

7.2 FORM OF PERFORMANCE BONDS

7.2.1 FORM OF DEPLOYMENT PERFORMANCE BOND

1 BACKGROUND

- 1.1 This Schedule 7.2.1 sets out the form of the Deployment Performance Bond that NBPco shall procure that the Surety (referred to in the Deployment Performance Bond as the “**Issuer**”) shall execute in accordance with Clause 39.1.1 (Performance Bond).

Form of Deployment Performance Bond

THIS DEPLOYMENT PERFORMANCE BOND (this “**Bond**”) is made on the [] day of [] 2019

BETWEEN:

- (1) **NBI INFRASTRUCTURE DESIGNATED ACTIVITY COMPANY**, a company registered in Ireland (with number 629167) having its registered office at 10 Earlsfort Terrace, Dublin 2, D02T380, Ireland (“**NBPco**”);
- (2) **[INSERT NAME OF BOND PROVIDER]** whose registered office is at [] (the “**Issuer**”);
- (3) **[THE MINISTER FOR COMMUNICATIONS, CLIMATE ACTION AND ENVIRONMENT]**, [29 to 31 Adelaide Road, Dublin 2, Ireland] (the “**Minister**”).

BACKGROUND

- A. The National Broadband Plan is a policy initiative of the Irish government, being implemented through the Minister, which aims to deliver High Speed Broadband to every citizen and business in Ireland. This is being achieved through a combination of accelerated commercial investment by telecoms operators, and a proposed State intervention to provide High Speed Broadband to those parts of Ireland where the commercial sector has, to date, not had concrete plans to invest.
- B. In order to implement the National Broadband Plan strategy, the Minister issued a Contract Notice for the National Broadband Plan competitive dialogue procedure inviting prospective suppliers to submit proposals and participate in the competitive dialogue.
- C. NBPco is an expert in the provision of services and deliverables of a similar scope, nature, scale, complexity and importance to the contemplated Services and Network.
- D. After an evaluation of all the final tenders submitted by tenderers the Minister appointed NBPco to implement, provide and perform the Services and Network in the Intervention Area under an agreement entered into by NBPco and the Minister dated [●] (the “**Agreement**”).
- E. Under the Agreement, NBPco is required to furnish a performance bond to the Minister to cover the Minister’s entitlement to be paid the Deployment Claw-Back Amount and/or any payments under Clause 42.8 (Subcontractors) of the Agreement and/or Schedule 6.9 (Consequences of Termination) of the Agreement or any other sums in accordance with the Agreement (in each case a “**Liability**” and, where referring to more than one, “**Liabilities**”).

IT IS AGREED AS FOLLOWS:

1. Terms defined in the Agreement have the same meaning in this Bond, and unless expressly specified otherwise in this Bond, references to Clauses or Paragraphs mean clauses or paragraphs in the Agreement.
2. Subject to clause 2.3 this Bond shall expire at the close of normal banking hours at this office on the earlier of:

- 2.1 the date immediately after the expiry of twenty four (24) calendar months from the Effective Date; or
- 2.2 the date upon which the Maximum Liability Amount (as defined in clause 3 of this Bond) is reduced to nil by operation of the terms of the Bond
(“Expiry Date”)
- 2.3 If the Minister has issued a notice or Demand to the Issuer, pursuant to Clause 4 prior to the Expiry Date, the Expiry Date shall not affect that notice or Demand provided always that the maximum aggregate liability of the Issuer shall not exceed the Maximum Liability Amount.
3. The maximum aggregate liability of the Issuer under this Bond shall not exceed the sum of €20,000,000 (the **“Maximum Liability Amount”**) which sum shall decrease in line with any payments made by the Issuer to the Minister in accordance with Clause 4.
4. The Issuer irrevocably and unconditionally promises to pay, as primary obligor, to the Minister an amount or amounts not exceeding the Maximum Liability Amount that the Minister is entitled to recover from NBPco in respect of any Liability due pursuant to the Agreement. The Issuer shall pay that sum to the Minister within five (5) Working Days of a notice in the form of a statement signed by the Minister or Minister’s Representative that specifies the amount claimed (known as the **“Demand”**).
5. For the purposes of this Bond, any award, decision, judgment, calculation or finding issued in accordance with the Agreement against or to NBPco in favour of the Minister in connection with the quantification or repayment of any Liability shall be conclusive evidence of any liability of NBPco.
6. The number of claims shall not be limited other than up to an absolute aggregate of the Maximum Liability Amount at the time of the Demand.
7. The Minister shall not be obliged to pursue any means of recourse against NBPco before being entitled to enforce this Bond against the Issuer.
8. The Issuer shall not be discharged or released by any alteration of any of the terms, conditions and provisions of the Agreement and no allowance of time by the Minister under or in respect of the Agreement or indulgence, forbearance or waiver as to payment, performance, any right of action or remedy or otherwise or the insolvency, winding-up, dissolution, receivership, examination, administration, incapacity, re-organisation or any analogous proceeding relating to NBPco or any change in the status, function, control or ownership of NBPco or any invalidity, unenforceability or illegality of the whole or any part of the Agreement or the rights of either the Minister or NBPco under the Agreement or any transfer, novation or assignment of the benefit of the Agreement or any other fact, circumstances, act, event, omission or provision of statute or law or otherwise which but for this clause 8 of the Bond might operate to discharge, impair or otherwise affect any of the obligations of the Issuer under this Bond or any of the rights, powers or remedies conferred on the Minister by this Bond or by law shall in any way release, reduce or affect the liability of the Issuer under this Bond.
9. The Minister may, but is not required to, provide to the Issuer a copy of any notice that the Minister gives to or receives from NBPco under Clause 39.4 (Performance Bond) of the Agreement.

10. The Minister may assign the benefit of this Bond, without the Issuer's or NBPco's consent, by giving written notice to the Issuer.
11. All notices must be in writing and sent by personal delivery, post, airmail or special courier to the Issuer at [insert Issuer postal address] and:
 - a) any notices sent by airmail, post or special courier will be deemed (in the absence of evidence of earlier receipt), to have been delivered two (2) days after despatch and in proving the fact of dispatch, it is sufficient to show that the envelope containing such notice was properly addressed, stamped and conveyed to the postal authorities or courier services for transmission by airmail or special courier;
 - b) the Issuer may, by five (5) days written notice to the Minister, change its postal address or addressee for receipt of notice.
12. This Bond is governed by and construed according to Irish law and the parties submit to the jurisdiction of the Irish courts to determine all matters concerning it.
13. Money payable by the Issuer under this Bond shall be paid in Euro in Ireland.

This Bond has been executed as a deed and is delivered and takes effect on the date stated at the beginning of it.

GIVEN under the **COMMON SEAL** of
the **NBPco**

Director

Director/Secretary

GIVEN under the **COMMON SEAL** of
the **ISSUER**

Signature of person authorised
to authenticate the seal

GIVEN under the common seal of
**THE MINISTER FOR
COMMUNICATIONS, CLIMATE
ACTION AND ENVIRONMENT**
(acting by [insert], a person duly
authorised pursuant to section 15(4) of
the Ministers and Secretaries Act
1924) and delivered as a deed

{COMMON SEAL}

Witness Signature

Signature of [insert]

Print Name

Print Name

Print Address

7.2.2 FORM OF EXPIRATION PERFORMANCE BOND

1 BACKGROUND

- 1.1 This Schedule 7.2.2 (Form of Expiration Performance Bond) sets out the form of the Performance Bond that NBPco shall procure that the Surety (referred to in the Expiration Performance Bond as the “**Issuer**”) shall execute in accordance with Clause 39.1.2 (Performance Bond).

Form of Expiration Performance Bond

THIS EXPIRATION PERFORMANCE BOND (this “**Bond**”) is made on the [] day of [] 20[xx]

BETWEEN:

- (1) **NBI INFRASTRUCTURE DESIGNATED ACTIVITY COMPANY**, a company registered in Ireland (with number 629167) having its registered office at 10 Earlsfort Terrace, Dublin 2, D02T380, Ireland (“**NBPco**”);
- (2) [**INSERT NAME OF BOND PROVIDER**] whose registered office is at [] (the “**Issuer**”);
- (3) [**THE MINISTER FOR COMMUNICATIONS, CLIMATE ACTION AND ENVIRONMENT**],[29 to 31 Adelaide Road, Dublin 2, Ireland] (the “**Minister**”).

BACKGROUND

- A. The National Broadband Plan is a policy initiative of the Irish government, which has been implemented through the Minister, in order to deliver High Speed Broadband to every citizen and business in Ireland. This is being achieved through a combination of accelerated commercial investment by telecoms operators, and a proposed State intervention to provide High Speed Broadband to those parts of Ireland where the commercial sector had, until 2016, not had concrete plans to invest.
- B. After an evaluation of all the final tenders submitted by tenderers the Minister appointed NBPco to implement, provide and perform the Services and Network in the Intervention Area under an agreement entered into by NBPco and the Minister dated [●] (the “**Agreement**”).
- C. Under Clause 39.1.2 (Performance Bond) of the Agreement, NBPco is required to furnish 3 years prior to the then scheduled Expiry Date, an expiration performance bond to the Minister to remain in place until such time as the Terminal Value Claw-Back Amount, and/or the IRR Claw-Back Amount and/or any payments under Schedule 6.9 (Consequences of Termination) of the Agreement or any other sum due to be paid to the Minister in accordance with the Agreement is paid to the Minister in accordance with the Agreement.

IT IS AGREED AS FOLLOWS:

1. Terms defined in the Agreement have the same meaning in this Bond and, unless expressly specified otherwise in this Bond, references to Clauses and Paragraphs mean clauses and paragraphs in the Agreement.
2. This Bond shall expire at the close of normal banking hours at this office on the earlier of:
 - 2.1 the full payment to the Minister (without deduction, set-off, withholding, abatement, counter-claim or otherwise) of:
 - (A) the full Terminal Value Claw-Back Amount;
 - (B) the full IRR Claw-Back Amount; and
 - (C) any payments under Schedule 6.9 (Consequences of Termination) of the Agreement or any other sum due in accordance with the Agreement;

or

- 2.2 the date upon which the Maximum Liability Amount (as defined in clause 3 of this Bond) is reduced to nil by operation of the terms of the Bond (“**Expiry Date**”).
3. The maximum aggregate liability of the Issuer under this Bond shall not exceed the sum of twenty million euro (€20,000,000), subject to Indexation (with Indexation being applied annually from the Effective Date to the date that is three years prior to the then scheduled Expiry Date) (the “**Maximum Liability Amount**”).
4. The Issuer irrevocably and unconditionally promises to pay, as primary obligor, to the Minister an amount or amounts not exceeding the Maximum Liability Amount that the Minister is entitled to recover from NBPco in respect of any Terminal Value Claw-Back Amount and/or any IRR Claw-Back Amount and/or any payments under Schedule 6.9 (Consequences of Termination) of the Agreement or any other sums in accordance with the Agreement. The Issuer shall pay that sum to the Minister within five (5) Working Days of a notice in the form of a statement signed by the Minister or Minister’s Representative that specifies the amount claimed (known as the “**Demand**”).
5. For the purposes of this Bond, any award, decision, judgment, calculation or finding issued in accordance with the Agreement against or to NBPco in favour of the Minister in connection with the quantification or repayment of any Terminal Value Claw-Back Amount or any IRR Claw-Back Amount shall be conclusive evidence of any liability of NBPco.
6. The number of claims shall not be limited other than up to an absolute aggregate of the Maximum Liability Amount at the time of the Demand.
7. The Minister shall not be obliged to pursue any means of recourse against NBPco before being entitled to enforce this Bond against the Issuer.
8. The Issuer shall not be discharged or released by any alteration of any of the terms, conditions and provisions of the Agreement and no allowance of time by the Minister under or in respect of the Agreement or indulgence, forbearance or waiver as to payment, performance, any right of action or remedy or otherwise or the insolvency, winding-up, dissolution, receivership, examination, administration, incapacity, re-organisation or any analogous proceeding relating to NBPco or any change in the status, function, control or ownership of NBPco or any invalidity, unenforceability or illegality of the whole or any part of the Agreement or the rights of either the Minister or NBPco under the Agreement or any transfer, novation or assignment of the benefit of the Agreement or any other fact, circumstances, act, event, omission or provision of statute or law or otherwise which but for this clause 8 of the Bond might operate to discharge, impair or otherwise affect any of the obligations of the Issuer under this Bond or any of the rights, powers or remedies conferred on the Minister by this Bond or by law shall in any way release, reduce or affect the liability of the Issuer under this Bond.
9. The Minister may, but is not required to, provide to the Issuer a copy of any notice that the Minister gives to or receives from NBPco under Clause 39.4 (Performance Bond) of the Agreement.
10. The Minister may assign the benefit of this Bond, without the Issuer’s or NBPco’s consent, by giving written notice to the Issuer.

11. All notices must be in writing and sent by personal delivery, post, airmail or special courier to the Issuer at [insert Issuer postal address] and:
- (a) any notices sent by airmail, post or special courier will be deemed (in the absence of evidence of earlier receipt), to have been delivered two (2) days after despatch and in proving the fact of dispatch, it is sufficient to show that the envelope containing such notice was properly addressed, stamped and conveyed to the postal authorities or courier services for transmission by airmail or special courier; and
 - (b) the Issuer may, by five (5) days written notice to the Minister, change its postal address or addressee for receipt of notice.
12. This Bond is governed by and construed according to Irish law and the parties submit to the jurisdiction of the Irish courts to determine all matters concerning it.
13. Money payable by the Issuer under this Bond shall be paid in Euro in Ireland.

This Bond has been executed as a deed and is delivered and takes effect on the date stated at the beginning of it.

GIVEN under the **COMMON SEAL** of
the **NBPco**

Director

Director/Secretary

GIVEN under the **COMMON SEAL** of
the **ISSUER**

Signature of person authorised
to authenticate the seal

GIVEN under the common seal of
**THE MINISTER FOR
COMMUNICATIONS, CLIMATE
ACTION AND ENVIRONMENT**
(acting by [insert], a person duly
authorised pursuant to section 15(4) of
the Ministers and Secretaries Act
1924) and delivered as a deed

{COMMON SEAL}

Witness Signature

Signature of [insert]

Print Name

Print Name

Print Address
