

Suggested amendments to MF/2 (Rev1) to update it in line with the amendments made to MF/1 by revision 5

GENERAL CONDITIONS

SUB – CLAUSE 1.1.AA

Add new sub-clause

‘1.1.aa “UK Construction Act” means the Housing Grants, Construction and Regeneration Act 1996 (incorporating any amendments brought into force by the Local Democracy Economic Development and Construction Act 2009 or otherwise from time to time).’

SUB-CLAUSE 8.1

Delete ‘Performance’ from the heading.

Delete current sub-clause and replace by:

8.1 If required by the Purchaser the Contractor shall provide the guarantee or bond of a parent company, bank or other surety for the due performance of the Contract. Unless otherwise specified in the Special Conditions, the term of the bond or guarantee shall be in the relevant form annexed to the Conditions.

Unless otherwise specified in the Contract the Contractor shall provide the bond or guarantee at his own expense.

The amount of the bond or guarantee, the period of its validity, the arrangements for its release and the currency of any monetary transactions involved shall be stated in the Special Conditions.

[Note: a Parent Company Guarantee and Demand Bond as contained in MF/1 Rev5 are annexed to these amendments.]

SUB-CLAUSE 21.2

In line 8 after ‘Contract Price’ insert ‘or will have an effect on the Programme’.

SUB-CLAUSE 25.8

Replace current sub-clause by:

25.8 If any defect of the kind referred to in sub-clause 25.2 (Making good defects) shall appear in any part of the Works within a period of three years after the date of the taking-over of such part of the Works, the same shall be made good by the Contractor by repair or replacement at the Contractor’s option provided that the defect would not have been disclosed by a reasonable examination prior to the expiry of the Defects Liability Period.

SUB-CLAUSE 28.2

Replace current sub-clause by:

28.2 If payment of any sum payable under sub-clause 28.1 (Payment) is delayed, the Contractor shall be entitled to receive simple interest on the amount unpaid during the period of delay. The interest shall be at the rate of four per cent above the Bank of England Base Rate in force from time to time during

the period of delay (or at such other rate as may be specified in the Special Conditions). The Contractor shall be entitled to interest without formal notice and without prejudice to any other right or remedy, The parties acknowledge that the Purchaser's liability under this clause 28.2 is a substantial remedy for the purposes of section 9(1) of the Late Payment of Commercial Debts (Interest) Act 1998, where applicable.

SUB-CLAUSE 34.3

Replace current sub-clause by:

34.3. The Purchaser shall not be liable to make any further payments to the Contractor until the Cost of execution and all other expenses incurred by the Purchaser in completing the Works have been ascertained and the amount incurred certified by the Engineer (herein called 'the Cost of Completion'). If the Cost of Completion when added to the Termination Value exceeds the total amount which the Engineer certifies would have been payable to the Contractor for the execution of the Works, the Engineer shall certify such excess and the Contractor shall upon demand pay to the Purchaser the amount of such excess. Any such excess shall be deemed a debt due by the Contractor to the Purchaser and shall be recoverable accordingly. If there is no such excess, the Contractor shall be entitled to the Termination Value and shall be paid or shall repay to the Purchaser as the case may be the difference, if any, between the Termination Value and the total of all payments received by the Contractor at the date of termination.

SUB-CLAUSE 40.2

Delete.

APPENDIX TO GENERAL CONDITIONS

Delete paragraph headed **Person to appoint arbitrator** and replace by:

Person to appoint adjudicator or arbitrator ('the Nominator')	SUB-CLAUSES 37.1(b) and 37.2(a) The President of the Institution of Mechanical Engineers The President of the Institution of Engineering and Technology (delete as appropriate) Other (insert).....
Rules governing Adjudication	SUB-CLAUSE 37.1(c)

SPECIAL CONDITIONS

Aide-Memoire to their preparation

CLAUSE 8.1

Delete 'Procedure for forfeiture [.....] (claims on bond)'

CLAUSES 28.1 AND 37

Note; Where the UK Construction Act applies, the terms of payment and disputes provisions will need to address the provisions of the UK Construction Act, otherwise scheme provisions imposed by Regulations made by Statutory Instrument pursuant to the UK Construction Act will apply. Clauses which address the UK Construction Act are found in MF/1 and can be adapted.]

Sub-Contract

CLAUSE 18 AND EIGHTH SCHEDULE

[Note: Where the UK Construction Act applies, the terms of payment and disputes provisions will need to address the provisions of the UK Construction Act, otherwise scheme provisions imposed by Regulations made by Statutory Instrument pursuant to the UK Construction Act will apply. Clauses which address the UK Construction Act are found in MF/1 and can be adapted.]

FORM OF SUPERVISION CONTRACT

CLAUSE 25

Delete.

THE SIXTH SCHEDULE

Delete all words from the heading **clause 23** onwards.

Insert:

'[Note: Where the UK Construction Act applies, the terms of payment and dispute provisions will need to address the provisions of the UK Construction Act, otherwise scheme provisions imposed by Regulations made by Statutory Instrument pursuant to the UK Construction Act will apply. Clauses which address the UK Construction Act are found in MF/1 and can be adapted.]'

ADDENDA

Form of Parent Company Guarantee Demand Bond

FORM OF PARENT COMPANY GUARANTEE

THIS GUARANTEE is made on 201[]
BETWEEN

- (1) [insert name of Guarantor], a company incorporated under the laws of England and Wales with company number [insert company number of Guarantor], whose registered office is at(the **'Guarantor'**); and
- (2) [insert name of Purchaser], a company incorporated under the laws of England and Wales with company number [insert name of Purchaser] whose registered office is at (the **'Purchaser'** which expression shall include its permitted assignees)

WHEREAS

- (A) This Guarantee is supplemental to a [proposed] agreement (the **'Contract'**) to be entered into between [insert name of Contractor] (the **'Contractor'**) and the Purchaser in relation to [insert Contract Title and/or reference number] (and the term 'Contract' shall include any variation of the terms agreed between the Purchaser and the Contractor).
- (B) The Guarantor has agreed with the Purchaser to guarantee due performance by the Contractor of its obligations under the Contract subject to the terms and conditions set out below.

It is hereby agreed as follows:

1.0 Interpretation

In this Guarantee (including the above recitals):

- (a) capitalised terms shall have the meanings given to them in the Contract;
- (b) a reference to 'the Guarantor' or the 'Purchaser' includes any successor(s) in title;
- (c) a reference to any document includes that document as amended, varied, or supplemented;
- (d) the headings in this Guarantee are to be ignored in construing it.

2.0 Guarantee

- 2.1 In consideration of the Purchaser entering into the Contract, the Guarantor hereby unconditionally and irrevocably guarantees to the Purchaser that the Contractor will duly perform and observe all the obligations on the Contractor under the Contract.
- 2.2 The Guarantor further warrants that if the Contractor goes into liquidation and the liquidator disclaims the Contract, the liability of the guarantor hereunder shall remain in full force and effect in respect of any claims, demands, losses, damages, and liabilities related to such liquidation or the termination of the Contract.
- 2.3 The Guarantor acknowledges having received a copy of the Contract.
- 2.4 In no event shall this Guarantee impose any greater obligation or liability on the Guarantor (either as to length of or amount of liability) than

if the Guarantor were jointly and severally liable with the Contractor under the Contract.

3.0 Guarantee Discharge and release

- 3.1 This Guarantee shall be effective from the date hereof and shall continue regardless of any intermediate payment or discharge in whole or in part of performance.
- 3.2 Upon the expiry of the Contractor's obligations and/or liabilities under the Contract or the settlement of any claims by the Guarantor to the maximum extent of the Contractor's liability under the Contract, this Guarantee shall cease to have effect.

4.0 Waiver of Defences

- 4.1 The liabilities and obligations of the Guarantor under this Guarantee shall remain in force notwithstanding any winding up, dissolution, reconstruction or reorganisation, or any change in the constitution of the Contractor.
- 4.2 The liabilities or obligations of the Guarantor under this Guarantee shall not be affected by the Purchaser:
 - (a) serving a notice upon the Contractor as contemplated by the Contract or agreeing with the Contractor any amendment, variation, or assignment, of the Contract.
 - (b) taking, dealing with, enforcing, abstaining from enforcing, surrendering or releasing any security, or other right or interest held by the Purchaser.
- 4.3 The Guarantor hereby waives any right it may otherwise have of first requiring the Purchaser to proceed against or enforce any other rights or security or claim payment against any person before claiming against the Guarantor under this Guarantee.
- 4.4 The Guarantee shall not be discharged nor will any liabilities hereunder be affected by the incapacity or lack of corporate power or authorisation on the part of the Contractor to enter into and perform the Contract.

5.0 Representations and Warranties

The Guarantor now warrants to the Purchaser that:

- (a) it is a corporation duly organised and validly existing under the laws of England and Wales;
- (b) it has the corporate power to enter into and perform this Guarantee, and that it has taken all necessary action to authorise the entry of the Guarantor into the Guarantee, which constitutes its legal, valid and binding obligation.

6.0 Notices

All notices in connection with, this Guarantee will be given in writing by letter, fax or email and is deemed to be given as follows:

- (a) if by letter, when delivered;
- (b) if by facsimile, when transmitted and full transmission has been separately notified by telephone by the transmitting party;
- (c) if by email, when the email has been received at the designated email address.

The address, facsimile numbers and email addresses of the parties hereto are as follows (or such other alternatives as may be notified by the relevant party):

Guarantor:

Address:
Attention:
Facsimile:
Email

Purchaser:

Address:
Attention:
Facsimile:
Email

8. Assignment

This Guarantee is personal to the parties and may not be transferred or assigned to any person, firm or company, without the previous consent of the other save that it may be assigned to a subsequent purchaser to whom the Contract is assigned.

9. Waivers

No failure or delay by the Purchaser in exercising any right or remedy pursuant to this Guarantee shall impair that right or remedy or operate as a waiver or variation.

10. Entire Agreement

- 10.1 This Guarantee sets out the entire agreement and understanding between the parties hereto in respect of the matters referred to herein.
- 10.2 This Guarantee has been duly executed and delivered as a deed on the date first above written.

11.0 Invalidity

If any provision of this Guarantee becomes invalid, illegal or unenforceable in any respect under any law, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired.

12.0 Third Party Rights

A person who is not a party to this Guarantee shall have no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any of its terms.

13.0. Governing Law

This Guarantee is governed by and shall be construed in accordance with the laws of England and Wales.

EXECUTED as a deed by
the GUARANTOR acting by }

two directors or a director and the Secretary [.....] (Signature)

EXECUTED as a deed by
the PURCHASER acting by

two directors or a director and the Secretary [.....] (Signature)

FORM OF DEMAND BOND

DEMAND GUARANTEE

<Beneficiary>

<Name>

<Address>

Date []

Dear Sirs,

OUR GUARANTEE REF: _____

We are informed that (hereinafter called the Contractor) have entered into a contract with you, for the supply of and that a bank Guarantee for being % of the contract is required.

On behalf of the Contractor, we <name of bank> Bank, <address of bank>, hereby give you our guarantee and undertake to pay you any amount or amounts not exceeding in total a maximum of on receipt of your first demand in writing over original handwritten signatures accompanied by your signed statement certifying that the Contractor is in breach of his obligations under the underlying contract, and the respect in which the Contractor is in breach. Any claims must bear the confirmation of your bankers that the signatures thereon are authentic.

For the avoidance of doubt any document(s) received by way of facsimile or similar electronic means is/are not acceptable for any purpose(s) under this guarantee.

This Guarantee is valid for written demands received by us on or before after which date our liability to you under this guarantee will cease and this guarantee will be of no further effect. If at such date we have not received any claim under this guarantee, it will automatically become null and void, whether returned to us or not.

This guarantee is personal to you and is not assignable.

This guarantee shall be governed by English Law and is subject to the Uniform Rules for Demand Guarantees of the International Chamber of Commerce (Publication No 758).

On expiry of the guarantee, please return this document to us.

Yours faithfully,

Executed as a deed
for and on behalf of

<name of bank>

Signed.....

Signed.....

Countersigned.....

AMENDMENT SLIP No.1

TO

MODEL FORM OF GENERAL CONDITIONS OF CONTRACT, MF/2

1. Foreword

This amendment slip provides recommended additional provisions for the Model Form MF/2 general conditions, the MF/2 Form of Sub-Contract and the MF/2 Form of Supervision Contract to take account of the Contracts (Rights of Third Parties) Act 1999 ("the Act"). It is emphasised that these additional provisions are models only and should be adapted and supplemented, where necessary, to reflect particular intentions.

The reason for these suggested changes is because the Act provides that in certain circumstances third parties will be allowed to enforce contractual terms. Those circumstances are (i) if the contract expressly provides that a third party may do so or (ii) if a term purports to confer a benefit on a third party. The expression "purports to confer a benefit" is uncertain in meaning and potentially far-reaching. The following Special Conditions will prevent third parties unintentionally being allowed to enforce terms.

The provisions of the Act extend to England, Wales and Northern Ireland and so will apply only to contracts which are subject to the laws of these countries. The Act applies only to contracts entered into after 11th May 2000.

2. Historical note

This first amendment slip to MF/2 was introduced in July 2000 and was thereafter included with copies of MF/2 (rev 1).

3. Amendments to MF/2 relating to the Contracts (Rights of Third Parties) Act 1999

3.1 The following new additional suggested Special Condition should be added after page 32 of MF/2 (rev 1).

**ADDITIONAL SPECIAL CONDITION FOR USE
WHERE THE CONTRACT IS SUBJECT TO THE
CONTRACTS (RIGHTS OF THIRD PARTIES)
ACT 1999**

Foreword

If it is desired that third parties should not unintentionally have a benefit conferred upon them and become entitled to enforce terms of the Contract, the following suggested additional sub-clause to the general conditions may be used.

Assignment and sub-contracting

3.3 Unless otherwise provided, the Purchaser and the Contractor do not intend any term of the Contract to be enforceable by a party other than themselves.

(Also, amend clause 3 heading so that it reads **Assignment, sub-contracting and third party benefits.**)

3.2 The following new suggested sub-clause should be added to the Sub-Contract at page 34.

2.3 The Contractor and the Sub-Contractor do not intend any term of the Sub-Contract to be enforceable by a party other than themselves.

3.3 The following new suggested clause should be added to the Supervision Contract at page 56.

Third party benefits	26.1 The Purchaser and the Contractor do not intend any term of the Supervision Contract to be enforceable by a party other than themselves.
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