

NEC Secondary Option X4 Ultimate Holding Company (and Performance) Guarantee

Presented by
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About Us




GVE Commercial Solutions Ltd are a commercial management consultancy providing quantity surveying and programming services. Our consultants specialise in the NEC forms of contract.

Our NEC capability has principally been acquired through practical application and experience within a 'live' project environment, assisting both contractors and subcontractors.

Our specialist NEC services include;

- Commercial and contract management of projects,
- Bespoke training,
- Project health check reviews,
- Contract reviews,
- Programme management,
- Dispute avoidance and/or resolution.

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Contract Assurance

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Overview

Many construction projects have a potentially complex structure of contract relationships and multiple participants, with inherent commercial risks.

Specific contract tools are frequently used to safeguard against these risks by providing some form of assurance, including the following;

- Bonds,
- **Guarantees,**
- Warranties,
- Indemnities,
- Payment security,
- Third party rights,
- Direct agreements,
- Insurances.

Warning: Trafalgar House Construction v General Surety (1995) HL 4 Jul 1995

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Group Company Structure

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Definitions

Holding company

This is a company that essentially owns 'assets' in other companies. Generally this type of company deals specifically with assets, investments, and management.

Subsidiary company

This is one where a 'holding company';

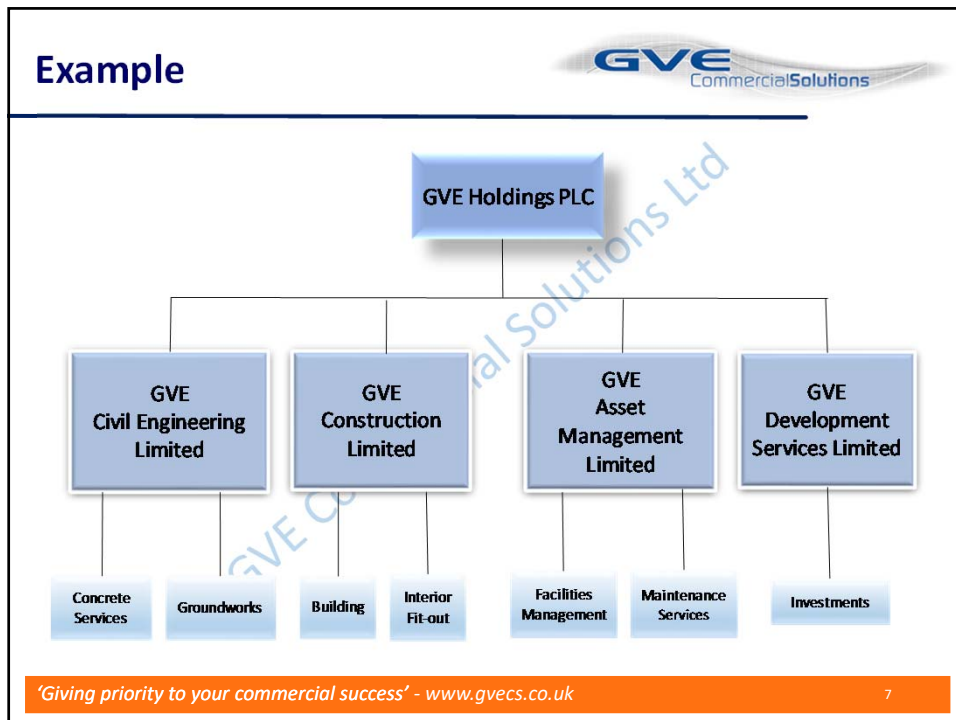
- Holds a majority of the voting rights, or
- Has the right to appoint or remove a majority of the board of directors.

The subsidiary company principally focusses on commercial operations.

Despite the asset ownership arrangement, each company is treated as a separate legal entity in relation to; liabilities, taxation, and governance.

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Why establish a 'Group' Company Structure?

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Purpose



Protecting Assets

These may be owned by the Holding Company and leased to a subsidiary.

Taxation benefits

Particular structures provide certain tax exemptions and reliefs.

Centralised Control

Particularly for Intellectual Property Rights and regulatory authorisations.

Flexibility

A subsidiary can pursue new ventures without risking the groups assets.

Succession Planning

The holding company can ensure continuity of the business when key people from a subsidiary company leave.

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What is a guarantee?

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Definition and features



This is essentially a contractual promise or undertaking by a guarantor.

Guarantees may be either;

Performance

The Guarantor will ensure contractual performance,

Financial

The Guarantor will provide compensation in the event of a breach.

A guarantee is a contract in it's own right so the requirements for forming a contract equally apply.

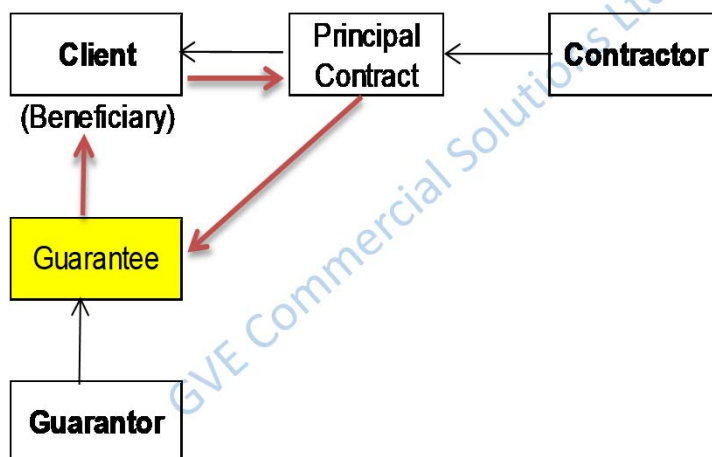
A material amendment or variation of the primary contract may release the guarantor, unless the guarantee expressly provides for this.

As the guarantor's obligations are contingent upon the underlying contract this creates a 'secondary obligation' arrangement.

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Secondary obligation



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Ultimate Holding Company Guarantee

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Definition and features

This is a formal guarantee between the Beneficiary and the ultimate holding company of the 'other party' under the principal contract.

The basic principles relating to a guarantee also equally apply.

An ultimate holding company guarantee should also consider;

- Capacity of the guarantor,
- Scope of the guarantee,
- Insolvency is not a breach of contract,
- Binding nature of legal decisions applied to the guarantor,
- Procedural details of how a claim is made,
- Change of 'ownership',
- Extent of liability.

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NEC Secondary Option X4

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NEC Suite

Secondary option X4 can be found in the following NEC forms;

- Engineering and Construction Contract (ECC),
- Engineering and Construction Subcontract (ECS),
- Professional Services Contract (PSC),
- Professional Services Subcontract (PSS),
- Term Service Contract (TSC),
- Term Service Subcontract (TSS),
- Facilities Management Contract (FMC),
- Facilities Management Subcontract (FMS),
- Supply Contract (SC),
- Design Build and Operate Contract (DBO),
- Alliance Contract (ALC).

Note: the FMC, FMS and ALC forms also include a supplementary provision in relation to a performance bond (see X13).

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X4.1 - Procedure



The contracting party must be a subsidiary of another company.

This is a guarantee of the contracting party's performance.

The form of the guarantee is set out in the Scope.

The guarantee is intended to be given by the Contract Date, or within four weeks of the Contract Date.

If the guarantee is not provided after the four week period, this can be notified as a default, which provides for a further four weeks to give the guarantee.

Upon the expiry of the additional four week period, there is the right of termination at sub-clause 91.2.

X4.2 - Alternative




This was introduced in NEC4 and provides the 'supplier' with the option to propose an alternative guarantor.

The proposed alternative must also be 'owned' by the ultimate holding company.

The proposed alternative is subject to formal acceptance.

A reason for not accepting the proposed alternative is that the commercial position is not strong enough to carry the guarantee.


The contract does not state what this means although it would also depend upon the terms of the guarantee.



Issues to consider

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Points to note

Contract Date – when does this actually occur?

Does the Guarantor have the capacity to 'perform' the obligations under the guarantee?

Ensure that a Guarantor is bound by any adjudication or tribunal decisions.

Provide for material variation or amendment of the primary contract.

Consider the use of 'contract assurance' measures with reference to a considered risk based approach rather than a 'tick box' exercise.

What about a guarantee from the Client / Purchaser?

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