

Form of Subcontractor Side Agreement and Collateral Warranty

Details

Parties	Employer, Contractor and Subcontractor	
Employer	Name	[Insert]
	Address	[Insert]
	Email	[Insert]
	Telephone	[Insert]
	Attention	[Insert]
Contractor	Name	[Insert]
	Address	[Insert]
	Email	[Insert]
	Telephone	[Insert]
	Attention	[Insert]
Subcontractor	Name	[Insert]
	Address	[Insert]
	Email	[Insert]
	Telephone	[Insert]
	Attention	[Insert]
Subcontractor Works	[Insert]	
Recitals	A.	The Employer has entered into the EPC Contract with the Contractor.
	B.	The Contractor has entered into the Subcontract with the Subcontractor.
	C.	The Employer, the Contractor and the Subcontractor wish to make certain arrangements relating to the termination of the EPC Contract and to confirm the obligations of the Subcontractor under the Subcontract.
Governing law	South Africa	
Date of agreement	The date of signature of this Agreement by the Party last signing.	

General terms

1. Definitions and interpretation

1.1 Definitions

In this Agreement the following words and expressions have the meanings set out below:

- (a) "**Agreement**" means this subcontractor side agreement.
- (b) "**Business Day**" means any day other than a Saturday, Sunday or gazetted national public holiday in South Africa
- (c) "**Contractor**" means the party described in the Details and any replacement.
- (d) "**Defect**" means where the work performed or Equipment delivered under the Subcontract is of a lower quality or standard than that referred to in clause 4, and **Defective** has a corresponding meaning.
- (e) "**Employer**" means the person described in the Details.
- (f) "**EPC Contract**" means the contract relating to the design, engineering, procurement, construction, installation, commissioning, testing, delivery, completion, and rectification of defects of the Facility dated [●] between the Employer and the Contractor, to which this Agreement is attached as a Schedule.
- (g) "**Equipment**" means the equipment, materials or goods supplied by the Subcontractor under the Subcontract.
- (h) "**Facility**" means the solar PV power plant in South Africa and all associated infrastructure to be constructed designed, engineered, procured, installed , commissioned and tested in accordance with the terms of the EPC Contract.
- (i) "**New Contract**" means the contract to be entered into by the Subcontractor and the Employer or the person nominated by the Employer pursuant to clause 2.1(a) of this Agreement.
- (j) "**Project Site**" means the land and other places upon which the Facility is to be constructed and any other land and places as more specifically referred to in the Subcontract.
- (k) "**Subcontract**" means the contract between the Contractor and the Subcontractor.
- (l) "**Subcontractor**" means the person described in the Details.
- (m) "**Subcontract Works**" means the works described in the Details.
- (n) "**Year**" means a period of 365 (three hundred and sixty-five) Days and 366 (three hundred and sixty-six) Days in a leap year in accordance with Gregorian calendar.

1.2 Interpretation

In this Agreement unless the contrary intention appears:

- (a) a reference to this Agreement or another instrument includes any variation or replacement of them;
- (b) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;

- (c) the singular includes the plural and vice versa;
- (d) the masculine includes the feminine and neuter; the feminine includes the masculine and neuter; the neuter includes the masculine and the feminine;
- (e) the word 'person' includes a firm, a body corporate, an unincorporated association, and an authority;
- (f) a reference to a person includes a reference to the person's executors, administrators, successors, substitutes (including, without limitation, any person acquiring rights and obligations by way of novation of the Subcontract, if applicable) and permitted assigns and/or cessionaries;
- (g) a reference to anything (including, without limitation, any amount) is a reference to the whole or any part of it and a reference to a group of persons is a reference to any one or more of them; and
- (h) a reference to all parties, clause, exhibits, annexures or schedules is, unless otherwise provided, to the parties, clause, exhibits, annexures or schedules of or to this Agreement.

2. Termination of the EPC Contract

2.1 Notice of Termination

If the EPC Contract is terminated then:

- (a) whether or not the Subcontract has been terminated, within 14 (fourteen) days of the date of termination of the EPC Contract, the Employer may, by written notice to the Subcontractor, with copy to the Contractor, direct the Subcontractor to enter into a New Contract with the Employer, or a person nominated by the Employer, to complete the Subcontract Works; or
- (b) if the Subcontract has not been terminated the Employer may, within 14 (fourteen) days of the date of termination of the EPC Contract, by written notice direct that the Subcontract be novated from the Contractor to the Employer or a person nominated by the Employer.

2.2 New Contract

If the Employer delivers a notice pursuant to clause 2.1(a), then:

- (a) such New Contract is deemed to have been entered into by the Employer and the Subcontractor upon delivery of the notice by the Employer pursuant to clause 2.1(a); and
- (b) the New Contract so formed is on the same terms as the Subcontract, specifically inclusive of all undertakings, guarantees, and/or warranties given by the Subcontractor to the Contractor under the original Subcontract.

2.3 Liability

- (a) If a New Contract is formed then, unless agreed in writing otherwise, neither the Employer nor the person nominated by the Employer is liable to the Subcontractor in respect of any claims made, or payment for any work carried out or goods, materials, plant, equipment or other items or services provided before the effective date of the New Contract or any claims that may be made by the Subcontractor against the Contractor for breach of the Subcontract or on any other basis whatsoever arising out of or in connection with the Subcontract.

- (b) The formation of a New Contract shall be without prejudice to the Contractor's and Subcontractor's obligations, risks liabilities, rights, powers or remedies under or in connection with the Subcontract, arising under the Subcontract or otherwise before the formation of the New Contract.

2.4 Report by Subcontractor

If the Employer delivers a notice pursuant to clause 2.1(a) then the Subcontractor must, within such a reasonable time and format as stipulated by the Employer, provide to the Employer a written report detailing the status of the Subcontract Works.

2.5 Termination of Subcontract

Subject to any existing rights and obligations of the Contractor, upon the formation of the New Contract (as between the Subcontractor and the Employer), the Subcontract will be deemed to have been terminated pursuant to the Subcontract.

2.6 Cession

If the Employer delivers a notice pursuant to clause 2.1(b), then, the cession of the rights and delegation of the obligations in respect of the Subcontract will be effected on the terms and conditions under a separate cession and delegation agreement to be agreed by the Employer and the Subcontractor, or the person nominated by the Employer, and will be effective from the date of the Employer's notice notwithstanding that a separate subcontract side agreement is not executed.

From the date of such cession and delegation:

- (a) all of the Contractors' rights, title, interest and/or benefit under the bank guarantee and the parent company guarantee (if applicable) issued by the Subcontractor in favour of the Contractor pursuant to the Subcontract shall be ceded to the Employer or the person nominated by the Employer and the Subcontractor irrevocably and unconditionally consents to any such cession;
- (b) the Contractor shall be released from any obligations and liabilities to the Subcontractor under and in accordance with the Subcontract;
- (c) the Subcontractor shall be released from any obligations and liabilities to the Contractor under and in accordance with the Subcontract; and
- (d) the Employer, or the person nominated by the Employer shall assume all future obligations and liabilities of the Contractor under the Subcontract.

3. Termination and amendment of the Subcontract

The Contractor and the Subcontractor must not materially amend the commercial terms (including but not limited to the contract price, key milestones, and scope of work) of the Subcontract without the prior written approval of the Employer which approval shall not be unreasonably withheld or delayed. Should the Employer fail to approve any amendment within 10 (ten) Business Days of receipt thereof, such amendment shall be deemed to be approved. The Contractor must not terminate the Subcontract without giving the Employer notice of not less than 14 (fourteen) days of the intention to terminate, providing a full explanation of the grounds for the termination.

4. Collateral Warranty

The Subcontractor warrants to the Employer that all work performed and all Equipment supplied by the Subcontractor in the course of the Subcontract Works will be:

- (a) at least of the quality and to the standard required by the Subcontract;
- (b) to the extent that the level of quality or standard are not stipulated in the Subcontract, of good workmanship and merchantable quality; and
- (c) executed in accordance with the warranties set out in the Subcontract,

provided that this collateral warranty does not novate, diminish, nor extend any undertakings, guarantees, or warranties given by the Subcontractor to the Contractor, the Parties acknowledging that this collateral warranty is in no way different from any such undertakings, guarantees and/or warranties given by the Subcontractor to the Contractor under the Subcontract.

5. Manufacturer's warranty

This Agreement is in addition to and does not derogate from any manufacturer's warranty attaching to any Equipment provided under the Subcontract or warranty required by law.

6. Rectification

The Subcontractor agrees to, at its own expense, replace and remedy to the reasonable satisfaction of the Employer so much of the Subcontract Works within 2 (two) Years from the completion of the Subcontract Works that the Employer reasonably considers to be defective or to be non-compliant with the terms of the Subcontract.

7. Time for rectification

As soon as reasonably practicable after written notification to the Subcontractor of a request by the Employer to comply with the Subcontractor's obligations under clause 6, the Subcontractor must replace and/or remedy the Subcontract Works or the Equipment supplied by the Subcontractor at its cost.

Where the Subcontractor (acting reasonably) disputes that such part or parts of the Subcontract Works are Defective (or the extent of a Defect), and the dispute is not resolved between the parties within 14 (fourteen) days of the written notice of the dispute provided by the Subcontractor to the Employer, the dispute shall be determined by an independent expert appointed by the then President of the South African Institute of Electrical Engineers (or such other expert agreed in writing by the parties acting reasonably). The determination of the independent expert will be final and binding on the parties, except if a party considers that a manifest error has occurred, or that the independent expert has committed fraud or misconduct, in which case that party may refer the matter to the High Court of South Africa, for determination.

8. Rectification at Subcontractor's cost

If, within a reasonable time after written notification by the Employer under clause 7 of this Agreement, the Subcontractor does not comply with the Subcontractor's obligations under clause 7 as stated in the notice which it is required to perform under the Subcontract, the Employer may perform the Subcontractor's obligations under clause 7 as stated in the notice, or cause such obligations to be performed. The Subcontractor indemnifies the Employer against all reasonable and documented costs and expenses necessarily incurred for the performance of the Subcontract Works or supply of Equipment under the Subcontract.

9. Ownership in Goods, Materials, Plant and Equipment

All goods, materials, plant and equipment and other items comprised in the Subcontract Works shall, in accordance with the Subcontract, become the property of the Employer, free from all liens, at whichever is the earlier of the following times:

- (a) when it is delivered to the Project Site; or
- (b) when the Contractor receives payment of the value of such items.

10. Continued performance

If the Employer delivers a notice pursuant to either clause 2.1(a) or clause 2.1(b), the Subcontractor shall not discontinue or suspend the performance of the Subcontract Works without first giving to the Employer not less than 30 (thirty) days' prior written notice specifying the Subcontractor's ground for discontinuing or suspending its performance thereof and stating the amount (if any) of monies outstanding under the Subcontract.

11. Security

The Subcontractor undertakes that the bank guarantee and parent company guarantee (if applicable) issued by the Subcontractor in favour of the Contractor pursuant to the Subcontract shall be capable of being ceded to the Employer and the Lenders upon written notice by the Employer or Lender (as defined in the Subcontract) without the prior written consent of the Subcontractor.

12. Limitation of liability

The Subcontractor shall have no greater liability to the Employer under this Agreement than it does to the Contractor under the Subcontract and for the avoidance of doubt the Subcontractor collateral warranty to the Employer is no greater nor more extensive than the undertakings, guarantees, and/or warranties given by the Subcontractor to the Contractor under the Subcontract, and all limitations of the Subcontractor's liability under the Subcontract shall apply *mutatis mutandis* under this Agreement.

13. Cession and assignment

- 13.1 This Agreement shall be binding upon, and inure to the benefit of, the Parties hereto and their successors and permitted cessionaries and assigns.
- 13.2 This Agreement and the rights hereunder shall not be capable of being assigned or ceded by any Party in whole or in part without the prior written consent of the other Parties hereto, which consent shall not be unreasonably withheld or delayed, except that the Employer may cede this Agreement without the prior written consent of the other Parties, to the same party, at the same time, in the same manner and to the same extent as it cedes the EPC Contract in accordance with its terms (which, for the avoidance of doubt, may include cession by way of security to Lenders, as defined in the EPC Contract); and each Party shall, at any other Party's request, duly execute and return to such other Party any documents provided by such other Party in order to give effect to, or perfect under applicable Laws, any permitted cession referred to above.

14. Notices

- 14.1 All notices required to be delivered pursuant to this Agreement must be delivered by hand or sent by email to the party to which it is necessary or required to be given at the address set out in the Details, or any replacement address notified by the parties to each other in writing.
- 14.2 Notices given to the addresses set out in the Details shall be deemed to have been duly given (until the contrary is proved):
 - (a) on delivery, if delivered to the Party's physical address; and
 - (b) on the first Business Day after despatch, if sent to the Party's e-mail address.

15. Governing law and jurisdiction

This Agreement shall be governed by and construed in accordance with the laws of the Republic of South Africa, and the parties agree to submit to the non-exclusive jurisdiction of the High Courts of South Africa in respect of any matter arising from or in connection with this Agreement, including its termination, except as otherwise provided regarding independent expert determination under clause 7.

16. Severability

If any term, condition or provision contained in this Agreement shall be held to be invalid, unlawful or unenforceable to any extent, such term, condition or provision shall not affect the validity, legality or enforceability of the remaining parts of this Agreement.

17. Lien

Notwithstanding anything to the contrary contained in the Subcontract, the Subcontractor waives any lien (including without limiting the generality of the foregoing, landlords' hypothec, storage or storemen liens, labourers, mechanics and vendor liens) it may have in respect of: (i) the Project Site, (ii) any relevant goods and equipment and things of all kinds to be provided under the Subcontract at the Project Site and/or (iii) the Facility, which it may have or may acquire from time to time.

18. Entire Contract

This Agreement contains all the express provisions agreed on by the Parties with regard to the subject matter of the Agreement and the Parties waive the right to rely on any alleged express provision not contained in this Agreement.

19. Indulgences

The grant of any indulgence by a Party under this Agreement shall not constitute a waiver of any right by the grantor or prevent or adversely affect the exercise by the grantor of any existing or future right of the grantor.

20. Variation, Cancellation and Waiver

No variation, amendment or cancellation of this Agreement, and no waiver of any right under this Agreement, shall be effective unless reduced to writing and signed by or on behalf of the Parties.

21. Counterparts

This Agreement may be executed in one or more counterparts. Any single counterpart or set of counterparts executed, in either case, by all the parties shall constitute a full original of this Agreement for all purposes.

Employer

Executed by the Employer by authority of its
directors:)
)
)
)

Signature of director

Signature of [*director*]/[*company secretary*]
[*delete whichever is not applicable*]

Date _____

Date _____

Name of director (block letters)

Name of [*director*]/[*company secretary*]
(block letters) [*delete as applicable*]

Contractor

Executed by the Contractor by authority of its
directors:)
)
)
)

Signature of director

Signature of [*director*]/[*company secretary*]
[*delete whichever is not applicable*]

Date _____

Date _____

Name of director (block letters)

Name of [*director*]/[*company secretary*]
(block letters) [*delete as applicable*]

Subcontractor

Executed by the Subcontractor by authority of
its directors:)
)
)
)

Signature of director

Signature of [director]/[company secretary]
[delete whichever is not applicable]

Date _____

Date _____

Name of director (block letters)

Name of [**director**]/[**company secretary**]
(block letters) [**delete as applicable**]