

### C1.3 : FORM OF PERFORMANCE GUARANTEE (PRO FORMA)

#### PERFORMANCE GUARANTEE

For use with the General Conditions of Contract for Construction Works, Third Edition, (2015).

#### GUARANTOR DETAILS AND DEFINITIONS

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“Guarantor”

means: .....  
.....

Physical address: .....  
.....

“Employer” means: .....  
.....

“Contractor” means: .....  
.....

“Employer’s Agent” means: .....  
.....

“Works” means: .....  
....

“Site” means: .....  
.

“Contract” means: The Agreement made in terms of the Form of Offer and Acceptance and such amendments or additions to the Contract as may be agreed in writing between the parties.

“Contract Sum” means:           The accepted amount inclusive of tax of R .....

Amount in words:               .....

“Guaranteed Sum” means:    The maximum aggregate amount of R .....

Amount       in       words:  
.....

.....

Type of Performance Guarantee: Fixed

“Expiry Date” means:           Date of issue of the Certificate of Completion

## **CONTRACT DETAILS**

Employer’s Agent issues: Interim Payment Certificates, Final Payment Certificate and the Certificate Completion of the Works as defined in the Contract.

### **1.     FIXED PERFORMANCE GUARANTEE**

- 1.1.   Where a fixed PERFORMANCE Guarantee has been selected. The Guarantor’s liability shall be limited to the amount of the Guarantee Sum.
- 1.2.   The Guarantor’s period of liability shall be from and including the date on which the Performance Guarantee is signed the date of issue by the Employer’s Agent of the Certificate of Completion of the Works, or the date of payment in full of the Guaranteed Sum, whichever occurs first.
- 1.3.   The Employer’s Agent and/or the Employer shall advise the Guarantor in writing of the date on which the Certificate of Completion of the Works has been issued.

### **2.     CONDITIONS APPLICABLE TO FIXED PERFORMANCES GUARANTEES:**

- 2.1.   The Guarantor hereby acknowledges that:
  - 2.1.1. Any reference in this Performance Guarantee to the Contract is made for the purpose of convenience and shall not be constructed as any intention whatsoever to create an accessory obligation or any intention whatsoever to create a suretyship.
  - 2.1.2. Its obligation under this Performance Guarantee is restricted to the payment of money.

- 2.2. Subject to the Guarantor's maximum liability referred to in 1.1 or 2.1, the Guarantor hereby undertakes to pay the Employer the sum certified upon receipt of the documents identified in 3.2.1 to 3.2.3:
- 2.2.1. A copy of a first written demand issued by the Employer to the Contractor stating that payment of a sum certified by the Employer's Agent in an Interim or Final Payment Certificate has not been made in terms of the Contract and failing such payment within seven (7) calendar days, the Employer intends to call upon the Guarantor to make payment in terms of 3.2.2;
- 2.2.2. A first written demand issued by the Employer to the Guarantor at the Guarantor's physical address with a copy to the Contractor stating that a period of seven (7) days has elapsed since the first written demand in terms of 3.2.1 and the sum certified has still not been paid;
- 2.2.3. A copy of the aforesaid payment which entitles the Employer to receive payment in terms of the Contract of the sum certified in 3.2.
- 2.3. Subject to the Guarantor's maximum liability referred to in 1.1 or 2.1, the Guarantor undertakes to pay to the Employer the Guaranteed Sum or the full outstanding balance upon receipt of a first written demand from the Employer to the Guarantor at the Guarantor's physical address calling up this Performance Guarantee, such demand stating that:
- 2.3.1. The Contract has been terminated due to the Contractor's default and that this Performance Guarantee is called up in terms of 3.3; or
- 2.3.2. A provisional or final sequestration or liquidation court order has been granted against the Contractor and that the Performance Guarantee is called up in terms of 3.3; and
- 2.3.3. The aforesaid written demand is accompanied by a copy of the notice of termination and/or the provisional/final sequestration and/or the provision liquidation court order.
- 2.4. It is recorded that the aggregate amount of payments required to be made by the Guarantor in terms of 3.2 and 3.3 shall not exceed the Guarantor's maximum liability in terms of 1.1 or 2.1
- 2.5. Where the Guarantor has made payment in terms of 3.3, the Employer shall upon the date of issue of the Final Payment Certificate submit an expense account to the Guarantor showing how all monies received in terms of this Performance Guarantee have been expended and shall refund to the Guarantor any resulting surplus. All monies refunded to the Guarantor in terms of the Performance Guarantee shall bear interest at the prime overdraft rate by the Employer's Bank compounded monthly and calculated from the date payment was made by the Guarantor to the Employer until the date of refund.
- 2.6. Payment by the Guarantor in terms of 3.2 or 3.3 will only be made within seven (7) calendar days upon receipt of the first written demand to the Guarantor.
- 2.7. Payment by the Guarantor in terms of 3.3 will only be made against the return of the original Performance Guarantee by the Employer.

- 2.8. The Employer shall have the absolute right to arrange his affairs with the Contractor in any manner which the Employer may consider fit and the Guarantor shall not have right to claim his from this Performance Guarantee on account of any conduct alleged to be prejudicial to the Guarantor.
- 2.9. The Guarantor chooses the physical address as stated above for the service of all notices for all purposes in connection herewith.
- 2.10. This Performance Guarantee is neither negotiable nor transferable and shall expire in terms of 1.1.2 or 2.2, where after no claims will be considered by the Guarantor. The original of this Guarantee shall be returned to the Guarantor after it has expired.
- 2.11. This Performance Guarantee, with the required demand notices in terms of 3.2 or 3.3, shall be regarded as a liquid document for the purposes of obtaining a court order.
- 2.12. Where the Performance Guarantee is issued in the Republic of South Africa the Guarantor hereby consents in terms of Section 45 of the Magistrate's Courts Act No 32 of 1944, as amended, to the jurisdiction of the Magistrate's Court of any district having jurisdiction in terms of Section 28 of the said Act, notwithstanding that the amount of the claim may exceed the jurisdiction of the magistrate's Court.

Signed at .....

.....

Date .....

Guarantor's signatory (1) .....

.....

Capacity .....

Guarantor's signatory (2) .....

.....

Capacity .....

Witness      signatory      (1)  
.....  
.....

Witness      signatory      (2)  
.....  
.....

**C1.4: HEALTH AND SAFETY AGREEMENT**

**ARTICLE OF AGREEMENT IN TERMS OF SECTION 37(2) OF THE OCCUPATIONAL  
SAFETY ACT, 1993**

MANDATARY AGREEMENT ON

OCCUPATIONAL HEALTH AND SAFETY

In accordance with the provisions of Section 37(2) of the Occupational Health and  
Safety Act 85 of 1993 as amended

AS ENTERED INTO BY AND BETWEEN

**THE NELSON MANDELA BAY DEVELOPMEN AGENCY**

(Hereinafter referred to as "the Employer / Client")

AND

\_\_\_\_\_  
(Hereinafter referred to as "the Mandatary / Contractor")

Compensation Fund number:

Common Law Liability

Insurance in respect of Third

Parties for the Minimum Sum of R.....

Herein represented by:.....in his/her capacity as: .....

duly authorized by virtue of a resolution date:.....

Attached hereto Annexure ....., of the said:.....

herein after referred to as the "Contractor":.....

**WHEREAS** the Contractor is the mandatory of the Employer as contemplated in an agreement in respect of .....

Contract Number: .....

**AND WHEREAS** section 37 of the Occupational Health and Safety Act, 1993 (Act 85 of 1993, hereinafter referred to as the "Act"), imposes certain powers and duties upon the Employer.

**AND WHEREAS** the parties have agreed to enter into an agreement in terms of section 37(2) of the Act.

**NOW THEREFORE** the parties agree as follows:

- (a) The Mandatory and/or his/her designated person appointed in terms of Section 16(1) or 16(2) of the Occupational Health and Safety Act 85 of 1993 ("the OHS Act") as amended shall report to the Occupational Health & Safety Practitioner designated by the Client / Employer prior to site establishment and commencement of works on site.
- (b) The Contractor undertakes to acquaint the appropriate officials and his/her employees with all relevant provisions of the Act and the Regulations promulgated in terms thereof.
- (c) The Contractor undertakes that all relevant duties, obligations and prohibitions imposed in terms of the Act and Regulations will be fully complied with. Provided that should the Employer prescribe certain arrangements and procedures, that same shall be observed and adhered to by the Contractor, his / her officials and employees. The Contractor shall bear the onus of acquainting himself/herself with such arrangements and procedures.
- (d) The Contractor hereby accepts sole liability for such due compliance with the relevant duties, obligations, prohibitions, arrangements and procedure, if any, imposed by the Act and Regulations and such acceptance expressly absolves the Employer from any failure to comply with any of the aforesaid duties, obligations, prohibitions, arrangements and procedure as the case may be.
- (e) The Contractor agrees that any duly authorized officials of the Employer shall be entitled, although not obliged, to take such steps as may be necessary to ensure that the Contractor has complied with the undertakings as more fully set out in this agreement, which steps may include, but not limited to, the right to inspect any

appropriate site or premises occupied by the Contractor, or to inspect any appropriate records held by the

Contractor or to take such steps it may deem necessary to remedy the default of the Contractor at the cost to the Contractor, including stoppage of unsafe activity(ies).

- (f) The Contractor shall be obliged to report forthwith to the Employer any incident, investigations, complaint or criminal charge which may arise as a consequence of the provisions of the Act and Regulations, pursuant to work performed in terms of this agreement, and shall, on written demand, provide full details in writing of such an incident, investigation, complaint or criminal charge as the case may be.
- (g) The Contractor undertakes to acquaint him/herself and his/her employees with the site and community/area at which the site is located, particularly the gang activities and consequences thereof common in this community. The Contractor therefore undertakes to provide as far as is reasonably practicable an environment that is safe to him/herself and all his/her staff while preparing and conducting work in the area.
- (h) The Mandatary and all members his/her staff shall under no circumstances get involved with gangs and gang related activities.
- (i) The Contractor undertakes to provide the specialised security services necessary for his/her staff, Construction Mobile Plant and Vehicles, Equipment, Tools and Materials brought onto site for the purposes of conducting work under this contract.
- (j) In the event of Work Stoppage for any reason at any stage in the contract, the Contractor will first make the site and works safe prior to leaving.
- (k) In terms of this agreement the Mandatary warrants that he/she agrees to the arrangements and procedures as prescribed by the Employer and as provided for in terms of Section 37 (2) of the OHS Act for the purposes of compliance with the Act.
- (l) The Mandatary acknowledges that this agreement constitutes an agreement in terms of Section 37 (2) of the OHS Act, whereby all responsibility for health and safety matters relating to the work that the Mandatary and his/her employees are to perform on the project site shall be the obligation of the Mandatary.
- (m) The Mandatary shall be deemed to be an employer in his own right while on the Employer's project site. In terms of Section 16 (1) of the OHS Act, the Mandatary shall accordingly ensure that him/herself, and/or his/her nominated Chief Executive Officer comply with the requirements of the OHS Act.



(n) Other Legislation and Standards with which the Occupational Health & Safety Act 85 of 1993 and Regulations are to be read. The Contractor must note this list is not exhaustive nor is it limited to the following:

- I. Hazards Chemical Substance Regulations of 1995
- II. Compensation for Occupational Injuries and Diseases Act 130 of 1993 as amended
- III. Hazardous Substance Act 15 of 1973
- IV. National Environmental Management Act 107 of 1998
- V. National Environmental Management: Air Quality Act 39 of 2004
- VI. National Road Traffic Act No.83 of 1996
- VII. National Water Act 36 of 1989
- VIII. National Building Regulations and Building Standards Act 103 of 1977

**For and on behalf of the Tenderer:** (Name & Address of Company)

Business Name: .....

Name & Surname: (Sect 16.1 Appointed).....

In my Capacity as: ... ..

Business Address: .....

.....

.....

.....

Witness: (Full Name in block letters) .....

Signature: .....

Date: .....

**For and on behalf of the Employer:** (Name & Address of Company)

Name & Surname: \_\_\_\_\_

In my Capacity as: Chief Executive Officer

**Mandela Bay Development Agency**

**P.O. Box 74**

**Port Elizabeth**

**6000**

Witness: (Full Name in block letters).....

Signature: .....

Date: .....

<b>C1.5 : DISCLOSURE STATEMENT</b>
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**PRO FORMA**

Date: \_\_\_\_\_

Contract: \_\_\_\_\_

Contractor: \_\_\_\_\_

Employer: \_\_\_\_\_

Engineer: \_\_\_\_\_

Dear Sirs

I am willing and available to serve as ad-hoc Adjudication Board Member in the abovementioned Contract.

In accordance with the General Conditions of Contract for Construction Works Adjudication Board Rules relating to the disclosure statements by selected or nominated persons to the adjudication, I hereby state that:

1. I shall act with complete impartiality and know of nothing at this time, which could affect my impartiality.
2. I have had no previous involvements in this project.
3. I do not have any financial interest in this project.
4. I am not currently employed by the Contractor, Employer or Engineer.
5. I do not have any financial connections with the Contractor, Employer or Engineer.
6. I do have or have not had a personal relationship with any authoritative member of the Contractor, Employer or the Engineer which could affect my impartiality.
7. I undertake to immediately disclose to the parties any changes in the above position which could affect my impartiality or be perceived to affect same.

Should there be any deviation from the foregoing statements, details shall be given.

I further declare that I am experienced in the work which is carried out under the Contract and in interpreting the contract documentation.

Name in full: \_\_\_\_\_

Signature: \_\_\_\_\_

## C1.6 : ADJUDICATION BOARD MEMBER AGREEMENT

### PRO FORMA

This Agreement is entered into between:

#### Adjudication Board Member:

Name: \_\_\_\_\_

Physical Address: \_\_\_\_\_

Postal Address: \_\_\_\_\_

E-mail Address: \_\_\_\_\_

Facsimile Number: \_\_\_\_\_

Telephone Number: \_\_\_\_\_

Mobile Number: \_\_\_\_\_

#### Contractor:

Name: \_\_\_\_\_

Physical Address: \_\_\_\_\_

Postal Address: \_\_\_\_\_

E-mail Address: \_\_\_\_\_

Facsimile Number: \_\_\_\_\_

Telephone Number: \_\_\_\_\_

Mobile Number: \_\_\_\_\_

#### Employer:

Name: \_\_\_\_\_

Physical Address: \_\_\_\_\_

Postal Address: \_\_\_\_\_

E-mail Address: \_\_\_\_\_

Facsimile Number: \_\_\_\_\_

Telephone Number: \_\_\_\_\_

Mobile Number: \_\_\_\_\_

The parties entered into a Contract for \_\_\_\_\_

\_\_\_\_\_ (name of project) which provides that a dispute under or in connection with the General Conditions of Contract for Construction Works, Second Edition 2010 (GCC), must be referred to **ad-hoc adjudication**.

The undersigned natural person has been appointed to serve as Adjudication Board Member and together with the undersigned Parties agree as follows:

1. The Adjudication Board Member accepts to perform his duties in accordance with the terms of the Contract, the GCC, Adjudication Board Rules and this Agreement.
2. The Adjudicator undertakes to remain independent and impartial of the Contractor, Employer and Engineer for the duration of the Adjudication Board proceedings.
3. The Adjudication Board Member agrees to serve for the duration of the Adjudication Board proceedings.
4. The parties may at any time, without cause and with immediate effect, jointly terminate this Agreement.
5. Unless the Parties agree, the Adjudication Board Member shall not act as arbitrator or representative of either Party in any subsequent proceedings between the Parties under the Contract. No Party may call the Adjudication Board Member as a witness in any such subsequent proceedings.
6. The standing Adjudication Board's duties shall end upon the Adjudication Board Member(s) receiving notice from the Parties of their joint decision to disband the Adjudication Board.
7. The Adjudication Board Member shall be paid in respect of time spent upon or in connection with the adjudication including time spent travelling:
  1. A monthly retainer of \_\_\_\_\_ (amount) for \_\_\_\_\_ (number of months), and/or
  2. A daily fee of \_\_\_\_\_ (amount) based on a \_\_\_\_\_ (number) hour day, and/or
  3. A hourly fee of \_\_\_\_\_ (amount), and/or
  4. A non-recurrent appointment fee of \_\_\_\_\_ (amount) which shall be accounted for in the final sums payable.
8. The Adjudication Board Member's expense incurred in adjudication work shall be reimbursed at cost.

Upon submission of an invoice for fees and expenses to the Parties, the **Employer** shall pay the full amount within 28 days of receipt of the invoice and shall be reimbursed by the other Party by half the amount so that fees and expenses are borne equally by the Parties. This Agreement is entered into:

**Contractor's** signature: \_\_\_\_\_

Contractor's Name: \_\_\_\_\_

Place: \_\_\_\_\_

Date: \_\_\_\_\_

Employer's signature: \_\_\_\_\_

Employer's Name: \_\_\_\_\_

Place: \_\_\_\_\_

Date: \_\_\_\_\_

Adjudication Board Member's signature: \_\_\_\_\_

Adjudication Board Member's Name: \_\_\_\_\_

Place: \_\_\_\_\_

Date: \_\_\_\_\_

<b>C1.7 : CONFIRMATION OF RECEIPT OF CONTRACT (PRO FORMA)</b>
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**CONFIRMATION OF RECEIPT**

The Tenderer, (now Contractor), identified in the Offer part of this Agreement, hereby confirms receipt from the Employer, identified in the Acceptance part of this Agreement, of one fully completed original copy of this Agreement, including the Schedule of Deviations (if any) on:

The ..... (day) of .....(month) ..... (year)

At .....(place)

It is hereby agreed that the official commencement date of the contract will be:

The ..... (day) of .....(month) ..... (year)

**SIGNED ON BEHALF OF/BY THE CONTRACTOR:**

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NAME

---

SIGNATURE

---

CAPACITY

**SIGNED BY WITNESS:**

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NAME

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SIGNATURE