This guaranty must be executed prior to issuance of a notice of intent to award.

GUARANTY

THIS GUARANTY is made and entered into as of [DATE], by [GUARANTOR], a [GUARANTOR\_STATE\_INC] [GUARANTY\_BIZ\_FORM] (“Guarantor”), in favor of the Using Governmental Unit(s).

Recitals & Representations

1. [GUARANTOR\_STATE\_PRINPLC] is [GUARANTOR]’s principal place of business. [GUARANTOR’S TIN] is [GUARANTOR]’s Taxpayer Identification Number.

2. Previously, the Using Governmental Unit solicited offers to contract by issuing Solicitation No. [SOLICITATION\_NO] entitled [SOLICITATION\_DESCRIPTION] (hereinafter the “Solicitation”). With the Solicitation, the Using Governmental Unit seeks to award a Contract (defined below).

3. By submitting a bid or proposal in response to the Solicitation, [CONTRACTOR], a [CONTRACTOR\_STATE] [CONTRACTOR\_BIZ\_FORM] (“Contractor”), seeks to enter into a Contract with the Using Governmental Unit.

4. [GUARANTOR\_CONTRACTOR\_BIZ\_RELATIONSHIP]

5. If the Using Governmental Unit enters into a Contract with Contractor, Guarantor will receive a significant economic benefit of reasonably equivalent value by virtue of its relationship with Contractor; accordingly, Guarantor seeks to induce Using Governmental Unit to enter into a Contract with Contractor. Guarantor acknowledges that Using Governmental Unit would not have awarded the Contract to Contractor but for this Guaranty.

In consideration of the foregoing and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and in reliance on the foregoing, the materiality of which is hereby acknowledged, the parties hereto agree as follows:

Agreement

1. General

a. Definitions.

(1) As used herein, the term “Contract” collectively refers to all the contractual agreements arising out of or resulting from the Solicitation, including without limitation, any purchase orders issued against such agreements and any associated agreements contemplated by or related to the Solicitation, and further includes any modifications, extensions, amendments and renewals of the foregoing, or substitutions thereof.

(2) As used herein, the term “Contractor” includes any of Contractor’s successors or assigns.

(3) As used herein, the term “Using Governmental Unit” means the following entity or entities of government: [USING GOVERNMENTAL UNITS].[[1]](#endnote-1)

b. Headings. The headings contained in this Guaranty are inserted for convenience only and will not affect the meaning or interpretation of this Guaranty.

c. Interpretation. Any question of interpretation or construction shall not be resolved by any rule providing for interpretation or construction against the party who causes the uncertainty to exist or against the drafters of this Guaranty.

d. Representation & Warranty. Guarantor represents and warrants to the Using Governmental Unit that the Recitals are true, accurate and complete, and that this Guaranty has been duly executed and delivered by Guarantor and constitutes the legal, valid and binding obligation of Guarantor, enforceable against Guarantor in accordance with its terms.

2. Guaranty.

a. Guaranty; Scope; Contractor’s Obligation Defined. As an inducement to, and in consideration of, Using Governmental Unit’s entry into a Contract with Contractor, Guarantor absolutely, unconditionally and irrevocably guaranties, without notice or demand, the full and timely payment and performance of any debt, liability or obligation of Contractor, howsoever arising, which Contractor presently or hereafter may have to the Using Governmental Unit arising out of or related to the Contract or the Contractor’s performance of the Contract (collectively “Contractor’s Obligations”).

b. Unconditional; No Right to Require Failure of Collection; Limited Right to Require Action Against Primary Debtor; Waiver of Contractor’s Counterclaims. This guaranty is a guaranty of payment and performance and not of collection. Except as otherwise provided herein, Using Governmental Unit may not proceed against Guarantor without first acquiring, from either the Chief Procurement Officer, the South Carolina Procurement Review Panel or a court, an order allowing Using Governmental Unit to recover from Contractor. The foregoing order shall be conclusive evidence of the amount and validity of Contractor’s Obligations. Guarantor waives any right to assert any defense, counterclaim, affirmative defense, or set-off of the Contractor. Without limiting the generality of the foregoing, Guarantor will not assert, plead or enforce against Using Governmental Unit any defense of waiver, release, statute of limitations, res judicata, or illegality. This guaranty will be binding and enforceable against Guarantor without regard to the enforceability or validity of the Contract, the obligation it evidences, or any fact which would constitute a legal or equitable defense or discharge of a guarantor. This Guaranty in no way alters the respective obligations, rights, defenses, setoffs, counterclaims, or privileges of the Contractor. Notwithstanding anything to the contrary in this paragraph, Using Governmental Unit may proceed against Guarantor without first having recourse to the Contractor or pursuing any other right or remedy if and upon the filing by Contractor or Guarantor of a petition in bankruptcy or insolvency or upon the initiation of any other proceeding or action by or against Contractor or Guarantor under the relevant law on insolvency or bankruptcy, or after the making by Contractor or Guarantor of any assignment or attempted assignment for the benefit of creditors or upon or after the institution of any proceedings for the liquidation or winding up of Contractor’s or Guarantor’s business or for the termination of either’s corporate charter.

c. Waiver of Notice of Acceptance, Transactions, Default, and Other. Guarantor waives any right to notice of acceptance of this guaranty; notice of any modification, extension, renewal or substitution of the Contract; notice of default by Contractors; and any other notice, whether similar or dissimilar to the foregoing.

d. No Duty to Avoid Impairment of Recourse. Any of the Contractor’s Obligations may be compromised, settled, released, discharged, renewed, extended, altered, waived, exchanged, modified, substituted, or otherwise dealt with in such a manner as Using Governmental Unit sees fit and such action shall not affect Guarantor’s liability. Without limiting the foregoing, Guarantor acknowledges that the Contract inherently involves significant potential for modification, consents to any such future modification, and expressly waives any defense arising out of any modification.

e. No Right to Rely on Surety Status. Guarantor does not have surety status and waives any surety defenses.

f. Waiver of Discharge, No Right to Rely on Debtor’s Defenses, and Counterclaims. Guarantor waives all rights to assert any discharge, defense, counterclaim, or set-off with respect to this guaranty, including but not limited to, any which might arise out of a failure to disclose any present or future information to Guarantor concerning the risks of this guaranty, the release by Using Governmental Unit of Contractor, or the Using Governmental Unit’s nonperformance.

h. No Rights Under Contract. Guarantor denies any status or right as a third-party beneficiary of the Contract and waives any right to enforce the Contract.

i. Duty to Disclose, Notice of Acceptance, and Waiver. Guarantor is completely familiar with Contractor, its financial and business affairs, and all its dealings with Using Governmental Unit. Guarantor will look solely to Contractor for notice that a Contract has been awarded. Guarantor will obtain all information it deems necessary or advisable concerning Contractor or which might otherwise bear on the guaranty directly from Contractor or other sources with regard to all risks involved in the entry into and continuation of the coverage of this guaranty. Guarantor waives all rights which it has now, or in the future may have, to any disclosure by Using Governmental Unit.

j. Bankruptcy, Merger, or Change of Control in Guarantor or Contractor. Without limitation, Guarantor agrees that the obligations of Guarantor pursuant to this Guaranty shall remain in full force and effect without regard to, and shall not be released, discharged or affected in any way by any of the following (whether or not Guarantor shall have any knowledge thereof): (a) any dissolution of or any voluntary or involuntary bankruptcy, insolvency, reorganization, arrangement, readjustment, assignment for the benefit of creditors, composition, receivership, liquidation, marshalling of assets and liabilities or similar events or proceedings with respect to Contractor or Guarantor, as applicable, or any of their respective property or creditors, or any action taken by any trustee or receiver or by any court in any such proceeding; (b) any merger or consolidation of Contractor or Guarantor, as applicable, into or with any person, or any sale, lease or transfer of any of the assets of Contractor or Guarantor, as applicable, to any other person; or (c) any change in the ownership of the capital stock of Contractor or Guarantor, as applicable, or any change in the relationship between Contractor or Guarantor, or any termination of any such relationship. In addition, if Contractor or Guarantor is a partnership, the obligations of all partners shall remain in full force and effect even if there are changes in the members of the partnership, and the guaranty shall, as applicable, extend to or apply with respect to the partnership both before and after any changes.

3. Miscellaneous.

a. Substitute Performance. The Using Governmental Unit has no obligation to accept substitute performance and may elect to recover only payment from the Guarantor.

b. Duty to Provide Information. The Using Governmental Unit may request information from Guarantor in order to evaluate Guarantor’s financial circumstances. Upon request, Guarantor shall cooperate with this effort and respond promptly to any such request. If Guarantor provides the Using Governmental Unit with any information it believes is exempt from public disclosure pursuant to the South Carolina Freedom of Information Act, Guarantor shall so designate such information. The Using Governmental Unit accepts no liability for the disclosure of information provided by Guarantor.

c. Choice-of-Law. The Guaranty, any action, suit or proceeding relating to the Guaranty, and all the rights and obligations of the parties shall, in all respects, be interpreted, construed, enforced and governed by and under the laws of the State of South Carolina, except its choice-of-law rules.

d. Choice-of-Forum. Any action, suit or proceeding relating to the Guaranty shall be resolved exclusively in the Court of Common Pleas for Richland County, State of South Carolina. Guarantor agrees that any act by the Using Governmental Unit regarding the Guaranty is not a waiver of either the State’s sovereign immunity or the State’s immunity under the Eleventh Amendment of the United States Constitution.

e. Waiver of Right to Jury Trial. To the extent permitted by law, Guarantor knowingly, voluntarily, and intentionally waives any right to a trial by jury in respect of any litigation based on, arising out of, under or in connection with this Guaranty or any agreement contemplated to be executed in connection with this Guaranty (e.g., the Contract), or any course of conduct, course of dealing, statements, or actions of any party with respect hereto.

f. Costs and Attorney Fees. Guarantor shall reimburse Using Governmental Unit for all costs and expenses, including attorneys' fees, reasonably incurred in enforcing the Using Governmental Unit’s rights under this Guaranty.

g. No Third Party Benefits. Nothing in this Guaranty is intended, and it shall not be construed, to confer any rights or benefits upon any person other than the Using Governmental Unit and no other third party shall have any rights or remedies hereunder.

h. Notice To Guarantor. All notices and other communications to Guarantor under this Guaranty shall be sufficiently given for all purposes hereunder if in writing and: (i) delivered personally; or (ii) sent by documented overnight delivery service, in each case, to the following: **[NOTICE ADDRESS]** or to such other address and/or to the attention of such other person as Guarantor may designate by written notice to the Using Governmental Unit.

i. Notice to Government. As long as the Contract is in effect, any notice or other communication to Using Governmental Unit regarding this Guaranty may be provided solely to the following address or, if another address is designated by written notice to the Guarantor, solely to the address most recently designated. In order to be effective, any notice to the Using Governmental Unit must identify the Solicitation by name and number. If the Contract is not in effect, notice must be given directly to Using Governmental Unit.

Procurement Services Division

State Budget & Control Board

1201 Main Street, Suite 430

Columbia, SC 29201

j. Binding Effect; Assignment. This Guaranty shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns; provided, however, that no party hereto may assign its rights or delegate its obligations under this Guaranty without the express written consent of the other party hereto.

k. Estoppel Certificate. Guarantor shall, within ten days after Using Governmental Unit’s request, deliver to Using Governmental Unit a certificate, in form and substance reasonably satisfactory to Using Governmental Unit, confirming that Guarantor will not assert any defense to enforcement of the Guaranty based upon the expiration of any statute of limitations. Failure to deliver a certificate constitutes a default.

l. Amendment; No Waiver. This Guaranty may not be modified or amended except by an instrument in writing signed by the party against whom enforcement of any such modification or amendment is sought. Any party hereto may, only by an instrument in writing, waive compliance by the other party hereto with any term or provision of this Guaranty. The waiver by any party hereto of a breach of any term or provision of this Guaranty shall not be construed as a waiver of any subsequent breach.

m. Integration. This guaranty is a completely integrated guaranty. Notwithstanding any contrary term, there are no oral or written conditions precedent or concurrent to the effectiveness of this guaranty. There are no terms or conditions other than those in this writing. This writing supersedes all prior or contemporaneous terms, conditions, and representations.

IN WITNESS WHEREOF, Guarantor has set its hand and seal hereto as of the date above written.

[GUARANTOR]

By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ L.S.

(signature)

Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

(typed/printed name of person signing above)

Its: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

(title / position of person signing above, e.g., president)

1. [*Add the following at the end of item #2 only if the contract is a statewide term contract*: The term “Using Governmental Unit” may be defined to mean “Statewide Term Contract” or “State Term Contract” or “Statewide Contract,” and if so defined, these terms mean any governmental entity that submits a purchase order that is accepted by Contractor pursuant to the Contract. If the term “Using Governmental Unit” is defined to mean more than one entity (e.g., multiple entities are listed or the term “Statewide Contract” is used), this Guaranty extends and applies to each entity separately, the same as if a distinct guaranty had been separately executed with each individual entity. Guarantor’s obligations to each entity is independent of its obligations to every other entity. Each entity’s rights, obligations and liabilities are independent of every other entity’s rights, obligations, and liabilities.] [↑](#endnote-ref-1)