

CONFIDENTIALITY AGREEMENT

BETWEEN

ESKOM PENSION AND PROVIDENT FUND

(Pension fund registration number 12/8/564)

(hereinafter referred to as “EPPF”)

AND

(Registration number _____)

(hereinafter referred to as “_____”)

TABLE OF CONTENTS

Clause		Page number
1	Introduction	3
2	The Confidential Information	3
3	Disclosure of Confidential Information	4
4	Title	5
5	Restrictions on Disclosure and Use of the Confidential Information	5
6	Data Protection	5
7	Standard of Care	6
8	Return of Material Containing or Pertaining to the Confidential Information	6
9	Excluded Confidential Information	7
10	Disclosing Party Undertaking	7
11	Term	8
12	Additional Action	8
13	Breach	8
14	Amendments	9
15	Enforcement	9
16	Headings	9
17	Representations and Warranties	9
18	Entire Agreement	9
19	Governing Law	9
20	Submission	10
21	Postal Addresses	10
22	Severability	11

1 INTRODUCTION

- 1.1 The parties intend to provide each other with certain information pertaining to their business and operations and the parties are in the process of discussing certain matters with a view to concluding an agreement ("the potential agreement"), which discussions have required and will require the disclosure to one another of information of a proprietary, secret and confidential nature. Whether or not the parties conclude the potential agreement will not affect the validity of this agreement.
- 1.2 For purposes of this agreement, "parties" means EPPF and _____ and "party" means any one of them as the context may indicate.
- 1.3 The parties acknowledge that any confidential information exchanged between them should be kept confidential and have therefore agreed to enter into this agreement.
- 1.4 The parties wish to record the terms and conditions upon which each shall disclose confidential information to the other, which terms and conditions shall constitute a binding and enforceable agreement between the parties and their agents.
- 1.5 This agreement shall also bind the parties, notwithstanding the date of signature hereof, in the event that any of the parties shall have disclosed any confidential information to the other party prior to date of signature hereof.
- 1.6 For the purpose of this agreement the party which discloses confidential information shall be referred to as "the disclosing party" and the party which receives the confidential information shall be referred to as "the receiving party".

2 THE CONFIDENTIAL INFORMATION

- 2.1 "**Confidential Information**" shall, for the purpose of this agreement include, without limitation, any technical, financial, commercial, business or scientific information know-how, trade secrets, agreements, undertakings, structures, products, messages, machinery, designs, drawings, technical specifications, plans, formulae, marketing methods, client lists, supplier lists, projects, projections, cash flow charts, software and copies, notes and extracts, strategic plans, direction, manner, timing and implementation of any projects to be undertaken, process, codes and data of all types (including, but not limited to, the information set out in 1.1 above) in whatever form, disclosed to or assessed by any party during the course of its relationship with the other parties. It also includes "personal information" as defined in the Protection of Personal Information Act, 4 of 2013 and which is disclosed by the disclosing party to the receiving party in terms of this agreement.
- 2.2 If the receiving party is uncertain as to whether any information is confidential

information, the receiving party shall treat such information as confidential until the contrary is agreed by the disclosing party in writing.

3 DISCLOSURE OF CONFIDENTIAL INFORMATION

- 3.1 The disclosing party shall only disclose the confidential information to the receiving party to the extent deemed necessary or desirable by the disclosing party in its discretion.
- 3.2 The receiving party acknowledges that the confidential information is a valuable, special and unique asset proprietary to the disclosing party.
- 3.3 The receiving party agrees that it will not, during or after the course of their relationship and/or the term of this agreement as described in Clause 10, disclose the information to any other party for any reason or purpose whatsoever without the prior written consent of the disclosing party, save in accordance with the provisions of this agreement. For avoidance of doubt, in this agreement "other party" means any party other than EPPF and.....their holding or subsidiary companies or agents who shall be deemed to be bound by the provisions of this agreement.
- 3.4 The receiving party undertakes not to disclose the confidential information to any other party, except where the confidential information is disclosed to any party to whom the receiving party has assigned or transferred (or may potentially assign or transfer) any of its rights or obligations under any agreement(s) and provided such party has undertaken to the receiving party in writing to adhere to the provisions of this agreement.
- 3.5 Notwithstanding anything to the contrary contained in this agreement the parties agree that the confidential information may be disclosed by the receiving party to its professional advisors, employees and employees of its subsidiaries on a need-to-know basis; provided that party takes whatever steps are necessary to procure that such persons agree to abide by the terms of this agreement to prevent the unauthorised disclosure of the confidential information to other parties. The receiving party's failure to procure the consent of such persons to abide by the terms of this agreement shall in no way detract from the receiving party's obligations in terms of this agreement. For purposes of this clause, the receiving party's professional advisors, employees, directors, managers and employees of its subsidiaries shall be deemed to be acting, in the event of a breach, as that party's duly authorised agents.
- 3.6 The receiving party agrees:

- 3.6.1 not to utilise, exploit or in any other manner whatsoever use the

confidential information disclosed pursuant to the provisions of this agreement for any purpose whatsoever without the prior written consent of the disclosing party;

- 3.6.2 that the unauthorised disclosure of the confidential information to another party may cause irreparable loss, harm and damage to the disclosing party. Accordingly, the receiving party indemnifies and holds the disclosing party harmless against the loss, claim harm or damage of whatsoever nature, suffered or sustained by the disclosing party pursuant to a breach by the receiving party of the provision of this agreement.
- 3.6.3 not to copy or reproduce the confidential information by any means without the prior written consent of the disclosing party unless so directed by a court order or law, it being recorded that any copies shall be and remain the property of the disclosing party;

4 TITLE

- 4.1 All confidential information disclosed by the disclosing party to the receiving party is acknowledged by the receiving party:

- 4.1.1 to be proprietary to the disclosing party; and

- 4.1.2 not to confer any rights to the receiving party of whatsoever nature in the confidential information.

5 RESTRICTIONS ON DISCLOSURE AND USE OF THE CONFIDENTIAL INFORMATION

- 5.1 The receiving party undertakes not to use the confidential information for any purpose other than:

- 5.1.1 that for which it is disclosed; and

- 5.1.2 in accordance with the provisions of this agreement.

6 DATA PROTECTION

- 6.1 The receiving party undertakes to comply with any obligations under applicable privacy and data protection laws governing personal information.
- 6.2 The receiving party shall ensure that all processing in respect of personal information will not place the disclosing party in breach of any applicable privacy and data

protection laws.

- 6.3 The receiving party undertakes to implement commercially reasonable measures to detect and/or prevent unauthorized access to its information technology systems and particularly in respect of protecting the integrity of and preventing unauthorised access to personal information that the receiving party has in its possession or under its control.
- 6.4 The receiving party undertakes to obtain the disclosing party's consent in the event of the receiving party having to forward the Personal Information, to a third party in pursuance of its obligations under this agreement. The receiving party shall in any event ensure that any such third party shall be bound by the security measures imposed on the receiving party in terms of clause 6.3.
- 6.5 The disclosing party shall be entitled to, on reasonable notice, investigate the steps the receiving party has taken to comply with this clause.

7 STANDARD OF CARE

- 7.1 The receiving party agrees that it shall protect the confidential information disclosed pursuant to the provisions of this agreement using the same standard of care that the receiving party applies to safeguard its own proprietary, secret or confidential information, provided that the standard of care shall not be lower than the standard care that would be applied by a reasonable receiving party in its position in the circumstances, and that the information shall be stored and handled in such a way as to prevent any unauthorised disclosure thereof.

8 RETURN OF MATERIAL CONTAINING OR PERTAINING TO THE CONFIDENTIAL INFORMATION

- 8.1 The disclosing party may, at any time, request the receiving party to return any material containing, pertaining or relating to confidential information disclosed pursuant to the terms of this agreement and may, in addition request the receiving party to furnish sufficient proof as may reasonably be required by the disclosing party, including without limitation, a written statement to the effect that, upon such return, the receiving party has not retained in its possession, or under its control, either directly or indirectly, any such material.
- 8.2 As an alternative to the return of the material contemplated in 8.1 above, the receiving party shall, at the instance of the disclosing party, destroy such material and furnish the disclosing party with sufficient proof as may reasonably be required by the disclosing party, including without limitation, a written statement to the effect that such material has been destroyed.

- 8.3 The receiving party shall comply with a request in terms of this clause, within seven days of receipt of such a request.
- 8.4 This clause shall not apply to the extent that the receiving party is obliged to retain any confidential information in terms of any applicable law, rule or regulation or by any competent judicial, governmental, supervisory or regulatory body.

9 EXCLUDED CONFIDENTIAL INFORMATION

- 9.1 The obligations of the receiving party pursuant to the provisions of this agreement shall not apply to any confidential information that:
 - 9.1.1 is known to, or in the possession of the receiving party prior to disclosure thereof by the disclosing party;
 - 9.1.2 is or becomes publicly known, otherwise than as a result of a breach of this agreement by the receiving party;
 - 9.1.3 is developed independently of the disclosing party by the receiving party in circumstances that do not amount to a breach of the provisions of this agreement;
 - 9.1.4 is disclosed by the receiving party after being requested or required to disclose such information in terms of any law or regulations or by any judicial, governmental, supervisory or regulatory body, court of law or legal process; provided that in these circumstances, the receiving party shall advise the disclosing party to take whatever steps it deems necessary to protect its interests in this regard and provided further that the receiving party will disclose only that portion of the information which it is legally required to disclose and the receiving party will use its reasonable endeavours to protect the confidentiality of such information to the greatest extent possible in the circumstances;
 - 9.1.5 is disclosed to another party pursuant to the prior written authorisation of the disclosing party;
 - 9.1.6 is received from another party in the circumstances that do not result in a breach of the provision of this agreement.
- 9.2 The onus of proving that one or more of the exclusions listed above applies in relation to any confidential information shall rest with the receiving party.

10 DISCLOSING PARTY UNDERTAKING

- 10.1 The disclosing party undertakes to use its reasonable commercial endeavours to ensure that the confidential information or other information disclosed by the disclosing party and received by the receiving party is accurate, up to date and complete as at the date of being disclosed.
- 10.2 Where it becomes apparent to either party that the confidential information provided is incomplete, out dated or inaccurate, that party shall inform the other party of such inaccuracy and the disclosing party shall use its reasonable commercial endeavours to procure updated or correct information and disclose it to the receiving party.
- 10.3 No confidential information or other information, communication or document made available to or supplied to the receiving party by the disclosing party shall constitute an offer or invitation to the receiving party, nor will any such information, communication or document form the basis of any contract apart from this agreement.

11 TERM

- 11.1 This agreement shall commence upon the date of signature of the last signing party hereto ("the effective date") and shall endure indefinitely.

12 ADDITIONAL ACTION

- 12.1 All parties to this agreement shall execute and deliver such other documents and do such other acts and things as may be necessary or desirable to give effect to the terms and provisions of this agreement.

13 BREACH

- 13.1 In the event that the receiving party should breach the provisions of this agreement and fail to remedy such breach within seven days from date of a written notice to do so, then the disclosing party shall be entitled to invoke all remedies available to it in law including the institution of an action for damages.

- 13.2 The parties acknowledge and agree that –

- 13.2.1 cancellation is not an appropriate remedy for breach of this agreement and this agreement may not be cancelled or terminated save by written agreement between the parties; and

- 13.2.2 damages alone may not be an adequate remedy for any breach of the obligations set out in this agreement and that the remedies of interdict, specific performance

and any other equitable relief are appropriate for any actual breach of this agreement. The disclosing party will be entitled to apply for such remedy, in addition to any other remedy to which it may be entitled in law (other than the remedy of cancellation).

- 13.2.3 Should any unauthorised disclosure of confidential information take place in breach of the provisions of this agreement, the disclosing party shall, in addition to the foregoing, be entitled by written notice to the receiving party to terminate all obligations to provide information to the receiving party with immediate effect and no further information will be disclosed to the receiving party in terms of this agreement.

14 AMENDMENTS

- 14.1 No amendment or waiver of any of the provisions of this agreement shall be effective unless reduced to writing and signed by both parties.

15 ENFORCEMENT

- 15.1 The failure by the disclosing party to enforce or to require the performance at any time of any of the provisions of this agreement shall not be construed to be a waiver of such provision, and shall not affect either the validity of this agreement or any part hereof or the right of the disclosing party to enforce the provisions of this agreement.

16 HEADINGS

- 16.1 The headings of the clauses of this agreement are used for convenience only and shall not affect the meaning or constructions of the contents of this agreement.

17 REPRESENTATIONS & WARRANTIES

- 17.1 All parties represent that they have authority to enter into this agreement and to do all things necessary to procure the fulfilment of its obligations in terms of this agreement.

18 ENTIRE AGREEMENT

- 18.1 This agreement contains the entire agreement of the parties with respect to the subject matter of this agreement and supersedes all prior agreements between the parties, whether written or oral, with respect to the subject matter of this agreement.

19 GOVERNING LAW

19.1 This agreement and the relationship of the parties in connection with the subject matter of this agreement and each other shall be governed and determined in accordance with the laws of the Republic of South Africa.

20 SUBMISSION

20.1 The parties hereby submit to the non-exclusive jurisdiction of the High Court of South Africa, Gauteng Local Division, Johannesburg.

21 POSTAL ADDRESSES

21.1 Any written notice in connection with this agreement may be addressed:

21.1.1 In the case of EPPF to:

Address: Isivuno House, EPPF Office Park
24 Georgian Crescent East
Bryanston
East 2152.
Telefax no: (011) 709 7510
Email: LebogangM@eppf.co.za or Lorato@eppf.co.za

and shall be marked for the attention of the Legal and Corporate Secretariat Manager;

21.1.2 In the case of _____ to:

Address: _____

Telefax no: _____

And shall be marked for the attention of _____.

- 21.2 A party may change its address by prior notice in writing to the other parties.
- 21.3 If any notice is to be sent by mail, it shall be sent by prepaid registered mail and shall then be deemed until and unless the contrary is proved, to have been received ten days after the date of posting.
- 21.4 If any notice is sent by telefax, it will be deemed, until and unless the contrary is proved, to have been received on the date recorded on the transmission slip.
- 21.5 If any notice is delivered by hand, it will be deemed to have been received on proof of the date of delivery.

22 SEVERABILITY

- 22.1 In the event of any one or more of the provisions of this agreement being held for any reason to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of this agreement, and this agreement shall be construed as if such invalid, illegal or unenforceable provision was not a part of this agreement, and the agreement shall be carried out as nearly as possible in accordance with its original terms and intent.

Signed at on this day of 2015

For Eskom Pension and Provident Fund:

....., duly authorised

AS WITNESSES:

1.
2.

Signed at on this..... day of2015

For

....., duly authorised

AS WITNESSES:

1.

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