



## Schedule 11 - Performance Bond

## CHANGE HISTORY

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5.0	Execution version	TfL	75501872.11

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## **1 Initial Performance Bond**

- 1.1 The Parties acknowledge that the Concessionaire has delivered to TTL the Performance Bond for five per cent (5%) of the Capital Investment Commitment (the "**Initial Bond Amount**").

## **2 Maintenance of the Performance Bond**

- 2.1 The Concessionaire shall:
- (a) procure the continuing validity and effectiveness of the Performance Bond until an Agreed-Upon Procedures Report prepared in accordance with Paragraphs 3.4 to 3.6 of Schedule 7.5 (Financial Transparency and Audit Rights) demonstrates to TTL's satisfaction that the sum of the Capital Investment Commitment minus the actual Capital Investment is less than £100,000,000 (one hundred million pounds sterling);
  - (b) provide at least thirty (30) Working Days' advance notice of the date on which the Performance Bond will expire; and
  - (c) immediately notify TTL of the occurrence of a Performance Bond Provider Downgrade or a Bond Event.

## **3 Performance Bond Provider**

- 3.1 Any Performance Bond procured pursuant to this Paragraph must be from a financial institution which either:
- (a) has a long-term credit rating of A+/A1/A+ or better from Standard & Poor's/Moody's/Fitch; or
  - (b) at TTL's absolute discretion, has a long-term credit rating of less than A+/A1/A+ from Standard & Poor's/Moody's/Fitch,
- (the "**Performance Bond Provider**").

## **4 Replacement of the Performance Bond**

- 4.1 Where:
- (a) a Performance Bond will expire;
  - (b) a Performance Bond Provider Downgrade; or
  - (c) a Bond Event occurs,

the Concessionaire shall:

- (i) where a Performance Bond will expire as contemplated in Paragraph 4.1(a), extend the term of the current Performance Bond so that it expires no earlier than twelve (12) months from the date of the extension or replace it with another Performance Bond with a validity period of not less than twelve (12) months;

- (ii) where a Performance Bond Provider Downgrade or a Bond Event occurs, deliver to TTL another Performance Bond for the Bond Amount in replacement for the then current Performance Bond which complies with the requirements of this Agreement or replace it with another Performance Bond with a validity period of not less than twelve (12) months; or
- (iii) in either case procure that alternative cash collateral or other security acceptable to TTL in an amount equal to the Bond Amount from time to time under the affected Performance Bond is made available to TTL on such terms and conditions as TTL shall, in its absolute discretion, consider appropriate.

4.2 If the Concessionaire fails to deliver such replacement or extended Performance Bond or replacement security by no later than:

- (a) in the case where a Performance Bond will expire as contemplated in Paragraph 4.1(a), fifteen (15) Working Days prior to the expiry of the then current Performance Bond; or
- (b) in the case of a Performance Bond Provider Downgrade or a Bond Event, thirty (30) Working Days following the occurrence of the Bond Provider Downgrade or Bond Event,

it shall constitute a breach by the Concessionaire of the terms of this Agreement and TTL shall be entitled to:

- (i) make demand under that Performance Bond for the Bond Amount at that time which amount shall be paid into an interest bearing account with a clearing bank of first class standing in London and held on trust for TTL and the Concessionaire for application in or towards amounts in respect of which TTL would have been entitled to make any demand under the Performance Bond. Any interest accruing in such account and any balance remaining at the Expiry Date or earlier termination of this Agreement or such other date as TTL shall determine following application by TTL in accordance with this Paragraph shall, subject to TTL's rights of set-off, belong to the Concessionaire; or
- (ii) recover a sum equivalent to the outstanding value of the Bond Amount as a debt from the Concessionaire.

4.3 If the Concessionaire subsequently delivers a replacement or extended Performance Bond complying with the provisions of this Agreement, the balance standing to the credit of the account (including any amount in respect of interest accrued) shall belong to the Concessionaire and TTL shall promptly take such steps as are reasonably requested by the Concessionaire to ensure release of such balance to the Concessionaire.

## **5 Substitution of the Performance Bond**

5.1 Following the provision of any Performance Bond, the Concessionaire may request that TTL accept a replacement Performance Bond in substitution for such Performance Bond. TTL shall not unreasonably refuse such request if the replacement Performance Bond complies with all the requirements of this Agreement.

## 6 Adjustments to the Bond Amount

6.1 Subject to Paragraph 2:

- (a) upon receipt by TTL of each Monthly Financial Report (FIN1) and completion of the related Monthly Operational Meeting; or
- (b) whenever the Business Plan is amended in accordance with the Change Control Procedure,

(each a "**Bond Adjustment Date**"), TTL shall issue a certificate in the form set out in Annex 2 to the Performance Bond Provider and the Bond Amount shall be reduced to an amount equal to A (the "**Adjusted Bond Amount**"), where:

A =

(Capital Investment Commitment – actual Capital Investment to the Bond Adjustment Date) x  
5 / 100

## 7 Demands

7.1 The Performance Bond shall be on terms that it is payable without further enquiry by the Performance Bond Provider to TTL for the full amount in London in accordance with TTL's written demand(s) on the Performance Bond Provider, certifying as to any one (1) or more of the following:

- (a) whether or not this Agreement is, or is to be, terminated as a result thereof:
  - (i) the Concessionaire has failed to pay any sum to TTL which is due and payable under the terms of this Agreement; or
  - (ii) a Default by the Concessionaire has occurred and is continuing and TTL expects to incur additional costs in connection with early termination of this Agreement;
  - (iii) a Capital Investment Failure has occurred; or
  - (iv) the Concessionaire has suffered an Insolvency Event;
- (b) that this Agreement has either terminated or expired and, in either case, there are liability or obligations outstanding from the Concessionaire to TTL; or
- (c) that the Concessionaire has not provided a replacement, renewed or extended Performance Bond when required in accordance with this Schedule.

## Annex 1 - Form of Performance Bond

(Letterhead of Bank)

To:

Transport Trading Limited  
5 Endeavour Square  
London  
E20 1JN  
United Kingdom

Contact person: [TBC]

Date:

Dear Sir

IN CONSIDERATION of you entering into Contract No [ ] ("**the Contract**") with [*insert name of Concessionaire*] ("**the Concessionaire**") in respect of [commercialising certain TTL assets (and potentially those of certain other public bodies) through investment in and operation of a public communication network] we [*insert name of Bank*] ("**the Bank**") hereby undertake upon first demand in writing made by you upon us from time to time or at any time to pay on each occasion the sum demanded by you on the terms and conditions set out in this letter ("**this Bond**").

Provided that:

1. This Bond shall come into force on the date of this Bond.
2. Any demand under this Bond shall be substantially in the form of either Appendix 1 or Appendix 3 to this Bond as required by the circumstances in which such demand is made, and as between you and us the facts set out in that demand shall (a) be deemed to be true and (b) shall be accepted by us as conclusive evidence for the purposes of this Bond that the amount claimed in the demand is due to you under this Bond.
3. Any demand in the form of Appendix 1 shall be accompanied by a copy of a letter from you sent to the Concessionaire by first class recorded post fourteen (14) or more days before the date of the demand, substantially in the form of Appendix 2 of this Bond.
4. Our liability under this Bond shall be limited as follows:-
  - (a) [NOTE TO PREFERRED TENDERER: The *performance bond must cover the Bond Amount as defined in Schedule 11 (Performance Bond)*]; and
  - (b) we shall have no liability under this Bond in respect of any demand dated after the expiry date of the Contract.
5. Our obligations under this Bond shall remain in full force and effect and shall not be terminated, reduced, discharged or otherwise affected by:
  - (a) any alteration or variation to the terms of the Contract made by agreement between you and the Concessionaire including, without limitation, any alteration in the extent

or nature or sequence or method or timing of the Services to be carried out under the Contract or any novation of the Contract (in whole or in part); or

- (b) any defence, counterclaim, withholding, set off or other deduction available to the Concessionaire under the Contract or otherwise; or
  - (c) any time being given to the Concessionaire or any other indulgence, waiver, concession, forbearance or forgiveness to the Concessionaire whether express or by conduct or any other thing done, omitted or neglected to be done under the Contract; or
  - (d) any other bond, security or guarantee now or subsequently held by you for all or any part of the obligations of the Concessionaire under the Contract; or
  - (e) the release or waiver of any such bond, security or guarantee referred to in paragraph 5(d) above; or
  - (f) any amalgamation, reconstruction or dissolution including, without limitation, winding-up of the Concessionaire;
  - (g) the termination of the Contract for any reason; or
  - (h) any other event which would or might operate to discharge a guarantor or any act or omission, matter or thing which, but for this provision, might operate to exonerate, discharge, reduce or extinguish your liability under this Bond; or
  - (i) the winding-up, bankruptcy, administration, receivership or insolvency of the Concessionaire; or
  - (j) any legal limitation, disability, incapacity, discharge by operation of law, change in the constitution, name or style of the Concessionaire or any other person relating to the Concessionaire (whether or not known to you); or
  - (k) any total or partial invalidity in, irregularity affecting or unenforceability of any of the obligations of the Concessionaire.
6. Any payment under this Bond shall be made by us in pounds sterling.
7. This Bond is irrevocable.
8. Terms defined in the Contract and not otherwise defined in this Bond shall have the same meaning in this Bond.
9. This Bond, executed and delivered as a deed, is governed by and shall be construed in accordance with the law of England and Wales. The courts of England shall have exclusive jurisdiction to settle any dispute which may arise out of or in connection with this Bond except that you have the right in your absolute discretion to enforce a judgment and/or to take proceedings in any other jurisdiction in which we are incorporated or in which any of our assets may be situated. You and we agree to submit to that jurisdiction.
10. You will be entitled to assign the benefit of this Bond (whether absolutely or by way of security and whether in whole or in part) to any party to whom you are entitled to assign (whether absolutely or by way of security and whether in whole or in part), novate, sub-contract, delegate, transfer, mortgage, or otherwise dispose of any or all of your rights, obligations and

liabilities to in accordance with the terms of the Contract but we may not assign the benefit and/or delegate the burden of this Bond in whole or in part or enter into any transaction which would result in any of those benefits and/or burdens passing to another person.

- 11. If any provision (in whole or in part) of this Bond is found by any court, tribunal, administrative body or authority of competent jurisdiction to be wholly or partly illegal, invalid or unenforceable then that provision shall, to the extent required, be severed from this Bond and shall be ineffective, without, so far as is possible, modifying any other provision of this Bond and this shall not affect any other provisions of this Bond which shall remain in full force and effect.
- 12. Any demand or other notice made by you under this Bond shall be duly made if sent by first class recorded delivery post to us.

[For non-UK resident banks:

- 13. For the purposes of this Bond we hereby appoint ..... of ..... [to be a London address] to accept service of process on our behalf, and service on the said ..... at the said address shall be deemed to be good service on us and we hereby irrevocably agree not to revoke or terminate such appointment.]

Executed as a Deed and delivered the day and year written above.

Executed as a Deed by ) \_\_\_\_\_  
[Bank] ) Director  
acting by a Director and the )  
Secretary or by two Directors ) \_\_\_\_\_  
Director/Secretary

The common seal of [Bank] ) \_\_\_\_\_  
was affixed to this Deed in ) Director  
the presence of )  
) \_\_\_\_\_  
Director/Secretary

## Appendix 1 - Form of Demand from TTL to [the bank]

Dear Sirs

**Contract No [                    ] in respect of services for [                    ]**

We refer to the Bond given by you to us dated [ ]. We enclose a copy of a letter from us to [*insert name of Concessionaire*] ("**the Concessionaire**") which was sent to the Concessionaire by first class recorded post on [ ] which is more than fourteen (14) days before the date of this demand.

The Concessionaire has not taken steps which we consider adequate to remedy the breaches.

[*e.g. a Milestone*] has/has not been achieved and the expiry date under the Contract has not been reached.

We hereby demand from you the sum of £[                    ] under your Bond. Please make payment by your cheque in sterling payable to [TTL].

Yours faithfully

On behalf of TTL

## Appendix 2 - Form of letter from TTL to the Concessionaire

To be sent by first class Recorded Delivery post

Dear Sirs

**Contract No [                    ] in respect of concession for [                    ]**

As explained in [previous letters to you/our letter dated ..... to you] you are in breach of your obligations under Contract No. [ ], and you have neither remedied nor implemented sufficient steps to remedy, those breaches.

This letter therefore notifies you that unless within fourteen (14) days from the date of this letter you take steps which we consider adequate to remedy the breaches we shall be entitled without further notice to you to call for payment under the Bond given on your behalf by [*name of bank*] dated [*date*].

Yours faithfully

On behalf of TTL

## **Appendix 3 - Alternative form of demand from TTL to [the bank]**

Dear Sirs

**Contract No [                    ] in respect of concession for [    ]**

We refer to the Bond given by you to us dated [    ].

An event has occurred of the type described in Clause [36 (Termination Rights)] of the Contract which entitles us (inter alia) to terminate the Contract in accordance with that clause.

[e.g. a *Milestone*] has/has not been achieved and the expiry date under the Contract has not been reached.

We hereby demand payment from you of the sum of £[    ] under your Bond. Please make payment by your cheque in sterling payable to [TTL].

Yours faithfully

On behalf of TTL

