**CONFIDENTIALITY AGREEMENT**

**"Agreement"**

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**Between**

**ESKOM HOLDINGS SOC LTD**

**and**

**Suppliers/tenderers**

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**Confidential**

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The Parties to this Agreement are:-

I. **ESKOM HOLDINGS SOC LTD** a company incorporated under the laws of the Republic of South Africa, having its registered office at Megawatt Park, Maxwell Drive, Sunninghill ext.3, Sandton, Republic of South Africa, with registration number 2002/015527/06 [hereinafter referred to as "**the Disclosing Party**".

II. **……** a company incorporated under the laws of [insert name of country], having its registered office at [registered address], with registration number [insert registration number]**,** hereinafter referred to as "**the Receiving Party**".

Hereinafter individually referred to as a "Party" and jointly as the "Parties".

**NOW THEREFORE, IT IS HEREBY AGREED AS FOLLOWS:**

1.1 The Disclosing Party intends providing the Receiving Party with certain information relating to [state the nature of the discussions and the reason for the disclosure here] ("**the Project**"/Transaction).

1.2 The parties wish to record the terms and conditions upon which the Disclosing Party shall disclose Confidential Information to the Receiving Party, which terms and conditions shall constitute a binding and enforceable Agreement between the parties and their agents.

1.3 Notwithstanding the date of signature hereof, this agreement shall be binding upon the parties with effect from the date upon which the Disclosing Party shall have disclosed any Confidential Information to the Receiving Party, whichever date is the earliest.




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1.4 Neither this Agreement nor the exchange of information contemplated hereby shall commit either party to continue discussions or to negotiate, or to be legally bound to any potential business relationship. The parties shall only be bound to a business relationship by way of a further definitive written Agreement signed by the Parties.

1.5 The party disclosing the Confidential Information shall be known as the "**Disclosing Party**" and the party receiving Confidential Information shall be known as the "**Receiving Party**".

## 2. The Confidential Information

"**Confidential Information**" shall for the purpose of this Agreement mean all information and materials (whether in written, graphic, electronically stored or oral form) owned and/or developed by the Disclosing Party or its affiliates, including, without limitation, any technical, commercial, financial or marketing information, strategies, operations, know-how, trade secrets, processes, machinery, designs, drawings, formulae, test work data, equipment, notes, memoranda, methods and other natural resources, technical specifications and data relating to the Project (including, but not Ltd to, the information set out in 1.1 above), relating to the disclosing Party's business practices or the promotion of the disclosing Party's business plans, policies or practices, which information is communicated to the receiving Party, or otherwise acquired by the Receiving Party from the Disclosing Party, during the course of the Parties' commercial interactions, discussions and negotiations with one another, whether such information is formally designated as confidential or not.

## 3. Disclosure of Confidential Information




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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 Parties acknowledge 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 its relationship with the disclosing party under this agreement and/or the term of this Agreement, disclose the Confidential Information to any third party for any reason or purpose whatsoever without the prior written consent of the Disclosing Party and to the extent of such authorisation, save in accordance with the provisions of this Agreement. In this Agreement "**third party**" means any party other than the Receiving and Disclosing Parties or their Representatives.

3.4 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 respective employees, agents, officers, directors, subsidiaries, associated companies, shareholders and advisers (including but not Ltd to professional financial advisers, legal advisers and auditors) **("Representatives")** on a need-to-know basis and for the purposes of the Project; provided that the Receiving Party takes whatever steps are necessary to procure that such Representatives agree to abide by the terms of this Agreement to prevent the unauthorised disclosure of the Confidential Information to third parties. For purposes of this clause, the Receiving Party's Representatives shall be deemed to be acting, in the event of a breach, as the Receiving Party's duly authorised agents.




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3.5 Except as otherwise contemplated in this Agreement, the Parties agree in favour of one another 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 other than the Project without the prior written consent of the Disclosing Party.

3.6 Accordingly, the Receiving Party agrees to indemnify, defend and hold the Disclosing Party harmless from and against any and all suits, liabilities, causes of action, claims, losses, damages, costs (including, but not Ltd to, cost of cover, reasonable attorneys' fees and expenses), or expenses of any kind (collectively, "Losses") incurred or suffered by the Disclosing Party and/or its Representatives arising from or in connection with the Receiving Party's unauthorized use or disclosure of the Disclosing Party's Confidential Information in violation of the Agreement.

**4. Title**

All Confidential Information disclosed by the Disclosing Party to the Receiving Party is acknowledged by the Receiving Party to be proprietary and the exclusive property of the Disclosing Party. This Agreement shall not confer any rights of ownership or license on the Receiving Party of whatever nature in the Confidential Information.

**5. Restricting 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 the Project; and

5.1.2 in accordance with the provisions of this Agreement.




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## 6. Standard of care

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 it applies to safeguard its own proprietary, secret or Confidential Information but no less than a reasonable standard of care, and that the Confidential Information shall be stored and handled in such a way as to prevent any unauthorised disclosure thereof.

## 7. Return of material containing or pertaining to the Confidential Information

7.1 The Disclosing Party may, at any time, and in its sole discretion request the Receiving Party to return any material and/or data in whatever form containing, pertaining to or relating to Confidential Information disclosed pursuant to the terms of this Agreement and may, in addition request the Receiving Party to furnish 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 and/or data.

7.2 If it is not practically able to do so, the Receiving Party shall destroy or ensure the destruction of all material and/or data in whatever form relating to the Confidential Information disclosed pursuant to the terms of this Agreement and delete, remove or erase or use best efforts to ensure the deletion, erasure or removal from any computer or database or document retrieval system under its or the Representatives' possession or control, all Confidential Information and all documents or files containing or reflecting any Confidential Information, in a manner that makes the deleted, removed or erased data permanently irrecoverable.The Receiving Party shall furnish the Disclosing Party




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with a written statement signed by one of its directors or duly authorized senior officers to the effect that all such material has been destroyed.

7.3 The Receiving Party shall comply with any request by the Disclosing Party in terms of this clause, within 7 (seven) business days of receipt of any such request.

## 8. Excluded Confidential Information

The obligations of the Receiving Party pursuant to the provisions of this Agreement shall not apply to any Confidential Information that:

8.1 is known to, or in the possession of the Receiving Party prior to disclosure thereof by the Disclosing Party;

8.2 is or becomes publicly known, otherwise than as a result of a breach of this Agreement by the Receiving Party;

8.3 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;

8.4 is disclosed by the Receiving Party to satisfy an order of a court of competent jurisdiction or to comply with the provisions of any law or regulation in force from time to time; provided that in these circumstances, the Receiving Party shall advise the Disclosing Party to enable 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 Confidential Information which it is legally required to disclose and the Receiving Party will use its reasonable endeavours to protect the confidentiality of such Confidential Information to the greatest extent possible in the circumstances;



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8.5 is disclosed to a third party pursuant to the prior written authorisation and Ltd to the extent of such approval of the Disclosing Party;

8.6 is received from a third party in circumstances that do not result in a breach of the provisions of this Agreement.

**9. Term**

This Agreement shall commence upon the date referred to in date of signature and shall endure for a period of 3 (three) years after the date of termination of the relationship between the parties or at a date specified in any subsequent agreement(s) between the Parties in pursuance of the Project referred to herein.

**10. Additional Action**

10.1 Each Party to this Agreement shall execute and deliver such other documents and do such other acts and things as may be reasonably necessary or desirable to give effect to the provisions of this Agreement.

10.2 Nothing contained in the Agreement shall be construed as creating an obligation on the part of either Party to refrain from entering into a business relationship with any third party. Nothing contained in the Agreement shall be construed as creating a joint venture, partnership or employment relationship between the Parties. Except as specified herein, neither Party shall have the right, power or implied authority to create any obligation or duty (express, implied or otherwise) on behalf of the other Party. For the avoidance of doubt, nothing in this Agreement shall oblige either of the Parties to enter into any agreements or transactions whatsoever.


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## 11. Breach

In the event that the Receiving Party should breach any of the provisions of this Agreement and fail to remedy such breach within seven (7) business 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, but not Ltd to, the institution of urgent proceedings as well as any other way of relief appropriate under the circumstances, in any court of competent jurisdiction, in the event of breach or threatened breach of the Agreement and/or an action for damages.

## 12. Amendments

No amendment, interpretation or waiver of any of the provisions of this Agreement shall be effective unless reduced in writing and signed by the duly authorised representatives of both Parties.

## 13. Enforcement

The failure or delay 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.

## 14. Representations & Warranties




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14.1 Each Party represents that it has authority to enter into this Agreement and to do all things necessary to procure the fulfilment of its obligations in terms of this Agreement.

14.2 The Disclosing Party warrants that disclosure of the Confidential Information to the Receiving Party:

14.2.1 will not result in a breach of any other Agreement to which it is a party; and

14.2.2 will not, to the best of its knowledge and belief, infringe the rights of any third party; and the Disclosing Party hereby indemnifies and holds the Receiving Party harmless against any liability for third party claims on such a basis.

**15. Entire agreement**

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.

**16. Governing law**

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.

**17. Addresses and Notices**

17.1 The Parties hereby choose the address for service (“domicilium”) for all purposes under the Agreement the addresses set out below:

| PARTY | PHYSICAL ADDRESS | POSTAL ADDRESS | TELEPHONE NO. | CONTACT PERSON |
|---|---|---|---|---|
| | | | | |




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| | | | | |
|---|---|---|---|---|
| ESKOM HOLDINGSSOC LTD | MEGAWATT PARK, MAXWELL DRIVE, SUNNINGHILL | P O BOX 1091 JOHANNESBURG 2000 SA | +27 | |
| INSERT NAME OF SUPPLIER/VENDOR /AND OTHER RATICULARS | | | | |

17.2 A Party may change its domicilium address, by giving thirty (30) business days prior notice in writing to the other Party.

17.3 Any notice given by one party to the other is deemed to have been received by the addressee:

17.3.1 on the date on which it was delivered to the addressee's address if delivered by hand; or

17.3.2 on the seventh ($7^{th}$) business day after the date of posting if sent by pre-paid registered post to the addressee's address; or

17.3.3 when received in legible form, if sent to the addressee's then telefax number.

**18. Severability**




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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 provisions was not a part of this Agreement, and this Agreement shall be carried out as nearly as possible in accordance with its original terms and intent.

## 19. Assignment

19.1 Neither Party may assign or otherwise transfer any of its rights or obligations under this Agreement to any third party without the prior written consent of the other Party.

19.2 Notwithstanding the above, Eskom may on written notice to the other Party hereto, cede and delegate its rights and obligations under this contract to any of its subsidiaries or any of its present divisions or operations which may be converted into separate legal entities as a result of the restructuring of the Electricity Supply Industry and the Electricity Distribution Industry.

## 20. Publicity

Neither party will make or issue any formal or informal announcement or statement to the press or any third party in connection with this Agreement without the prior written consent of the other Party.

## 21. Interpretation

21.1 For the purposes of this Agreement the following rules of construction shall apply, unless the context requires otherwise:

21.1.1 the singular shall include the plural and vice versa;




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21.1.2 a reference to any one gender, whether masculine, feminine or neuter, includes the other two;

21.1.3 any reference to a person includes, without being Ltd to, any individual, body corporate, unincorporated association or other entity recognised under any law as having a separate legal existence or personality;

21.1.4 any word or expression defined in, and for the purposes of, this agreement shall if expressed in the singular include the plural and vice versa, and a cognate word or expression shall have a corresponding meaning;

21.1.5 references in this agreement to “clauses”, “sub-clauses” and are to clauses and sub-clauses of this agreement; and

21.1.6 any reference in this agreement to this agreement or any other agreement, document or instrument shall be construed as a reference to this agreement or that other agreement, document or instrument as amended, varied, novated or substituted from time to time.

21.2 All the headings and sub-headings in this agreement are for convenience only and are not to be taken into account for the purposes of interpreting it.


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SIGNED by the Parties and witnessed on the following dates and at the following places respectively:

**For Eskom Holdings**

**SIGNED** at _____ on _____

_____
Duly authorised to sign on behalf of Eskom

For: **ESKOM HOLDINGS SOC LTD**
***No lower than Procurement Senior Manager to sign***

**AS WITNESS:**

_____
Witness signature

_____
(Name of witness in print)




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**For Supplier/Tenderer**

**SIGNED** at _____ on _____

_____ For: _____

Duly authorised to sign on behalf of Supplier/tenderer **[NAME OF Supplier/tenderer]**

**AS WITNESS:**

_____

Witness signature

_____

(Name of witness in print)


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