years after the date of the Performance Certificate under the Construction Contract (or from the date of termination of the Construction Contract or termination of the Contractor's right to complete the Construction Contract). All licence fees shall be the sole responsibility of the Subcontractor.
- 3.4 The Subcontractor shall be responsible at its cost for obtaining the consents (if any) required from third parties in connection with any third party technology or intellectual property rights forming part of or to be used in relation to the Subcontract Works and/or the Subcontractor's Documents, including without limitation any third party technology or intellectual property rights with respect to any software forming part of or to be used in relation to the Subcontract Works and/or the Subcontractor's Documents.
- 3.5 The Subcontractor shall ensure that any licence, contract or agreement which it enters into with a third party that provides for the provision or procurement of licenses for the use of third party technology or intellectual property rights forming part of or to be used in relation to the Subcontract Works and/or the Contractor's Document includes provisions whereby:
- (a) such licenses grant the Employer, its servants and agents, designee and any successor operator the right to use the subject third party technology or intellectual property rights in the operation of the Subcontract Works and/or the Panama Canal Expansion Program;
  - (b) such licenses are transferable to the Employer, its servants and agents, designee and any successor operator and permit the granting of sub-licenses. For avoidance of doubt, the obligation on the Subcontractor under this clause to transfer by assignment

to the Employer rights in the Subcontractor's Documents shall be taken to include an obligation on the Subcontractor to assign all its rights and interests in any such licence, contract or agreement entered into by the Subcontractor with a third party;

- (c) the terms thereof, including cost, are not materially different and are no less beneficial to the relevant licensee than those of typical third party arms length licensing arrangements and enable the Subcontractor to comply with this clause; and
- (d) each license includes an indemnification of the Employer, its servants and agents, designee and any successor operator for infringement of patents or third party intellectual property rights.

3.6 Upon the issuance of the Performance Certificate under the Construction Contract (or upon termination of the Construction Contract or upon termination of the Contractor's right to complete the Construction Contract), the Subcontractor shall assign and transfer exclusively to the Employer all rights, title and interests in and to the Subcontractor's Documents, including all intellectual property rights, licenses and proprietary industrial rights in and to the Subcontractor's Documents. The Subcontractor shall execute any assignment documents requested by the Employer.

#### 4. **Prohibited Materials**

- 4.1 The Subcontractor warrants and undertakes that it shall design, execute and complete the Subcontract Works (including any rectification of defects therein) ensuring that it does not use and will not specify for use in relation to the Subcontract Works any Prohibited Materials.
- 4.2 The Subcontractor agrees that it will immediately give notice to the Employer if it becomes aware at any time prior to the issue of the Performance Certificate under the Construction Contract that any Prohibited Materials have been or may be so used.

#### 5. **Notices**

- 5.1 Any notice to be given or served hereunder shall be delivered personally or sent by post or facsimile transmission in permanent written form. In the case of the Employer it shall be marked for the attention of [●] at [●], facsimile number [●], in the case of the Contractor it shall be marked for the attention of [●] at [●], facsimile number [●], and in the case of the Subcontractor it shall be marked for the attention of [●] at [●], facsimile number [●] or such other person or at such other address or number for service as the party to be served may have previously notified in writing to the other party.

**6. Concurrent Liabilities**

- 6.1 The rights and benefits conferred upon the Employer by this Agreement are in addition to any other rights and remedies it may have against the Subcontractor including without prejudice to the generality of the foregoing any remedies in negligence.

**7. Assignment**

- 7.1 This Agreement shall not be transferred, assigned, pledged or used as security for a loan or advance in part or in whole by the Subcontractor without the prior written approval of the Employer in its absolute discretion.

**8. Law and Language**

- 8.1 This Agreement shall be governed by and construed in accordance with the laws of the Republic of Panama. The parties further agree that the statute of limitations applicable to claims of latent defects shall be ten years from the date of the issuance of the Performance Certificate under the Construction Contract.

**9. Dispute Resolution**

- 9.1 Any dispute arising out of under or in connection with this Agreement or out of the subject matter of this Agreement shall be finally settled by international arbitration in law (within the meaning of Panamanian law). Unless otherwise agreed by both 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. **Step-In Rights**

- 10.1 The Subcontractor will not exercise or seek to exercise any right which may be or become available to it to terminate or treat as terminated the Subcontract or discontinue or suspend the performance of any services and obligations thereunder without first giving to the Employer not less than twenty-eight (28) days' prior written notice specifying the Subcontractor's grounds for terminating or treating as terminated the Subcontract or discontinuing or suspending its performance thereof.
- 10.2 Within twenty-eight (28) days of such notice the Employer may give written notice to the Subcontractor that the Employer shall thenceforth become the employer under the Subcontract to the exclusion of the Contractor and thereupon the Subcontractor shall admit that the Employer shall be such employer and the Subcontract shall be and remain in full force and effect notwithstanding any of the said grounds.
11. The Employer shall from the service of a notice under clause 10.2 become responsible for the sums properly payable to the Subcontractor for the work undertaken by the Subcontractor pursuant to the Subcontract provided that notwithstanding anything contained in this Agreement and notwithstanding any payments which may be made by the Employer to the Subcontractor, the Employer shall not be under any obligation to the Subcontractor unless the Employer shall have given written notice to the Subcontractor pursuant to clause 10 of this Agreement. Nothing herein shall release, waive or prejudice the rights of the Subcontractor to recover unpaid sums under the Contractor's Payment Bond. To the extent the Employer pays the Subcontractor for Subcontract Works which it performed for the Contractor, all rights of the Subcontractor under the Payment Bond are assigned to the Employer to the extent of such payment.
12. The Contractor hereby agrees that it will not take any steps which would prevent or hinder the Employer from exercising its rights under this Agreement and confirms that the rights of the Employer in clause 10 override any obligations of the Subcontractor to the Contractor under the Subcontract.
13. It is hereby understood that the step-in rights contained herein shall, at the sole discretion of the Employer, prevail over any other step-in rights granted by either Contractor, Subcontractor or any Parent Company in any other documents or instruments, including, without limitation, any Performance Bond, Surety or any Parent Company Guarantee.

**In Witness** whereof the Parties hereto have caused this Agreement to be executed the day and year first before written in accordance with their respective laws.

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 )  
Contractor: )  
)  
)

SIGNED by: )  
)  
Name: )  
Position: )  
Address: )  
Date: )  
)

for and on behalf of the Contractor and )  
for and on behalf of [insert name of Lead )  
Member], as Member and Lead Member )  
in the presence of )  
)

Witness:  
Name:  
Address:  
Date:

SIGNED by:

Name:  
Position:  
Address:  
Date:

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

Witness:  
Name:  
Address:  
Date:

[Insert such number of execution blocks  
as required to enable all Members to sign  
the Agreement. The Agreement is to be  
signed by each Member on its own behalf  
and on behalf of the Contractor]

SIGNED by: )

)

)

Name: )

Position: )

Address: )

Date:

for and on behalf of the Subcontractor in  
the presence of:

Witness:

Name:

Address:

Date: