

ECONOMY PLANNING & PLACE BUILDING CONTRACT DIRECTIVE

DATE: July 2017

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REFERENCE

PERFORMANCE BONDS

1. The contract documents for all buildings let by the County Council which exceed a value of £250,000 are to include for the provision of a performance bond. However, the successful Contractor may elect to deposit with the Council's bankers a sum of money in lieu of a bond. This 'Deposit by Way of Security' will be 10% of the Contract Sum and the Contractor will be required to enter into a formal Agreement with the Council.

If the Contractor does not procure execution and delivery of the bond (or a Deposit by Way of Security), then, notwithstanding any other term of the Contract, the Council may deduct £[insert figure which equates to 10% of the Contract Sum] from the sums that would otherwise be due to the Contractor under the Contract." This figure will be deducted in equal amounts from the first three Interim Payments and will be released upon procurement of the bond.

2. The clauses to be included in the Preliminaries to bills of quantities/schedules of work/specifications/employers requirements are to be as shown on Appendix 'A' attached. A separate item is also to be included on the General Summary for pricing/identifying the cost of providing the bond (or for stating that the Contractor will enter into a Deposit by Way of Security (for which there is no administrative charge)

Appendix A
(attached)

3. Tenderers are required at the time of tendering to state the name and address of the Surety with whom they propose to enter into a bond and the Council's standard documentation makes provision for this (see attached On Demand Bond and Deposit by Way of Security Agreement). (Should a tenderer be undecided as to whether to enter into a bond or a Deposit by Way of Security, the name and address of the Surety must be stated)

On Demand
Bond (attached)
& Deposit
by Way of
Security
Agreement
(attached)

Tenderers are expected to ensure that their Surety will accept the Council's bond wording without amendment prior to submitting their bid. Failure to do so and which results in any increase in the cost of a bond (to the successful Contractor) post contract award, will be wholly absorbed by the Contractor and will not be added to the tender price/Contract Sum.

4. When tenders are received and the priced bills of quantities/schedules of work/specifications/employers requirements are checked a check is also to be made that the cost of the bond (where a Deposit by Way of Security will not be entered into) has been shown separately from other costs and, if not, a separate statement is to be obtained from the tenderer.

NOTE:

THIS DIRECTIVE IS APPLICABLE TO THE MAJORITY OF SCHEMES BUT IT WILL NOT NECESSARILY BE APPROPRIATE TO ALL WORKS AND THEREFORE ON EACH SCHEME IT WILL BE NECESSARY TO CHECK THE SPECIFIC REQUIREMENTS.



5. In some instances, Capital & Asset Management in consultation with the Chief Monitoring Officer and Director of Resources & Section 151 Officer, may decide not to proceed with the bonding arrangements, and/or alternatively to accept a parent company guarantee.
6. Should it be decided on a particular scheme, prior to the formulation of the contract, not to proceed with the bonding arrangements, the cost of the bond will be omitted from the tender amount in calculating the contract sum. Where a bond is to be omitted agreement must be obtained from the tenderer before the contract sum is established.
7. Bonds are not to be omitted without the prior agreement of Capital & Asset Management.

CONCLUSION
(Appendix A follows)

Preliminaries
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PERFORMANCE BOND/DEPOSIT BY WAY OF SECURITY

PERFORMANCE BOND: The Contractor will be required to enter into a Performance Bond with one Surety being an approved bank, guarantee society or insurance company for an amount equal to 10 per cent of the contract sum for the due and proper performance and observance of the terms and stipulations of the contract. In the event of the Surety approved by the Employer becoming bankrupt or insolvent or compounding with his or their creditors, the Contractor shall forthwith, upon being required by the Employer so to do obtain a fresh surety and enter into a new bond jointly with such surety in the same sum and in the same terms as that contained in the original bond for the due and proper performance and observance of the terms of the contract.

DEPOSIT BY WAY OF SECURITY

As an alternative to a performance bond, the Contractor may enter into a Deposit by Way of Security with the Employer, by depositing with the Employer an amount equal to 10% of the contract sum and signing an Agreement for the due and proper performance and observance of the terms and stipulations of the contract. The bond/Deposit by Way of Security will not be released until the Certificate for Practical Completion has been issued, or where the Works are divided into sections, the bond will not be released until the final Section Completion Certificate/Section Completion Statement has been issued.

The form of bond/Agreement for Deposit by Way of Security shall be as set out in the specimen enclosed with the tender documents.

Include in the tender sum for all costs incurred in obtaining the bond (where a Deposit by Way of Security will not be entered into) including the necessary stamp duties payable.

The tenderer's attention is drawn to the requirement for the name and address of the proposed Surety to be stated on the tender form when tenders are submitted. The name and address of a broker, or other intermediary will not be accepted. (Should a tenderer be undecided as to whether to enter into a bond or a Deposit by Way of Security, the name and address of the Surety must be stated)

PRICING OF PERFORMANCE BOND: The cost of providing the performance bond is to be entered as a separate total elsewhere on the general summary indicated. (There is no administrative charge for entering into a Deposit by Way of Security)

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To collection

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||

£

DATED:

20

[CONTRACTOR]

BOND

FOR CONTRACT (PC - [])

AT

[INSERT PROJECT NAME]

THIS BOND is made as a DEED on the _____ day of _____, 20____

BETWEEN

- (1) _____, company registration number _____, with offices at _____ (“the **Surety**”, which term shall include its successors and assigns), and
- (2) [Contractor name], company registration number [insert], with offices at [] (“the **Contractor**”, which term shall include its successors and permitted assigns), and
- (3) **West Sussex County Council**, with offices at County Hall, Chichester, West Sussex, PO19 1RQ (“the **Employer**”, which term shall include its successors and assigns).

WHEREAS

By an Agreement (“the **Contract**”) made between the Employer and the Contractor, the Contractor has agreed to carry out certain works at [insert] PC No {insert} “the **Works**”) in accordance with the terms and conditions of the Contract.

NOW IT IS AGREED as follows:

1. Bond

By this Bond the Contractor and the Surety, their successors and assigns, are jointly and severally held and bound subject to the conditions hereof to the Employer for the payment to the Employer of the sum of £[] (in words) being 10% of the contract sum as referred to in the Contract.

2. Conditions

The conditions of this Bond are that:

- 2.1 if the Contractor duly discharges all the Contractor’s obligations under or pursuant to the Contract; or
- 2.2 in the event of the Contractor’s default in the discharge of any such obligations, the Surety shall pay to the Employer up to the maximum amount of this Bond the loss and damage thereby caused to the Employer as established and ascertained pursuant to and in accordance with the provisions of or by reference to the Contract,

this Bond shall, subject to Clause 4 below, hereby be discharged but otherwise shall remain in force.

3. Discharge

Whether or not this Bond shall be returned to the Surety, the obligations of the Surety under this Bond shall be released and discharged absolutely upon issue of the Practical Completion Certificate by the Architect/Contract Administrator appointed under the Contract, save in respect of any default, abandonment or insolvency which has occurred and in respect of which a claim in writing has been made upon the Surety before the expiry of the Bond.

4. Payment

- 4.1 Notwithstanding Clause 2 if any of the following events occur the Surety shall within 7 days pay to the Employer on the Employer’s first demand, in writing over original handwritten signatures stating that one or more of the following events has occurred, the sum stated by the Employer as being its expected loss or damage up to the maximum amount of this Bond (such claim and statement shall be accepted as conclusive evidence that the amount claimed is due to the Employer under this Bond):
 - 4.1.1 if the Contractor abandons the Contract without due cause; or
 - 4.1.2 where the Contractor is:
 - (a) a company, on the passing of a resolution for winding-up (otherwise than for the purpose of a solvent amalgamation or reconstruction where the resulting entity assumes all of the obligations of the Contractor), or a court of competent jurisdiction making an order to that effect; or

- (b) a partnership, on its dissolution; or
- (c) either a company or a partnership or an individual, on ceasing to carry on its business or substantially the whole of its business, becoming or being declared insolvent or committing any act of bankruptcy or convening a meeting of or making or proposing to make any arrangement or composition with its creditors or the appointment of a receiver, liquidator, trustee or similar officer over any of its assets.

4.2 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 and/or 4.1, but the Surety shall not be obliged to pay to the Employer more than the maximum amount of the Bond in total.

4.3 After completion of the Works the Employer shall ascertain the actual loss arising to it due to the event occurring under Clause 4.1 and:

4.3.1 if this is less than the amount paid by the Surety under Clause 4.1 then the Employer shall forthwith repay to the Surety; or

4.3.2 if this is more than the amount paid by the Surety then the Surety shall forthwith pay the Employer -

the difference between the actual loss and the said amount paid by the Surety not exceeding in aggregate the amount of this Bond.

5. Waiver

No alterations in the Contract, or in the Works, and no extension of time, forbearance or forgiveness, or any act, matter or thing whatsoever except fulfilment of one of the above conditions or an express release by Deed by the Employer shall in any way release the Surety from any liability under this Bond.

6. Assignment

Upon the benefit of the Contract being assigned by the Employer to any party ("the Assignee") the Employer shall then be entitled to assign or transfer all or any of the Employer's rights under this Bond to the Assignee, but the Assignee shall not make any claim under this Bond until the Surety has received in writing notice of the assignment from the Employer.

7. Law and Jurisdiction

7.1 This Bond shall be governed by and construed in all respects in accordance with English law.

7.2 In relation to any legal action or proceedings arising out of or in connection with this Bond ("Proceedings"), each of the parties irrevocably submits to the exclusive jurisdiction of the English Courts and waives any objection to Proceedings in such courts on the grounds of venue or on the grounds that Proceedings have been brought in an inappropriate forum.

IN WITNESS of which the parties have executed and delivered this Bond as a Deed the day and year first written above.

EXECUTED as a DEED by the SURETY

EXECUTED as a DEED by the CONTRACTOR

[_____]
acting by:

[_____]
acting by:

.....

.....

Director
Name:

Director
Name:

.....

.....

Director/Secretary
Name:

Director/Secretary
Name:

DATED

20

[Contractor's name]

&

WEST SUSSEX COUNTY COUNCIL

AGREEMENT FOR

DEPOSIT BY WAY OF SECURITY FOR CONTRACT (PROJECT No. [])

AT

[Name of project]

AC2/[]/JAR

THIS AGREEMENT is made as a DEED on the day of 20

BETWEEN

- (1) [Name of Contractor], company registration number [insert], with offices at [insert] ("the Contractor") which term shall include its successors and permitted assigns) and
- (2) WEST SUSSEX COUNTY COUNCIL, with offices at County Hall, West Street, Chichester, West Sussex, PO19 1RQ ("the Employer"), which term shall include its successors and assigns).

WHEREAS

By an Agreement ("the Contract") made between the Employer and the Contractor, the Contractor has agreed to carry out certain works at [Name of project] PC-[insert] ("the Works") in accordance with the terms and conditions of the Contract.

NOW IT IS AGREED as follows:

- (1) UPON the execution of this Agreement the Contractor will deposit with the Employer by way of security the sum of £[insert] (in words) (hereinafter called "the Sum").
- (2) THE Employer will deposit the Sum with the Employer's bankers which Sum together with interest thereon calculated on a daily basis and compounded half-yearly on the Thirty-first March and Thirtieth September in each year at a rate to equal the Employer's banker's higher deposit rate will be refunded to the Contractor upon the issue of the Practical Completion Certificate by the Architect/Contract Administrator appointed under the Contract.
- (3) NOTWITHSTANDING clause (2) in the event of the Contractor's default in the discharge of his obligations under the Contract by the following:
 - (i) if the Contractor abandons the Contract without due cause; or
 - (ii) where the Contractor is:
 - (a) a company, on the passing of a resolution for winding-up (otherwise than for the purpose of a solvent amalgamation or reconstruction where the resulting entity assumes all of the obligations of the Contractor), or a court of competent jurisdiction making an order to that effect; or
 - (b) a partnership, on its dissolution; or

(c) either a company or a partnership or an individual, on ceasing to carry on its business or substantially the whole of its business, becoming or being declared insolvent or committing any act of bankruptcy or convening a meeting of or making or proposing to make any arrangement or composition with its creditors or the appointment of a receiver, liquidator, trustee or similar officer over any of its assets

then on the completion of the Works by the Employer, the Employer shall refund to the Contractor any remaining part of the Sum and accrued interest having deducted from the Sum amounts equal to the loss and damage thereby caused to the Employer as established and ascertained pursuant to and in accordance with the provisions of or by reference to the Contract.

LAW AND JURISDICTION

This Agreement shall be governed by and construed in all respects in accordance with English Law

In relation to any legal action or proceedings arising out of or in connection with this Agreement ("Proceedings"), each of the parties irrevocably submits to the exclusive jurisdiction of the English Courts and waives any objection to Proceedings in such courts on the grounds of venue or on the grounds that Proceedings have been brought in an inappropriate forum.

IN WITNESS of which the parties have executed and delivered this Agreement as a Deed the day and year first written above.

EXECUTED as a Deed by the Contractor

[insert Contractor's name]

Acting by:

.....

Director

Name:

.....

Director/Company Secretary

Name:

EXECUTED as a Deed by the Employer

The Common Seal of the WEST SUSSEX)
COUNTY COUNCIL)
was hereunto affixed in the presence of:)

Authorised Officer