



Ministry
of Justice

OFFICIAL SENSITIVE
CONTINGENCY RESPONSE PROGRAMME
FAC-1 CONTRACT
PERFORMANCE SECURITY SCHEDULE – PART 2: PERFORMANCE BOND

PART 2

PERFORMANCE BOND



DATED 20[25]

(1) [GUARANTOR]

and

(2) [CLIENT]

PERFORMANCE BOND

relating to

[INSERT NAME OF WORKS PACKAGE]



THIS PERFORMANCE BOND is made as a deed on

20[25]

BETWEEN the following parties whose names and registered office addresses are set out in the Schedule to this Performance Bond (the "**Schedule**");

- (1) the "**Guarantor**" as guarantor, and
- (2) the "**Client**".

RECITALS

- (A) The Client and the Alliance Member have entered into the FAC-1 Contract.
- (B) Pursuant to the FAC-1 Contract, the Client and the Alliance Member have executed the Notice to Proceed in connection with the Works and, pursuant to the same, the Alliance Member has agreed to undertake the design and construction of the Works in accordance with and subject to the terms and conditions of the FAC-1 Contract as supplemented by the Notice to Proceed (collectively referred to as the "**Contract**" in this Performance Bond).
- (C) The Guarantor has agreed with the Client at the request of the Alliance Member (and in accordance with the provisions of the Contract) to guarantee the performance of the obligations of the Alliance Member pursuant to and in accordance with the Contract upon the terms and conditions of this Performance Bond subject to the limitation set out in clause 7.

NOW THIS PERFORMANCE BOND HEREBY WITNESSES as follows:

1. Subject to clause 1A, the Guarantor guarantees to the Client that in the event of a breach of the Contract by the Alliance Member, or in the event of the Insolvency of the Alliance Member, the Guarantor shall subject to the provisions of this Performance Bond satisfy and discharge the Damages sustained by the Client as established and ascertained as against either the Alliance Member or the Guarantor pursuant to and in accordance with the provisions of or by reference to the Contract and taking into account all sums due or to become due to the Alliance Member.
- 1A. Notwithstanding clause 1, where the Alliance Member's engagement under the Contract is terminated for a reason that is not related to the Insolvency of the Alliance Member, the Client acknowledges and agrees that, for the purposes of this Performance Bond, no "forecast" of the "Project Manager" (as defined in the Contract) under "A2" and/or "A3" of clause 93.2 of the Contract shall be binding on the Guarantor and that, notwithstanding any provision of the Contract by which, following termination of the Alliance Member's engagement under the Contract, the Alliance Member might be required to make payment of an "amount due on termination" (as such term is used in the Contract) on the basis of such a "forecast", the Guarantor shall have no liability to make payment to the Client under this Guarantee Bond until such time as the whole of the Works have been completed and the additional cost to the Client in completing the whole of the Works have been properly established and ascertained taking into account all sums due to the Alliance Member (if any) under the Contract.
2. Without prejudice to the Client's general entitlement to make a claim under clause 1 of this Performance Bond, the Parties agree that for the purposes of this Performance Bond, the Damages sustained by the Client shall, subject to clause 4, be deemed to be established and ascertained pursuant to and in accordance with the provisions of the Contract for the purposes of clause 1 above if the amount of such Damages has been determined as being due and payable either:
 - 2.1 by the Alliance Member under an Award obtained by the Client against the Alliance Member prior to the Insolvency of the Alliance Member; or
 - 2.2 by the Alliance Member and/or the Guarantor under an Award obtained by the Client against the Guarantor following the Insolvency of the Alliance Member.



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3. Pursuant to clause 2 above, the Guarantor irrevocably and unconditionally undertakes to pay to the Client on demand (the "**Demand**") (without any set off or counterclaim), any amount specified by the Client in a Demand served upon the Guarantor stating that:
- 3.1 the specified amount has been determined by an Award as being due and payable by the Alliance Member or the Guarantor (as appropriate) to the Client (and the Client has attached a certified copy of such Award); and



- 3.2 where the Award has been obtained against the Alliance Member, the Alliance Member has failed to pay such amount in full to the Client by the final date for payment as determined in the Award or within seven (7) days of the making of the Award, whichever is the earlier,

and the Client shall not be obliged to seek recourse under any other security that it may have in connection with the Contract (including, but not limited to, under any parent company guarantee that the Alliance Member is required to procure in favour of the Client pursuant to and in accordance with the Contract) prior to exercising its rights under this clause 3.

4. Any Demand under clause 3 above shall be conclusive evidence (and admissible as such) of the Guarantor's liability to pay the Client and of the amount which the Guarantor is liable to pay the Client without further enquiry and notwithstanding any objection of the Alliance Member but without prejudice to the rights of the Parties to obtain a final determination of the Damages payable under clause 1 above (and any consequential orders for payment or repayment) pursuant to legal proceedings.
5. In the event of the Insolvency of the Alliance Member, the Client may submit a claim under clause 1 of this Performance Bond in respect of the Damages it has sustained or incurred as a result of a breach of the Contract by, or the Insolvency of, the Alliance Member.
6. If any claim made by the Client in accordance with clause 5 is not satisfied in full by the Guarantor within seven (7) days of the date of service of such claim this shall constitute a dispute and either the Client or the Guarantor may refer the matter to adjudication in accordance with the Adjudication Rules.
7. The maximum aggregate liability of the Guarantor and the Alliance Member under this Performance Bond shall not exceed the Bond Amount as identified in the Schedule.
8. The Guarantor shall not be discharged or released by:
- 8.1 any alteration, amendment or variation of any of the terms conditions and provisions of the Contract or any other document or security so that references to the Contract in this Performance Bond shall include each such variation and amendment;
- 8.2 any alteration, amendment or variation in the extent or nature of the Works;
- 8.3 the Insolvency of the Alliance Member;
- 8.4 any time or waiver granted to the Alliance Member;
- 8.5 the taking, variation, compromise, renewal or release of or refusal or neglect to perfect or enforce any rights, remedies or securities against the Alliance Member;
- 8.6 any legal limitation, disability or incapacity relating to the Alliance Member; and/or
- 8.7 any unenforceability, invalidity or frustration of any obligation of the Alliance Member or any other person under the Contract or any other document or security, waiver by the Client of any of the terms, provisions, conditions, obligations and agreements of the Alliance Member or any failure to make demand upon or to take action against the Alliance Member.
9. Whether or not this Performance Bond shall be returned to the Guarantor the obligations of the Guarantor under this Performance Bond shall be released and discharged absolutely upon the Expiry Date (as defined in the Schedule) save:



9.1 in respect of any breach of the Contract; or

9.2 in the event of the Insolvency of the Alliance Member,

in either case which has occurred and in respect of which notice in writing stating such breach or such Insolvency of the Alliance Member has occurred (as the case may be) has been given to the Guarantor before the Expiry Date.

10. The Client may freely assign, novate or otherwise transfer the whole or any part of its rights and/or obligations under this Performance Bond to any third party to whom the Contract is assigned without the Guarantor's prior consent (and the Client shall give notice of such assignment, novation or transfer (as the case may be) to the Guarantor and Alliance Member within ten (10) Working Days of such assignment, novation or transfer taking effect), but may not otherwise without the prior written consent of the Guarantor, such consent not to be unreasonably withheld or delayed.
11. All Demands, claims notices or other communications required under this Performance Bond shall be made in writing and must be delivered by hand or by recorded / special delivery post to the relevant address below or such other address as a party may notify to the other in writing by not less than five (5) Working Days' prior notice.

For service upon Guarantor:	[INSERT ADDRESS] (marked for the attention of [INSERT NAME / POSITION])
For service upon the Client:	[INSERT ADDRESS] (marked for the attention of [INSERT NAME / POSITION])
For service upon the Alliance Member:	[INSERT ADDRESS] (marked for the attention of [INSERT NAME / POSITION])

12. Any such Demand, notice or communication shall be deemed to have been received:
- 12.1 if delivered by hand, when left at the proper address for service or if the time of such delivery is either after 17:00 on a Working Day or on a day other than a Working Day, at 10:00 on the following Working Day; and
- 12.2 if delivered by recorded / special delivery post, upon the second (2nd) Working Day after posting.
13. The Parties to this Performance Bond do not intend that any of its terms will be enforceable, by virtue of The Contracts (Rights of Third Parties) Act 1999 or otherwise, by any person not a party to it.
14. This Performance Bond shall be governed by and construed in accordance with the laws of England and Wales and only the courts of England and Wales shall have jurisdiction hereunder.
15. In this Performance Bond, the following capitalised terms shall have the meanings given to them below (to the extent that any such term is not specified in the Schedule or the Appendix):

"Adjudication Rules"	means the rules set out at paragraph 2 of the Appendix;
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"Award"	means: (a) a decision of an adjudicator made pursuant to the provisions of (and the process set out in) Option W2 the Contract obtained prior to the Insolvency of the Alliance Member; (b) a decision of an Adjudicator under clause 6 and the Adjudication Rules; and/or (c) a judgment of a court of competent jurisdiction other than an interim judgment;
"Damages"	shall mean any debt due from the Alliance Member pursuant to the Contract and/or and all losses and/or damages in connection with a breach of contract or as a result of the Insolvency of the Alliance Member paid or suffered by the Client and claimable under the Contract;
"Demand"	has the meaning given to such term in clause 3;
"Insolvency of the Alliance Member"	means where the Alliance Member is subject to or suffers an "Insolvency Event" as defined in the FAC-1 Contract;
"Party"	means the Guarantor or the Client (and "Parties" shall be construed accordingly);
"Schedule"	means the schedule to this Performance Bond; and
"Working Day"	has the meaning given to such term in the FAC-1 Contract.



SCHEDULE 1

Alliance Member:	means [INSERT NAME] (company number [INSERT COMPANY NUMBER]) whose registered office is at [INSERT ADDRESS] and who is defined and referred to as the "Alliance Member" in the FAC-1 Contract (with each such term including its successors in title);
Client:	THE SECRETARY OF STATE FOR JUSTICE OF THE MINISTRY OF JUSTICE of 102 Petty France, Westminster, London, SW1H 9AJ and who is also defined and referred to as the "Client" in the FAC-1 Contract (with such term including its successors in title and assigns);
Contract:	has the meaning given to such term in recital (a) of this Performance Bond;
FAC-1 Contract:	means an ACA Framework Alliance Contract (FAC-1) (as amended) between (1) the Beneficiary; and (2) the Alliance Member dated [INSERT DATE] ;
Notice to Proceed	means the Notice to Proceed in respect of the Works executed by the Beneficiary and the Alliance Member and dated [INSERT DATE] pursuant to and in accordance with the FAC-1 Contract (and all documents and terms and conditions referred to in the same);
Works:	means the main works package known as [INSERT DESCRIPTION] as more particularly identified and described as such in the Notice to Proceed to and/or the documentation forming part of and/or referred to in the same (and defined as the "works") therein;
Bond Amount:	The sum of [INSERT AMOUNT IN WORDS] (£ [INSERT AMOUNT AS A NUMBER]); ¹ and
Expiry Date:	The date on which "Completion" of the Works is certified pursuant to and in accordance with the Contract.

¹ **DRAFTING NOTE:** If it is agreed, on a case-by-case basis, that the Bond Amount will increase in line with any adjustments to the fixed cost for the design and construction of the main works package, the Performance Bond will need to be updated to reflect this.



APPENDIX

ADJUDICATION RULES

1. DEFINITIONS

- 1.1 In these Adjudication Rules, the following capitalised terms shall have the meanings given to them below:

"Adjudication"	has the meaning given to such term in paragraph 2.1.2 of the Adjudication Rules;
"Adjudicator"	has the meaning given to such term in paragraph 2.1.3 of the Adjudication Rules;
"Adjudicator Nominating Body"	means the [Royal Institution of Chartered Surveyors];
"Costs of Adjudication"	has the meaning given to such term in paragraph 2.6.2 of the Adjudication Rules;
"Dispute"	means any dispute arising under clause 6 of this Performance Bond; and
"Notice of Adjudication"	has the meaning given to such term in paragraph 2.1.1 of the Adjudication Rules.

- 1.2 Where a capitalised term used in this Appendix is not defined in paragraph 1.1, such term shall have the meaning given to it in the Performance Bond and/or the Schedule as the context requires.

2. ADJUDICATION RULES

2.1 Commencement

- 2.1.1 These Adjudication Rules shall apply to the exclusion of any other procedure upon either of the Parties serving upon the other written notice of its intention to refer any inability to agree the amount payable in respect of a demand submitted under clause 3 of the Performance Bond to this adjudication procedure (a "**Notice of Adjudication**").
- 2.1.2 Any Notice of Adjudication shall be served in accordance with the provisions of clause 3 of the Performance Bond and to identify in sufficiently full terms the Dispute which is to be referred to adjudication under the Adjudication Rules ("**Adjudication**").
- 2.1.3 Within seven (7) days from the date of referral to it of a Notice of Adjudication, and provided that it is willing and able to act, the adjudicator identified and agreed upon under this paragraph 2, or the adjudicator nominated under paragraph 2.2, or the replacement adjudicator nominated under paragraph 2.3 (in each case being the "**Adjudicator**") shall give written notice of its acceptance of appointment to each of the Parties.
- 2.1.4 The date of the referral of the Dispute shall be the date that the Adjudicator so confirms its acceptance.
- 2.1.5 Either Party may serve a Notice of Adjudication at any time and either Party may serve more than one (1) Notice of Adjudication but no Notice of Adjudication shall refer more than



one (1) Dispute to Adjudication, although the same Adjudicator may act as the Adjudicator of more than one (1) Dispute if so identified and agreed, or nominated, and willing to act.

2.2 Appointment

- 2.2.1 Subject to the following provisions of this paragraph 2.2, where the Parties agree within three days of service of the Notice of Adjudication (or have agreed in advance) upon the identity of the Adjudicator then, subject to paragraph 2.1.3, that person shall be the Adjudicator.
- 2.2.2 Where the Parties have not so agreed upon the identity of the Adjudicator, or where such person has not so confirmed their willingness to act, then the Party who is seeking the referral of the Dispute to Adjudication may apply to the Chairman, Vice-Chairman, President or Vice-President (as appropriate or available) of the Adjudicator Nominating Body to nominate the Adjudicator, with any such application to the Nominator to be made in writing and accompanied by a copy of this Performance Bond, or such other evidence of the agreement of the Parties that these Adjudication Rules should apply, and a copy of the Notice of Adjudication, and requiring the Nominator to secure the appointment of the Adjudicator and the referral of the Dispute to the Adjudicator within seven (7) days from the date of application being made upon it.
- 2.2.3 The Adjudicator Nominating Body may replace the Adjudicator with another nominated person as Adjudicator if and when it appears to it necessary to do so but only after giving written notice to the Parties of its intention to make such replacement. The Adjudicator Nominating Body may only exercise such power if and when either Party shall satisfy it that the Adjudicator (whether agreed or nominated) is not acting impartially, or that the Adjudicator is physically or mentally incapable of conducting the Adjudication, or that the Adjudicator is failing to proceed with the Adjudication or make its decision with necessary despatch. In the event that the Adjudicator is replaced by an Adjudicator Nominating Body with this paragraph 2.2, the Parties agree that all timescales shall be re-calculated from the date that his replacement confirms acceptance of its appointment to each of the Parties.

2.3 Scope of the Adjudication

- 2.3.1 The scope of an Adjudication shall be the matters identified in the relevant Notice of Adjudication, together with any further matters that both Parties agree in writing should be within the scope of the Adjudication.
- 2.3.2 The Adjudicator may rule upon its own substantive jurisdiction and as to the scope of the Adjudication but should the Adjudicator at any time decide that the Dispute upon which it has been asked to adjudicate is, in fact, the same or substantially the same (in all material respects) as a Dispute which has already been decided upon by way of referral to Adjudication under this Performance Bond and in accordance with these Adjudication Rules, then it shall immediately bring the Adjudication in which it is acting to an end and that earlier decision shall stand.

2.4 The purpose of the Adjudication and the role of Adjudicator

- 2.4.1 The underlying purpose of an Adjudication shall be to resolve the relevant Dispute, or such elements of it that the Adjudicator rules are within the scope of the Adjudication, as rapidly and economically as is reasonably possible.
- 2.4.2 Subject to the other terms of this Performance Bond, a decision of the Adjudicator shall be binding as to the amount of any sum payable under this Performance Bond until the relevant Dispute is finally determined by legal proceedings, by arbitration (where the Parties so elect) or by arrangement between the Parties.



- 2.4.3 The Adjudicator shall have the like power to open up and review any certificates, or other decisions, relevant to the Dispute, that have been or are to be issued or made pursuant to the Contract or this Performance Bond as would a court or arbiter given such powers and the power to award sums equivalent to damages payable pursuant to and in accordance with the Contract.
- 2.4.4 The Adjudicator shall act fairly and impartially, but shall not be obliged to act as though it were an arbiter.

2.5 Conduct of the Adjudication

- 2.5.1 The Adjudicator shall establish the procedure and timetable for the Adjudication.
- 2.5.2 Without prejudice to the generality of paragraph 2.5.1, the Adjudicator may if it thinks fit:
- (a) require the delivery of written statements relating to matters in issue in the Dispute;
 - (b) require either Party to produce a bundle of key documents, whether helpful or otherwise to that Party's case, and to draw such inference as may seem proper from such bundle that may become apparent;
 - (c) require either Party to deliver to it and/or the other Party copies of any documents other than documents that would be privileged from production to a court;
 - (d) limit the length of any written or oral submission;
 - (e) require the attendance before it for questioning of either Party or employee or agent of either Party;
 - (f) make site visits;
 - (g) make use of its own specialist knowledge;
 - (h) obtain advice from specialist consultants, provided that at least one of the Parties so requests or consents;
 - (i) review and revise any of its own previous directions; and
 - (j) conduct the Adjudication in an inquisitorial manner and take the initiative in ascertaining the facts and the law; and
 - (k) require any Party to pay or make contribution to the legal and other costs of the other Party arising in the Adjudication.
- 2.5.3 The Adjudicator may reach its decision with or without the holding of an oral hearing.
- 2.5.4 The Adjudicator shall exercise its powers in accordance with these Adjudication Rules, shall act fairly and impartially and shall give each Party a reasonable opportunity to put its case and to deal with that of the other Party.
- 2.5.5 In reaching any decision as to the amount of any sum payable under this Performance Bond and the liability of the Guarantor to pay it, the Adjudicator shall have regard to the documentation required by the Guarantor and the documentation provided by the Employer pursuant to clause 3 of the Performance Bond (or lack of it).



- 2.5.6 The Adjudicator may not:
- (a) require any advance payment of or security for its fees;
 - (b) receive any written submissions from one Party that are not also made available to the other;
 - (c) refuse any Party the right at any hearing or meeting to be represented by a representative of that Party's choosing who is present; and
 - (d) act or continue to act in the face of a conflict of interest.

2.6 The Adjudicator's decision, fees and expense

- 2.6.1 The Adjudicator shall reach a decision within twenty-eight (28) days of the date of the referral of the Dispute (as referred to in paragraph 2.1.4) or such longer period as is agreed by the Parties after the Dispute has been referred to the Adjudicator. The Adjudicator shall be entitled to extend the said period of twenty-eight (28) days by up to fourteen (14) days with the consent of the Party by whom the Dispute was referred. As soon as possible after it has reached a decision, the Adjudicator shall deliver a copy of the decision to each of the Parties.
- 2.6.2 The Parties shall be jointly and severally liable for the Adjudicator's reasonable fees and expenses including those reasonable fees and expenses of any specialist consultant appointed by the Adjudicator under the Adjudication Rules ("**Costs of Adjudication**"), and the Adjudicator shall have the discretion to make directions regarding the apportionment of the Costs of Adjudication. If no such directions are made, the Parties shall bear the Costs of Adjudication in equal shares.
- 2.6.3 The Adjudicator may in any decision direct the payment of such compound or simple interest as may be permitted by this Performance Bond.
- 2.6.4 All decisions shall be in writing and, within seven (7) days of the request of either Party, such request to be made not later than seven days from the date of delivery of his decision to both Parties, the Adjudicator shall provide detail of its reasons for that decision.

2.7 Immunity, confidentiality and non-compellability

- 2.7.1 Neither the Nominator, nor the Adjudicator nor any employee or agent of any of them shall be liable for anything done or not done in the discharge or purported discharge of their functions, whether in negligence or otherwise, unless the act or omission is in bad faith.
- 2.7.2 The Adjudication and all matters arising in the course thereof are and will be kept confidential by the Parties except insofar as necessary to implement or enforce any decision of the Adjudicator or as may be required for the purpose of any subsequent proceedings under this Performance Bond and save insofar as may be required by law.
- 2.7.3 In the event that either Party seeks to challenge or review any decision of the Adjudicator in any subsequent legal proceedings, the Adjudicator shall not be joined as a party to, nor shall be cited or otherwise required to give evidence or provide his notes in, such legal proceedings except where required by applicable law.
- 2.7.4 All information, data or documentation disclosed or delivered by a Party to the Adjudicator in consequence of or in connection with his appointment hereunder shall be treated as



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confidential by the Adjudicator and each Party to the Adjudication (save as otherwise agreed between the Parties).

IN WITNESS whereof the Parties have executed and delivered this Performance Bond as a Deed on the date stated at the beginning of it:

[EXECUTION BLOCKS TO BE INSERTED]