

Performance bond

DATED _____ []

[SURETY] (1)

and

[CONTRACTOR] (2)

and

[EMPLOYER] (3)

PERFORMANCE BOND

in relation to the development of

[INSERT]

THIS PERFORMANCE BOND is made on

[]

BETWEEN:

- (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) [FULLY COMPANY NAME] whose principal address is at [PLEASE INSERT] (“**Employer**”).

WHEREAS:

- (A) The Employer has entered into the Contract with the Contractor.
- (B) The Employer requires the Contractor to provide a bond, substantially in the form of this Performance Bond, to the Employer.
- (C) The Surety has agreed to enter into this Performance Bond with the Employer and the Contractor for the benefit of the Employer.
- (D) It is the intention of the parties that this document be executed as a deed.

IT IS AGREED:

1 **Definitions and interpretation**

1.1 The following definitions apply in this Performance Bond:

- 1.1.1 “**Business Day**” means a day other than a Saturday, Sunday or public holiday in England when banks in London are open for business;
- 1.1.2 “**Contract**” means an agreement dated [DATE] between the Employer and the Contractor including all amendments to variations of or supplements to it from time to time in force;
- 1.1.3 “**Maximum Amount**” means £[SUM];
- 1.1.4 “**Works**” means the design, construction and completion of the building works referred to in the Contract, carried out by or on behalf of the Contractor in accordance with the Contract.

1.2 Unless the context otherwise requires:

- 1.2.1 clause headings shall not affect the interpretation of this Performance Bond;
- 1.2.2 a “**person**” includes a natural person, corporate or unincorporated body (whether or not having separate legal personality) and that person’s personal representatives, successors and permitted assigns;

- 1.2.3 words in the singular shall include the plural and in the plural shall include the singular;
- 1.2.4 a reference to one gender shall include a reference to the other genders;
- 1.2.5 a reference to any party shall include that party's personal representatives, successors and permitted assigns;
- 1.2.6 any obligation on a party not to do something includes an obligation not to agree to that thing being done;
- 1.2.7 a reference to "**writing**" or "**written**" includes fax and e-mail;
- 1.2.8 a reference to this Performance Bond or to any other deed, agreement or document referred to in this Performance Bond is a reference to this Performance Bond or such other deed, agreement or document as varied or novated (in each case, other than in breach of the provisions of this Performance Bond) from time to time; and
- 1.2.9 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.

2 Promise to pay

- 2.1 If the Contractor fails to pay any sum that becomes due (under or in connection with the Contract) from it to the Employer (including any debt, damages, interest or costs), the Employer may give notice to the Surety requiring the Surety to pay that sum as established and ascertained in accordance with the terms of the Contract, up to the Maximum Amount, to the Employer. The Surety shall pay that sum to the Employer within 5 Business Days of receipt of the Employer's notice.
- 2.2 If the Employer terminates the Contractor's employment under clause 8.5 of the Contract, the Employer may give notice to the Surety requiring the Surety to pay the sum referred to in clause 8.7.6 of the Contract. The Surety shall pay that sum to the Employer within 5 Business Days of receipt of the Employer's notice.
- 2.3 The Employer may give different notices to the Surety on different occasions, each requiring the Surety to pay the sum referred to in clauses 2.1 and/or 2.2, but the Surety shall not be obliged to pay to the Employer more than the Maximum Amount in aggregate.

3 Expiry

- 3.1 Subject to clause 3.2, this Performance Bond shall expire three calendar months after the date of the Defects Correction Certificate (as defined in the Contract).
- 3.2 If the Employer has given any notice under clause 2.1 or 2.2 before the end of the three calendar months referred to in clause 3.1, clause 3.1 shall not affect that notice and the Employer may continue its claim under that notice.

4 Employer's protections

- 4.1 The Surety agrees that it shall not in any way be released from liability under this Performance Bond by any act, omission, matter or other thing whereby, in absence of this provision, the Surety would or might be released in whole or in part from liability under this Performance Bond including, without limitation and whether or not known to the Surety:
- 4.1.1 any arrangement made between the Contractor and the Employer;
 - 4.1.2 any alteration in the obligations undertaken by the Contractor whether by way of any modification, amendment, supplement or variation referred to in clause 6.1 or otherwise;
 - 4.1.3 any indulgence, waiver, consent or forbearance by the Employer whether as to payment, time, performance or otherwise;
 - 4.1.4 any additional or advanced payment to the Contractor;
 - 4.1.5 any compromise of any dispute with the Contractor;
 - 4.1.6 any failure of supervision to detect or prevent any fault of the Contractor;
 - 4.1.7 any assignment of the benefit of the Contract;
 - 4.1.8 the taking, variation, renewal or release of, the enforcement or neglect to perfect or enforce any right, guarantee, remedy or security from or against the Contractor or any other person;
 - 4.1.9 any unenforceability, illegality or invalidity of any of the provisions of the Contract or any of the Contractor's obligations under the Contract, so that this Performance Bond shall be construed as if there were no such unenforceability, illegality or invalidity;
 - 4.1.10 any legal limitation, disability, incapacity or other circumstances relating to the Contractor, or any other person; and/or
 - 4.1.11 the dissolution, amalgamation, reconstruction, reorganisation, change in status, function, control or ownership, insolvency, liquidation or the appointment of an administrator or receiver of the Contractor or any other person.

5 Conclusive liability and extent of liability

- 5.1 For the purposes of this Performance Bond, any judgment, award (whether interim or final) or adjudicator's decision against the Contractor in favour of 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.

6 Changes to the Contract

- 6.1 The Surety authorises the Contractor and the Employer to make any modification, amendment, supplement or variation to the Contract. The Surety's liability shall extend to all liabilities of the Contractor under the Contract as modified, amended, supplemented or varied.

7 No obligation to pursue the Contractor

- 7.1 The Employer shall not be obliged, before enforcing this Performance Bond, to take any action in any court or arbitral proceedings against the Contractor, to make any claim against or any demand of the Contractor, to enforce any other security held by it in respect of the obligations of the Contractor under the Contract or to exercise, levy or enforce any distress, diligence or other process of execution against the Contractor.

8 Security and Subrogation

- 8.1 Until all amounts which may be or become payable under the Contract or this Performance Bond have been irrevocably paid in full, the Surety shall not as a result of this Performance Bond or any payment or performance under this Performance Bond be subrogated to any right or security of the Employer or claim or prove in competition with the Employer against the Contractor or any other person or demand or accept repayment of any monies or claim any right of contribution, set-off or indemnity and any sums received by the Surety or the amount of any set-off exercised by the Surety in breach of this provision shall be held by the Surety in trust for and shall be promptly paid to the Employer.
- 8.2 The Surety shall not hold any security from the Contractor in respect of this Performance Bond and any such security which is held in breach of this provision shall be held by the Surety in trust for and shall promptly be transferred to the Employer.
- 8.3 Until all amounts which may be or become payable under the Contract or this Performance Bond have been irrevocably paid in full, if (notwithstanding the provisions of clause 8.1 and clause 8.2) the Surety has any rights of subrogation against the Contractor or any rights to prove in a liquidation of the Contractor, the Surety agrees to exercise such rights in accordance with the directions of the Employer.

9 Payment and expenses

- 9.1 Each payment to be made by the Surety under this Performance Bond shall be made in pounds sterling, free and clear of all deductions or withholdings of any kind, except for those required by law, and if any deduction or withholding must be made by law, the Surety shall pay that additional amount which is necessary to ensure that the Employer receives a net amount equal to the full amount which it would have received if the payment had been made without the deduction or withholding.
- 9.2 If the Surety fails to make any payment due to the Employer under this Performance Bond by the due date for payment, then the Surety shall pay interest on the overdue amount at the rate of 4% per annum above the base rate of Barclays Bank plc from time to time. Such interest shall accrue on a daily basis from the due date until actual payment of the overdue amount, whether before or after judgment. The Surety shall pay the interest together with the overdue amount.
- 9.3 Each party shall pay its own costs incurred in connection with the negotiation, preparation and execution of this Performance Bond.

10 Warranties

- 10.1 The Surety warrants and confirms to the Employer:

10.1.1 that it is duly incorporated with limited liability and validly existing under the law of England and Wales; and

10.1.2 its obligations under this Performance Bond are legal, valid, binding and enforceable in accordance with its terms.

11 Assignment

11.1 The Employer may without the consent of the Surety or the Contractor assign or charge the benefit of this Performance Bond at any time to any person to whom the benefit of the Contract has been or will be validly assigned or charged and any such assignment or charge shall not release the Surety from liability under this Performance Bond.

11.2 The Employer shall notify the Surety and the Contractor of any such assignment or charge. If the Employer fails to do so, the assignment or charge will still be valid.

11.3 The Surety and the Contractor shall not contend that any person to whom the benefit of this Performance Bond is assigned or charged under clause 11.1 may not recover any sum under this Performance Bond because that person is an assignee or chargee and not a named party to this Performance Bond.

11.4 The Surety may not assign or charge the benefit of this Performance Bond without the Employer's written consent.

12 Notices

12.1 Any notice or other communication given to a party under or in connection with this Performance Bond shall be in writing and shall be:

12.1.1 delivered by hand or by pre-paid first-class post or other next working day delivery service at its registered office (if a company) or its principal place of business (in any other case); or

12.1.2 sent by fax to its main fax number.

12.2 Any notice or communication shall be deemed to have been received:

12.2.1 if delivered by hand, on signature of a delivery receipt;

12.2.2 if sent by pre-paid first-class post or other next working day delivery service, at 9.00 am on the second working day after posting;

12.2.3 if sent by fax, at 9.00 am on the next working day after transmission.

12.3 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.

13 Waiver

13.1 No delay or omission of the Employer in exercising any right, power or privilege under this Performance Bond shall impair or be construed as a waiver of such right, power or privilege nor shall any single or partial exercise of any such right, power or privilege preclude any further exercise of such right, power or privilege or the

exercise of any other right, power or privilege. The rights and remedies of the Employer provided for in this Performance Bond are cumulative and not exclusive of any rights or remedies provided by law.

- 13.2 A waiver given or consent granted by the Employer under this Performance Bond will be effective only if given in writing and then only in the instance and for the purpose for which it is given and shall not prevent the Employer from subsequently enforcing any of the provisions of this Performance Bond.

14 Severance

- 14.1 If any provision or part-provision of this Performance Bond is or becomes invalid, illegal or unenforceable, it shall be deemed modified to the minimum extent necessary to make it valid, legal and enforceable. If such modification is not possible, the relevant provision or part-provision shall be deemed deleted. Any modification to or deletion of a provision or part-provision under this clause shall not affect the validity and enforceability of the rest of this Performance Bond.

- 14.2 If any provision or part-provision of this Performance Bond is found to be invalid, illegal or unenforceable, the parties shall negotiate in good faith to amend such provision so that, as amended, it is legal, valid and enforceable, and, to the greatest extent possible, achieves the intended commercial result of the original provision.

15 Third party rights

- 15.1 Except for any person to whom the benefit of this Performance Bond is assigned or charged in accordance with clause 11.1, a person who is not a party to this Performance Bond shall not have any rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Performance Bond.

16 Counterparts

- 16.1 This Performance Bond may be executed in any number of counterparts, each of which when executed and delivered shall constitute a duplicate original, but all the counterparts shall together constitute the one deed.

17 Entire agreement

- 17.1 This Performance Bond constitutes the entire agreement between the parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter.

- 17.2 The parties shall have no remedies in respect of any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this Performance Bond.

18 Governing law and jurisdiction

- 18.1 This Performance Bond 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 and Wales.

- 18.2 Each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this Performance Bond or its subject matter or formation (including non-contractual disputes or claims).
- 18.3 [The Surety irrevocably appoints [NAME] of [ADDRESS] [FAX NUMBER] as its agent to receive on its behalf in England or Wales service of any proceedings under this Performance Bond. Such service shall be deemed completed on delivery to such agent (whether or not it is forwarded to and received by the Surety) and shall be valid until such time as the Employer has received prior written notice that such agent has ceased to act as agent. If for any reason such agent ceases to be able to act as agent or no longer has an address in England or Wales, the Surety shall forthwith appoint a substitute acceptable to the Employer and deliver to the Employer the new agent's name and address [and fax number] within England and Wales.]¹
- 18.4 [The Surety irrevocably consents to any process in any legal action or proceedings under this Performance Bond being served on it in accordance with the provisions of this Performance Bond relating to service of notices of claims. Nothing contained in this Performance Bond shall affect the right to serve process in any other manner permitted by law.]²

19 Execution as a Deed

19.1 This instrument is executed as a deed and was delivered when it was first dated.

[insert employer execution block]

[SURETY EITHER]

Signed as a deed by [INSERT NAME OF SURETY] acting by:

.....
Director's name	Director's signature
.....
Director's[/Secretary's] name	Director's[/Secretary's] signature

[OR]

Signed as a deed by [INSERT NAME OF SURETY] acting by a director in the presence of:

.....
	Director's signature

	Director's name
Witness' signature

¹ Use this clause if the surety is out of the jurisdiction. Delete if the surety is in England and Wales.

² Use this clause if the surety is out of the jurisdiction. Delete if the surety is in England and Wales.

Witness' name
Witness' address
.....
.....
Witness' occupation

[CONTRACTOR EITHER]

Signed as a deed by [INSERT NAME OF)
CONTRACTOR] acting by:)

.....
Director's name Director's signature

.....
Director's[/Secretary's] name Director's[/Secretary's] signature

[OR]

Signed as a deed by [INSERT NAME OF)
CONTRACTOR] acting by a director in the)
presence of:)

.....
Director's signature

.....
Director's name

Witness' signature
Witness' name
Witness' address
.....
.....
Witness' occupation