

## C1.3 FORMS OF SECURITIES

### Pro-formas for Bonds & Guarantees

For use with the NEC3 Term Service Contract (June 2005) (TSC3)

The *conditions of contract* stated in the Contract Data Part 1 may include one or more of the following Secondary Options:

- Option X4: ~~Parent company guarantee~~  
Option X13: Performance Bond  
Option X14: ~~Advanced payment to the Contractor~~

Each of these Secondary Options requires a bond or guarantee "in the form set out in the Works Information".

Pro forma documents for these bonds and guarantee are provided here for convenience but are to be treated as part of the Works Information.

The organisation providing the bond / guarantee does so by copying the pro forma document onto his letterhead without any change to the text or format and completing the required details. The completed document is then given to the *Employer* within the time stated in the contract.

This pro forma document is available for use by the Surety on the *Employer's* web page at [www.\\_\\_\\_\\_\\_](http://www._____)

#### **Drafting instructions:**

1. Select the required pro-formas by deleting the ones not required, then complete all the details except that which the bond / guarantee provider is required to complete.
2. There are two pro-formas suitable for use with Option X13, but only one of them can be used; the Reducing Value Guarantee is generally used only for building works.
3. Then delete these drafting instructions. Delete this whole Securities section if none of the above secondary Options have been selected by the *conditions of contract*.

**Pro forma Performance Bond (for use with Option X13)**

*(to be reproduced exactly as shown below on the letterhead of the Surety)*

**Transnet Freight Rail  
A Division of Transnet Limited  
Table 3/74, Inyanda House  
P O Box 8617  
Parktown  
2193**

Date:

Dear Sirs,

**Performance Bond for Contract No. SIC 8072**

With reference to the above numbered contract made or to be made between

**Transnet Freight Rail, A Division of Transnet Limited**

(the *Employer*) and

(the *Contractor*), for

**The maintenance of permanent track with on-track ballast tamping machines, Countrywide**

(the *works*).

I/We the undersigned

on behalf of the Surety

of physical address

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

and duly authorised thereto do hereby bind ourselves as Surety and co-principal debtors in *solidum* for the due and faithful performance of all the terms and conditions of the Contract by the *Contractor* and for all losses, damages and expenses that may be suffered or incurred by the *Employer* as a result of non-performance of the Contract by the *Contractor*, subject to the following conditions:

1. The terms *Employer, Contractor, Project Manager, works* and Defects Certificate have the meaning as assigned to them by the *conditions of contract* stated in the Contract Data for the aforesaid Contract.
2. We renounce all benefits from the legal exceptions "Benefit of Execution and Division", "No value received" and all other exceptions which might or could be pleaded against the validity of this bond, with the meaning and effect of which exceptions we declare ourselves to be fully acquainted.
3. The *Employer* has the absolute right to arrange his affairs with the *Contractor* in any manner, which the Employer deems, fit and without being advised thereof the Surety shall not have the right to claim his release on account of any conduct alleged to be prejudicial to the Surety. Without derogating from the foregoing compromise, extension of the construction period, indulgence, release or variation of the *Contractor's* obligation shall not affect the validity of this performance bond.
4. This bond will lapse on the earlier of
  - the date that the Surety receives a notice from the *Project Manager* stating that the last Defects Certificate has been issued, that all amounts due from the *Contractor* as certified in terms of the contract have been received by the *Employer* and that the *Contractor* has fulfilled all his



obligations under the Contract, or

- the date that the Surety issues a replacement Performance Bond for such lesser or higher amount as may be required by the *Project Manager*.

5. Always provided that this bond will not lapse in the event the Surety is notified by the *Project Manager*, (before the dates above), of the *Employer's* intention to institute claims and the particulars thereof, in which event this bond shall remain in force until all such claims are paid and settled.

6. The amount of the bond shall be payable to the *Employer* upon the *Employer's* demand and no later than 7 days following the submission to the Surety of a certificate signed by the *Project Manager* stating the amount of the *Employer's* losses, damages and expenses incurred as a result of the non-performance aforesaid. The signed certificate shall be deemed to be conclusive proof of the extent of the *Employer's* loss, damage and expense.

7. Our total liability hereunder shall not exceed the sum of:

(say) \_\_\_\_\_

R \_\_\_\_\_

8. This Performance Bond is neither negotiable nor transferable and is governed by the laws of the Republic of South Africa, subject to the jurisdiction of the courts of the Republic of South Africa.

Signed at \_\_\_\_\_ on this \_\_\_\_\_ day of \_\_\_\_\_ 200\_

Signature(s) \_\_\_\_\_

Name(s) (printed) \_\_\_\_\_

Position in Surety company \_\_\_\_\_

Signature of Witness(s) \_\_\_\_\_

Name(s) (printed) \_\_\_\_\_

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# PART C1.4: ADJUDICATOR'S CONTRACT

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## Adjudicator's Contract

This contract should be used for the appointment of an Adjudicator to decide disputes under the NEC family of contracts. It may also be used for the appointment of an Adjudicator under other forms of contract

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An NEC document

June 2005

### OGC endorsement of NEC3

OGC advises public sector procurers that the form of contract used has to be selected according to the objectives of the project, aiming to satisfy the *Achieving Excellence in Construction (AEC)* principles.

This edition of the NEC (NEC3) complies fully with the AEC principles. OGC recommends the use of NEC3 by public sector construction procurers on their construction projects.



Office of Government Commerce

NEC is a division of Thomas Telford Ltd, which is a wholly owned subsidiary of the Institution of Civil Engineers (ICE), the owner and developer of the NEC.

The NEC is a family of standard contracts, each of which has these characteristics:

- Its use stimulates good management of the relationship between the two parties to the contract and, hence, of the work included in the contract.
- It can be used in a wide variety of commercial situations, for a wide variety of types of work and in any location.
- It is a clear and simple document – using language and a structure which are straightforward and easily understood.

NEC3 Adjudicator's Contract is one of the NEC family and is consistent with all other NEC3 documents. Also available are the Guidance Notes and Flow Charts.

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# neC 3 Adjudicator's Contract

## FORM OF AGREEMENT

This Agreement is made on the ..... day of ..... between

- ..... (name of company/organisation)  
of .....  
..... (address) and

- ..... (name of company/organisation)  
of .....  
..... (address)

(the Parties) and

- ..... (name)  
of .....  
..... (address)

(the Adjudicator)

1. The Parties appoint the Adjudicator in accordance with the conditions of contract and Contract Data attached to this Agreement.
2. The Adjudicator accepts this appointment and undertakes to carry out the Adjudicator's duties as described in the conditions of contract.

Signed jointly on behalf of the Parties by

..... (signature)

Name .....

Position .....

on behalf of .....

and

..... (signature)

Name .....

Position .....

on behalf of .....

and signed by the Adjudicator

..... (signature)

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form of agreement

conditions of contract

contract data

## CONDITIONS OF CONTRACT

### 1 General

<div style="writing-mode: vertical-rl; transform: rotate(180deg);">form of agreement</div> <div style="writing-mode: vertical-rl; transform: rotate(180deg);">conditions of contract</div> <div style="writing-mode: vertical-rl; transform: rotate(180deg);">contract data</div>	<b>Actions</b>	1.1	The Parties and the Adjudicator shall act as stated in this contract and in the <i>contract between the Parties</i> . The Adjudicator shall act impartially.
		1.2	The Adjudicator notifies the Parties as soon as he becomes aware of any matter which may present him with a conflict of interest.
	<b>Identified and defined terms</b>	1.3	In these conditions of contract, the Adjudicator and the Parties are those identified in the Form of Agreement. Terms identified in the Contract Data are in italics and defined terms have capital initials.
		1.4	Expenses are the cost of <ul style="list-style-type: none"> <li>• printing, reproduction and purchase of documents, drawings, maps, records and photographs,</li> <li>• telegrams, telex, faxes and telephone calls,</li> <li>• postage and delivery charges,</li> <li>• travelling, hotel and similar expenses,</li> <li>• room charges and</li> <li>• charges by others for help in an adjudication</li> </ul> incurred by the Adjudicator for an adjudication.
	<b>Interpretation and the law</b>	1.5	In this contract, except where the context shows otherwise, words in the singular also mean in the plural and the other way round and words in the masculine also mean in the feminine and neuter.
		1.6	This contract is governed by the <i>law of the contract</i> .
		1.7	If a conflict arises between this contract and the <i>contract between the Parties</i> then this contract prevails.
		1.8	If as a result of the <i>contract between the Parties</i> another party has become a party to a dispute which is to be decided by the Adjudicator, references to Parties in this contract are interpreted as including the other party.
	<b>Communications</b>	1.9	Each communication which this contract requires is in a form which can be read, copied and recorded. Writing is in the <i>language of this contract</i> .
		1.10	A communication has effect when it is received at the last address notified by the recipient for receiving communications or, if none is notified, at the address of the recipient stated in the Form of Agreement.

## 2 Adjudication

- 2.1 The Adjudicator does not decide any dispute that is the same or substantially the same as one that he or his predecessor has previously decided.
- 2.2 The Adjudicator decides a dispute referred to him under the *contract between the Parties*. He makes his decision and notifies the Parties of it in accordance with the *contract between the Parties*.
- 2.3 After notifying the Parties of his intention, the Adjudicator may obtain from others help that he considers necessary in reaching his decision. Before making his decision, the Adjudicator provides the Parties with a copy of any information or advice from others and invites their comments on it.
- 2.4 The Parties co-operate with the Adjudicator and comply with any request or direction he makes in relation to the dispute.
- 2.5 The Parties and the Adjudicator keep the Adjudicator's decision and information provided for an adjudication as confidential to those who have a proper interest in them.
- 2.6 After a decision has been made, the Adjudicator keeps documents provided to him by the Parties for the *period of retention*.

## 3 Payment

- Advanced payment** 3.1 Each time a dispute is referred to the Adjudicator, the Party referring the dispute makes an advanced payment to him of the amount stated in the Contract Data. The advanced payment is made within one week of the date when the dispute is referred.
- Assessing the amount due** 3.2 The Adjudicator assesses the amount due and submits an invoice to each Party for that Party's share of the amount due. Unless otherwise agreed, the Parties pay the Adjudicator the amount due in equal shares.
- 3.3 The Adjudicator submits invoices after each decision on a dispute has been notified to the Parties and after termination.
- 3.4 The amount due is
- the Adjudicator's fee multiplied by the total of the time spent on an adjudication and the time spent travelling, plus
  - the Expenses, less
  - the amount of the advanced payment and other previous payments.
- Any tax which the law requires the Parties to pay to the Adjudicator is included in the invoice.
- Payment of the amount due** 3.5 The Parties pay the amount due within three weeks of receiving the Adjudicator's invoice or, if a different period is stated in the Contract Data, within the period stated.
- 3.6 Payments are in the *currency of this contract* unless otherwise stated in this contract.

- 3.7 If a payment is late, interest is paid on the late payment. Interest is assessed from the date by which the late payment should have been made until the date when the late payment is made. Interest is calculated on a daily basis at the *interest rate* and is compounded annually.
- 3.8 If one of the Parties fails to pay, the other Party pays the Adjudicator the amount due with interest. The defaulting Party repays to the other Party the amount paid to the Adjudicator together with interest.

## 4 Termination

- 4.1 The Parties may, by agreement, terminate the appointment of the Adjudicator for any reason. They notify the Adjudicator of the termination.
- 4.2 The Adjudicator may, by notifying the Parties, terminate his appointment if
  - he considers that he cannot act because of a conflict of interest,
  - he is unable to decide a dispute,
  - an advance payment has not been made or
  - he has not been paid an amount due within five weeks of the date by which payment should have been made.
- 4.3 Unless he has terminated his appointment or his appointment has been terminated by the Parties, the Adjudicator's appointment terminates on the date stated in the Contract Data.

form of agreement  
 conditions of contract  
 contract data

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## CONTRACT DATA

**Statements given in all contracts**

- The *contract between the Parties* is .....
- The *period of retention* is ..... weeks.
- The *law of the contract* is the law of .....
- The *language of this contract* is .....
- The amount of the advanced payment is .....
- The Adjudicator's fee is ..... per hour.
- The *interest rate* is ..... % per annum above .....
- The *currency of this contract* is .....
- The Adjudicator's appointment terminates on .....

**Optional statements**

**If the period for payment of invoices is not three weeks**

- The period for payment of invoices is ..... weeks.

**If additional conditions of contract are required**

- The *additional conditions of contract* are .....
- .....
- .....
- .....

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form of agreement
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**nec3** Adjudicator's Contract

Index by clause numbers (main clause heads indicated by bold numbers).

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# CONTRACT DATA

- Statements given in all contracts**
- The *contract between the Parties* is **To be advised**.....
  - The *period of retention* is ...**N/A**..... weeks.
  - The *law of the contract* is the law of **the Republic of South Africa**
  - The *language of this contract* is **English**.....
  - The amount of the advanced payment is **N/A**.....
  - The Adjudicator's *fee* is...**To be advised**.....per hour.
  - The *interest rate* is **2%** per annum above the prime lending rate of the **Standard Bank of South Africa.**
  - The *currency of this contract* is **ZAR**.....
  - The Adjudicator's appointment terminates on **(To be advised)**.....

- Optional statements**
- If the period for payment of invoices is not three weeks**
- The period for payment of invoices is **four**.....weeks.
- If additional conditions of contract are required**
- The *additional conditions of contract* are **To be advised**.....
  - .....
  - .....
  - .....
  - .....

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