

## SECTION C APPENDIX 3

### PERFORMANCE BOND

**THIS DEED** is dated **[DATE]**

#### **PARTIES**

- (1) [FULL COMPANY NAME] incorporated and registered in England and Wales with company number [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS] ("Surety");
- (2) [FULL COMPANY NAME] incorporated and registered in England and Wales with company number [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS] ("Provider");
- (3) MILTON KEYNES COUNCIL of Civic Offices, 1 Saxon Gate East. Central Milton Keynes MK9 3EJ ("Authority")

#### **BACKGROUND**

- (A) By the Contract the Provider has agreed with the Authority to perform the Services therein described upon and subject to the terms and conditions therein set out.
- (B) The Surety has agreed with the Authority at the request of the Provider to guarantee the performance of the obligations of the Provider under the Contract upon the terms and conditions of this Performance Bond.

#### **AGREED TERMS**

##### **1. INTERPRETATION**

- 1.1 The definitions and rules of interpretation in this clause apply in this deed.

"Contract": an agreement in writing dated [DATE] between the Authority and the Provider.

"Contract Period" means the term of Contract as stated in clause A3 of the Contract.

"Contract Price" is the amount payable to the Provider for the Services which is the tendered price of [£xxxx]

"Business Day": any day other than a Saturday or Sunday or public holiday in England and Wales.

"Maximum Amount": 5% of the Contract Price.

"Services": the services referred to in the Contract, provided by or on behalf of the Provider in accordance with the Contract.

- 1.2 Clause headings shall not affect the interpretation of this deed.

- 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 Words in the singular shall include the plural and vice versa.
- 1.6 A reference to one gender shall include a reference to the other genders.
- 1.7 A reference to a party shall include that party's legal and personal representatives, successors or permitted assigns.
- 1.8 A reference to a statute, statutory provision or subordinated legislation is a reference to it as it is in force from time to time, taking account of any amendment, extension, or re-enactment and includes any statute, statutory provision or subordinate legislation which it amends or re-enacts.
- 1.9 A reference to a statute or statutory provision shall include any subordinate legislation made from time to time under that statute or statutory provision.
- 1.10 Any obligation in this deed on a person not to do something includes an obligation not to agree or allow that thing to be done.
- 1.11 A reference to writing or written includes faxes but not e-mail.
- 1.12 A reference to a document is a reference to that document as varied or novated (in each case, other than in breach of this deed) at any time.
- 1.13 References to clauses are to the clause of this deed unless stated otherwise.
- 1.14 Where the words include(s), including or in particular are used in this deed, they are deemed to have the words "without limitation" following them.

## **2. PROMISE TO PAY UP TO MAXIMUM AMOUNT**

- 2.1 If the Provider fails to pay any sum that is due and demanded from it by the Authority under or in connection with the Contract (including any debt, damages, interest or costs), the Authority may give notice to the Surety demanding the Surety to pay that sum, up to the Maximum Amount, to the Authority. The Surety shall pay that sum to the Authority within 10 Business Days of receipt of the Authority's notice.
- 2.2 The Authority may give different notices to the Surety on different occasions, each requiring the Surety to pay the sum referred to in clause **Error! Reference source not found.**, but the Surety shall not be obliged to pay to the Authority more than the Maximum Amount in total.

## **3. AMENDMENTS TO THE CONTRACT**

- 3.1 The Contract or the Services may be modified, amended or supplemented in any way without the consent of the Surety. No such modification, amendment or supplement shall affect, release or impair the liability of the Surety under this deed. The Surety's liability shall extend to all the liabilities of the Provider under the Contract as modified, amended or supplemented.
- 3.2 The invalidity, avoidance or termination of the Contract shall not affect, release or impair the liability of the Surety under this deed.

- 3.3 No waiver, concession, allowance of time, compromise or forbearance given to, or made with, the Provider shall affect, release or impair the liability of the Surety under this deed. The terms of this deed shall apply to the terms of any such waiver, concession, allowance of time, compromise or forbearance as they apply to the Contract.

#### **4. CONCLUSIVE LIABILITY AND EXTENT OF LIABILITY**

- 4.1 Without prejudice to clause 4.3, for the purposes of this deed, any money judgment or adjudicator's decision against the Provider in favour of the Authority under or in connection with the Contract shall be conclusive evidence of any liability of the Provider to which that judgment or decision relates.
- 4.2 The inability of the Provider to pay its debts (within the meaning of section 123 of the Insolvency Act 1986) or the entry of the Provider into liquidation, administration, receivership, bankruptcy or any compromise or arrangement with some or all of its creditors (or any equivalent process in any other jurisdiction) shall not reduce, release or impair the liability of the Surety under this deed.
- 4.3 The Authority shall not be obliged to pursue any means of recourse against the Provider before being entitled to enforce this deed against the Surety.
- 4.4 The Authority may compromise, release, waive or neglect any security as it sees fit, without impairing its rights under this deed.

#### **5. EXPIRY**

- 5.1 Subject to clause **Error! Reference source not found.**, this deed shall expire at the end of the Contract Period.
- 5.2 If the Authority has given any notice under clause 2 before the end of the Contract Period, clause **Error! Reference source not found.** shall not affect that notice and the Authority shall be entitled to continue its claim under that notice.

#### **6. ASSIGNMENT**

- 6.1 The Authority may assign or charge the benefit of this deed, without the consent of the Surety or of the Provider or to any person to whom the Authority assigns the benefit of the Contract.
- 6.2 The Authority may notify the Surety and the Provider of any assignment. If the Authority fails to do this, the assignment shall still be valid.
- 6.3 The Provider and the Surety shall not contend that any person to whom the benefit of this deed is assigned may not recover any sum (including any debt, damages, interest or costs) under this deed because that person is an assignee and not a named party to this deed.

#### **7. NOTICES**

- 7.1 Any notice required to be given under this deed shall be in writing and shall be delivered personally, or sent by pre-paid first-class post or recorded delivery or by commercial courier, to each party required to receive the notice, as set out below:

(a) [AUTHORITY]: [CONTACT] [ADDRESS]

(b) [PROVIDER]: [CONTACT] [ADDRESS]

(c) [SURETY]: [CONTACT] [ADDRESS]

or as otherwise specified by the relevant party by notice in writing to each other party.

7.2 Any notice shall be deemed to have been duly received:

- (a) if delivered personally, when left at the address and for the contact referred to in this clause; or
- (b) if sent by pre-paid first-class post or recorded delivery, at 9.00 am on the second Business Day after posting; or
- (c) if delivered by commercial courier, on the date and at the time that the courier's delivery receipt is signed.

7.3 A notice required to be given under this deed shall not be validly given if sent by e-mail.

7.4 The provisions of this clause shall not apply to the service of any proceedings or other documents in any legal action (including any adjudication, litigation or arbitration).

## **8. THIRD PARTY RIGHTS**

A person who is not a party to this deed shall not have any rights under or in connection with it.

## **9. GOVERNING LAW AND JURISDICTION**

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

9.2 The parties irrevocably agree that the courts of England shall have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this deed or its subject matter or formation (including non-contractual disputes or claims).

In witness of which this document has been executed as a deed and is delivered and takes effect on the date stated at the beginning of it.

THE COMMON SEAL OF )

MILTON KEYNES COUNCIL )

was affixed to this deed )

in the presence of:

Authorised Signatory

EXECUTED AND DELIVERED )

as a deed by [THE SURETY] )

acting by the signatures of

Director

Director/Secretary

EXECUTED AND DELIVERED )

as a deed by [THE PROVIDER] )

acting by the signatures of

Director

Director/Secretary