

NEC4

Term Maintenance Contract

Annex 26 – Performance bond DN581359

Commercial and Procurement Team

Somerset County Council

County Hall

Taunton

TA1 4DY

commercialandprocurement@somerset.gov.uk

DATED

PERFORMANCE BOND

between

[SURETY]

and

[CONTRACTOR]

and

[EMPLOYER]

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THIS DEED is dated

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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] (**Contractor**).
- (3) SOMERSET [COUNTY] COUNCIL whose office is at County Hall, Taunton, Somerset, TA1 4DY (**Employer**).

BACKGROUND

- (A) By an agreement dated [DATE] (Agreement) the Employer agreed to engage [INSERT NAME] (Contractor) to provide highway maintenance services.
- (B) It is a condition of the Agreement that the Contractor procures the execution and delivery to the Employer of a bond, in the form of this deed, to the Employer.
- (C) The Surety has agreed to enter into this deed with the Employer and the Contractor for the benefit of the Employer.

AGREED TERMS

Interpretation

The following definitions and rules of interpretation apply in this deed.

Definitions:

Contract: an agreement in writing dated [DATE] between the Employer and the Contractor.

Business Day: a day other than a Saturday, Sunday or public holiday in England when banks in are open for business.

Maximum Amount: £1,000,000

Services: the services referred to in the Contract, carried out by or on behalf of the Contractor in accordance with the Contract.

Clause and annex headings shall not affect the interpretation of this deed.

A person includes a natural person, corporate or unincorporated body (whether or not having separate legal personality).

A reference to a company shall include any company, corporation or other body corporate, wherever and however incorporated or established.

Unless the context otherwise requires, words in the singular shall include the plural and in the plural shall include the singular.

Unless the context otherwise requires, a reference to one gender shall include a reference to the other genders.

This agreement shall be binding on, and enure to the benefit of, the parties to this agreement and their respective personal representatives, successors and permitted assigns, and references to any party shall include that party's personal representatives, successors and permitted assigns.

A reference to a statute or statutory provision is a reference to it as amended, extended or re-enacted from time to time.

A reference to a statute or statutory provision shall include all subordinate legislation made from time to time under that statute or statutory provision.

A reference to writing or written includes email.

Any obligation on a party not to do something includes an obligation not to agree that thing to be done.

References to clauses are to the clauses of this deed.

Any words following the terms including, include, in particular, for example or any similar expression shall be construed as illustrative and shall not limit the sense of the words, description, definition, phrase or term preceding those terms.

Promise to pay up to Maximum Amount

If the Contractor fails to pay any sum that becomes due from it to the Employer under or in connection with the Contract (including any debt, damages, interest or costs), the Employer may give notice to the Surety requiring the Surety to pay that sum, up to the Maximum Amount, to the Employer. The Surety shall pay that sum to the Employer within 10 Business Days of receipt of the Employer's notice. The Employer's notice may be in the form set out in the Annex to this agreement. The Employer may give different notices to the Surety on different occasions, each requiring the Surety to pay the sum referred to in clause 0, but the Surety shall not be obliged to pay to the Employer more than the Maximum Amount in aggregate.

Amendments to Contract

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



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deed. The Surety's liability shall extend to all the liabilities of the Contractor under the Contract as modified, amended or supplemented.

The invalidity, avoidance or termination of the Contract (or the Contractor's employment under the Contract) shall not affect, release or impair the liability of the Surety under this deed.

No waiver, concession, allowance of time, compromise or forbearance given to, or made with, the Contractor 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.

Priority of claims against the Contractor

Until the Employer has recovered all sums due to it under or in connection with the Contract, the Surety shall not:

in respect of any payment made or liability under this deed, claim, rank or vote as a creditor in the liquidation of the Contractor in competition with the Employer; or

enforce any security over the assets of the Contractor in respect of any such payment or liability in competition with the Employer.

This clause 0 shall not limit or restrict the exercise or enforcement by the Surety of its rights against any other person.

If the Surety recovers any sums in breach of clause 0, the Surety shall hold such sums on trust:

to pay to the Employer any sums due from the Contractor to the Employer under or in connection with the Contract; and

subject to clause 0, for the benefit of the Surety.

Conclusive liability and extent of liability

For the purposes of this deed:

any money judgment, award or adjudicator's decision against the Contractor in favour of the Employer or

any written acknowledgment by the Contractor that it has failed to pay a sum due from it to the Employer,

under or in connection with the Contract shall be conclusive evidence of any liability of the Contractor to which that judgment, award or decision relates.

Subject to clause 0, the Employer may not recover any more under this deed in respect of any matter than the Employer would be entitled to recover from the Contractor in respect of that matter.

The inability of the Contractor to pay its debts (within the meaning of section 123 of the Insolvency Act 1986) or the entry of the Contractor into liquidation, administration, receivership, bankruptcy or any compromise or arrangement with some or all of its creditors (or any equivalent process in any other



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jurisdiction) shall not reduce, release or impair the liability of the Surety under this deed.

The Employer shall not be obliged to pursue any means of recourse against the Contractor before being entitled to enforce this deed against the Surety.

The Employer may compromise, release, waive or neglect any security as it sees fit, without impairing its rights under this deed.

Expiry

Subject to clause 0, this deed shall expire [one year] after expiry or early termination the Contract.

If the Employer has given any notice under clause 0 before the end of the [one year period] referred to in clause 0, clause 0 shall not affect that notice and the Employer may continue its claim under that notice.

Assignment

The Employer may assign or charge the benefit of this deed, without the consent of the Surety or of the Contractor to any person to whom the Employer assigns the benefit of the Contract.

The Employer shall notify the Surety and the Contractor of any assignment. If the Employer fails to do this, the assignment shall still be valid.

The Contractor 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.

Notices

A notice given to a party under or in connection with this deed:

shall be in writing;

shall be signed by or on behalf of the party giving it;

shall be sent to the party for the attention of the contact and at the address or email address listed in clause 0;

shall be sent by a method listed in clause 0; and

is deemed received as set out in clause 0 if prepared and sent in accordance with this clause.

The parties' addresses and contacts are as set out in this table:

Party	Contact	Address	Email address
Employer	[POSITION OF CONTACT]	County Hall, Taunton, Somerset, TA1 4DY	[EMAIL ADDRESS]
Contractor	[POSITION OF CONTACT]	[ADDRESS]	EMAIL ADDRESS

Surety	[POSITION OF CONTACT]	[ADDRESS]	EMAIL ADDRESS
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A party may change its details given in the table in clause 0 by giving notice, the change taking effect for the party notified of the change at 9.00 am on the later of:

**the date, if any, specified in the notice as the effective date for the change; or
the date five Business Days after deemed receipt of the notice.**

This table sets out:

**delivery methods for sending a notice to a party under this deed; and
for each delivery method, the corresponding delivery date and time when
delivery of the notice is deemed to have taken place provided that all other
requirements in this clause have been satisfied and subject to the provisions in
clause 0:**

Delivery method	Delivery date and time
Delivery by hand.	On signature of a delivery receipt.
Pre-paid first class post or other next working day delivery service providing proof of delivery.	9.00 am on the second Business Day after posting or at the time recorded by the delivery service.
Email.	At the time of transmission.

For the purpose of clause 0 and calculating deemed receipt all references to time are to local time on Business Days in the place of deemed receipt.

This clause does not apply to the service of any proceedings or other documents in any legal action or, where applicable, any arbitration or other method of dispute resolution.

Third party rights

No one other than a party to this deed, their successors and permitted assignees, shall have any right to enforce any of its terms.

Governing law

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

Jurisdiction

Each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim (including non-contractual

disputes or claims) arising out of or in connection with this deed or its subject matter or formation.



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

Executed as a deed by [NAME OF SURETY] acting by [NAME OF FIRST DIRECTOR], a director and [NAME OF SECOND DIRECTOR OR SECRETARY], [a director **OR** its secretary]

.....
[SIGNATURE OF FIRST DIRECTOR]
Director

.....
[SIGNATURE OF SECOND DIRECTOR OR SECRETARY]
[Director **OR** Secretary]

OR

Executed as a deed by [NAME OF SURETY] acting by [NAME OF DIRECTOR], a director, in the presence of:

.....
[SIGNATURE OF DIRECTOR]
Director

.....
[SIGNATURE OF WITNESS]
[NAME, ADDRESS [AND OCCUPATION] OF WITNESS]

Executed as a deed by [NAME OF CONTRACTOR] acting by [NAME OF FIRST DIRECTOR], a director and [NAME OF SECOND DIRECTOR OR SECRETARY], [a director **OR** its secretary]

.....
[SIGNATURE OF FIRST DIRECTOR]
Director

.....
[SIGNATURE OF SECOND DIRECTOR OR SECRETARY]
[Director **OR** Secretary]

OR

Executed as a deed by [NAME OF CONTRACTOR] acting by [NAME OF DIRECTOR], a director, in the presence of:

.....
[SIGNATURE OF DIRECTOR]
Director

.....
[SIGNATURE OF WITNESS]
[NAME, ADDRESS [AND OCCUPATION] OF WITNESS]

Annex Form of notice



[Referred to in clause 0.]

From: [EMPLOYER'S ADDRESS: SEE clause 0]

To: [SURETY'S ADDRESS: SEE clause 0]

CC: [CONTRACTOR'S ADDRESS: SEE clause 0]

Sent by [METHOD OF SERVICE].

Dear [SURETY]

Demand under a bond dated [DATE] (Bond) relating to highway maintenance services

This letter is a notice under the Bond. Defined terms used in this letter have the same meanings as in the Bond.

[We are the assignee of the benefit of the Bond by a [deed of assignment **OR** an assignment agreement] dated [DATE] between [PARTY] and [PARTY].]

The Contractor has failed to properly pay a sum due to us under or in connection with the Contract. We require you to pay to us £[SUM][, the Maximum Amount] within 10 Business Days.

[The sum due to us from the Contractor is summarised in the attachment to this notice.]

Please make payment to [PAYMENT DETAILS].

Yours faithfully

[SIGNED]

For and on behalf of the Employer