

## **Annexure N**



### **SERVICE LEVEL AGREEMENT**

between

**DEVELOPMENT BANK OF SOUTHERN AFRICA LIMITED**

and

**[insert]**



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## 1. PARTIES

1.1 The Parties to this Agreement are:

1.1.1 **The Development Bank of Southern Africa Limited**, reconstituted and incorporated in terms of section 2 of the Development Bank of Southern Africa Act, 1997 (“**DBSA**”); and

1.1.2 **[insert]**, details of the service provider (“**Service Provider**”).

**The Parties agree as follows:**

## 2. INTERPRETATION

2.1 The headings to the clauses, schedules and annexures of this Agreement are for reference purposes only and shall in no way govern or affect the interpretation of nor modify nor amplify the terms of this Agreement nor any clause, schedule or annexure hereof.

2.2 Unless the context dictates otherwise, the words and expressions set forth below shall bear the following meanings and cognate expressions shall bear corresponding meanings:

2.2.1 “**Agreement**” means this Service Level Agreement and any Schedules attached hereto;

2.2.2 “**Business Day**” means any day other than a Saturday, Sunday or official public holiday;

2.2.3 “**Deliverables**” means the specific deliverables to be delivered by the Service Provider as part of the Services, fully described in Annexure B;

2.2.4 “**End Date**” means **[insert]**;

2.2.5 “**Effective Date**” means **[insert]**;

2.2.6 “**Fees**” means the amounts payable by the DBSA to Service Provider for the Services rendered, calculated in accordance with the fee structure as provided in Annexure A;

2.2.7 “**IPP**” means Independent Power Producers;

- 2.2.8 “**IPP Office**” means the Independent Power Producers Office which was established under the Memorandum of Agreement between the Department of Energy, National Treasury and the Development Bank of Southern Africa or its successor in title.
- 2.2.9 “**IPP Office Premises**” means Building 9, Byls Bridge, Corner Jean and Olievenhoutbosch, Erf 3082, Highveld Ext 73, Centurion, 0157
- 2.2.10 “**IPP Project**” means Independent Power Producers Projects;
- 2.2.11 “**Parties**” means the DBSA for the ultimate benefit of the IPP-Office and Service Provider and Party means, as the context requires, any one of them;
- 2.2.12 “**Services**” means the Services to be rendered by Service Provider to the DBSA, as more fully described in Annexure B;
- 2.2.13 “**Signature Date**” means the date of the last signature to this Agreement;
- 2.2.14 “**Term**” has the meaning ascribed to it in clause 4; and
- 2.2.15 “**VAT**” means the Value Added Tax payable in terms of the Value Added Tax Act 89 of 1991 as amended.
- 2.3 Any reference in this Agreement to:
- 2.3.1 “**clause**” is, subject to any contrary indication, construed as a reference to a clause of this Agreement;
- 2.3.2 “**law**” is construed as any law including common law, statute, constitution, decree, judgment, treaty, regulation, directive, by-law, order or any other measure of any government, local government, statutory or regulatory body or court having the force of law; and
- 2.3.3 “**person**” is construed as a reference to any natural or juristic person, firm, company, corporation, government, state, agency or organ of a state, association, trust or partnership (whether or not having separate legal personality).
- 2.4 Unless inconsistent with the context or save where the contrary is expressly indicated:
- 2.4.1 if any provision in a definition is a substantive provision conferring rights or imposing obligations on any Party, notwithstanding that it appears only in this interpretation clause, effect shall be given to it as if it were a substantive provision of this Agreement;

- 2.4.2 any number of days prescribed in this Agreement excludes the first day and includes the last day; and any relevant action or notice may be validly done or given on the last day, unless the last day falls on a day which is not a Business Day, in which case the last day shall be the next succeeding Business Day;
- 2.4.3 if the day for payment of any amount or performance of any obligation falls on a day which is not a Business Day, that day will be the next Business Day;
- 2.4.4 any reference to legislation is to that legislation as at the Signature Date, as amended or replaced from time to time;
- 2.4.5 any reference in this Agreement to this Agreement or document shall be construed as a reference to this Agreement or, as the case may be, such other agreement, instrument or document as same may have been, or may from time to time be, amended, varied, novated, ceded, delegated, supplemented or replaced;
- 2.4.6 no provision of this Agreement constitutes a stipulation for the benefit of any person who is not a Party to this Agreement save for the purposes of the IPP-Office;
- 2.4.7 a reference to a Party includes that Party's successors-in-title and permitted assigns;
- 2.4.8 the words "including" and "in particular" are without limitation;
- 2.4.9 any one gender includes the other genders;
- 2.4.10 the singular includes the plural and *vice versa*.
- 2.5 The schedules to this Agreement form an integral part hereof and words and expressions defined in this Agreement shall bear, unless the context otherwise requires, the same meaning in such schedules. To the extent that there is any conflict between the schedules to this Agreement and the provisions of this Agreement, the provisions of this Agreement shall prevail.
- 2.6 Where any term is defined within the context of any particular clause in this Agreement, the term so defined, unless it is clear from the clause in question that the term so defined has limited application to the relevant clause, shall bear the same meaning as ascribed to it for all purposes in terms of this Agreement, notwithstanding that that term has not been defined in this interpretation clause.
- 2.7 The rule of interpretation that, in the event of ambiguity, the contract must be interpreted against the party responsible for the drafting of the contract does not apply.

- 2.8 The termination of this Agreement does not affect those of its provisions which expressly provide that they will operate after termination, or which must continue to have effect after termination, or which must by implication continue to have effect after termination.
- 2.9 Where figures are referred to in numerals and in words, if there is any conflict between the two, the words shall prevail.

### 3. INTRODUCTION

- 3.1 During November 2010 the Department, National Treasury and Development Bank of Southern Africa ("DBSA") signed a Memorandum of Agreement ("MoA") intended to allow each of the parties to contribute towards "creating conditions advantageous to the market development of IPP Projects and subsequent development and procurement of IPP Projects". On the basis of such arrangements, DBSA procure and appoint transaction advisors to support the Department in the formulation and undertaking of the procurement process of IPP projects and program/s.
- 3.2 In 2012, the Minister of Energy has determined that new generation capacity should be procured from hydro, coal and gas sources to support the Country's base load energy mix and generation from gas and cogeneration as part of the medium-term risk mitigation project/programme. This is to be procured through one or more of the Independent Power Producer (IPP) programmes and to contribute towards national energy security. This determination was made as per the policy adjusted scenario of the Integrated Resource Plan for Electricity 2010 – 2030, published by the Department on 06 May 2011 in the Government Gazette, page 14.
- 3.3 Furthermore, electricity produced from Coal, Natural Gas, Hydro and co-generation energy sources, described below, shall be procured as contemplated in the NewGen Regulations (as published by the Department as procurer of the energy in August 2011) which may include where appropriate and having regard to all relevant circumstances, tendering processes; direct negotiation and other procurement processes.
- 3.4 **Baseload IPP Programme**
- 3.4.1 In terms of the Determination on Baseload IPP Procurement Programme promulgated on 19 December 2012, the Minister determined that 2652 megawatts to be generated from Natural Gas (which include Liquefied Natural Gas or Natural Gas delivered by pipeline) which represents the capacity allocated under the New Build to Gas CCGT (natural gas) and OCGT (diesel) for the years 2012 to 2025 in Table 3 of the IRP. 474 megawatts to be generated from Natural Gas was also determined in the Medium Term Risk Mitigation Project IPP Procurement Programme.

- 3.4.2 On 18 August 2015, the Gas IPP Procurement Programme and Amendment to the Baseload IPP Procurement Programme and Medium Term Risk Mitigation Project IPP Procurement Programme Determination was promulgated, in terms of which gas has its own determination and 3126 megawatts will be generated therefrom. The megawatts in paragraph (a) and (b) remain part of the Baseload Determination.
- 3.4.3 An additional determination of 600MW has been made by the Minister of Energy, to be procured from Gas under the Baseload IPP Programme. This Programme will be different in that it will seek to involve State Owned Companies to work in conjunction with Strategic Partners to develop projects.
- 3.4.4 As a fossil fuel, natural gas could be a viable opportunity to secure energy security and help reduce South Africa's carbon intensity and greenhouse gas emissions. Possibilities include conventional indigenous offshore gas, coal bed seam methane, underground gasification of coal, Integrated Gasification Combined Cycle (IGCC), unconventional shale gas resources in the Karoo basin, pipeline imports from within the SADC region and imports of liquefied natural gas from SADC and other global Liquefied Natural Gas (LNG) export producing countries. All of these could be used for power generation, gas-to-liquid refineries, minerals beneficiation, industrial applications, commercial users, automotive fuel and domestic consumption.
- 3.4.5 The Department is in the process of designing, a procurement programme for gas fired generation plants that will serve as a catalyst for the development of a gas industry.

### 3.5 **Medium Term Risk Mitigation Project**

- 3.5.1 In Determination on Medium Term Risk Mitigation Project IPP Procurement Programme promulgated on 19 December 2012, the Minister determined that 474 MW of base load energy to be generated from Natural Gas which represents the capacity allocated to Gas CCGT (natural gas) under New Build programme for the years 2019 to 2020 in Table 3 of the IRP. This has been amended as discussed above.
- 3.5.2 The medium term risk mitigation project is intended to address a potential shortfall of generation in the medium term (next 6 to 7 years).

### 3.6 **Determination on additional 600 MW Gas**

- 3.6.1 On 27 May 2016, the Minister of Energy determined further new capacity to contribute towards energy security in the form of 600 MW to be generated from gas, which may be generated from any gas type or source, including natural gas delivered to the power

generation facility by any method including by pipeline from a natural gas field or elsewhere or an LNG based method; coal bed methane; synthesis or syngas; above or underground coal gasification; Shale Gas and any other gas type or source as may be considered appropriate by the procurer. The location of this facility will be between Ankerlig and Saldanha.

3.6.2 The Gas Determinations currently totals 3726 MW.

3.6.3 The LNG-to-Power Programme will provide the anchor gas demand on which LNG import and regasification facilities can be founded at the three Ports. The availability of LNG import, storage and regasification facilities will also enable the development of non-power gas demand and associated economic development. The intent is to stimulate further and future indigenous gas exploration and development.

3.7 The Department through the DBSA, has issued RFP [insert no] inviting local and/or internationally available, skilled and committed, experienced and suitably-qualified specialists, project officers/managers and sector experts to provide the relevant services to it for the procurement of IPPs to give effect to the Minister of Energy's determinations as set out above.

3.8 All submissions by the Service Provider in terms of any DBSA procurement process, including inter alia relating to the Service Provider's technical competence and broad based black economic empowerment ("BBBEE") rating, are regarded as material warranties and representations by the Service Provider which prompted the entry into this Agreement.

#### **4 DURATION**

Notwithstanding the Signature Date, this Agreement shall commence on the Effective Date and shall, subject to termination in terms of clause 18, terminate on the End Date, unless the Parties agree in writing to an extension of this Agreement ("**Term**").

#### **5 APPOINTMENT OF THE SERVICE PROVIDER**

5.1 The DBSA hereby appoints the Service Provider to perform the Services.

5.2 The Service Provider hereby accepts the appointment.

#### **6 SERVICE LEVELS AND STANDARDS**

6.1 Service Provider shall execute the Services in accordance with Annexure B.

6.2 In executing the Services, the Service Provider shall:



- 6.2.1 carry out all its obligations in terms of this Agreement in a professional manner with due care, skill and diligence, in accordance with generally accepted professional techniques and practices, and, in doing so, employ appropriate technology;
- 6.2.2 always act to support and safeguard the legitimate interests of the DBSA and the IPP-Office in any dealings with third parties;
- 6.2.3 keep and maintain accurate, adequate and systematic accounts and records in respect of the activities, in such form and detail as the DBSA and IPP-Office may reasonably request, provided that Service Provider shall retain such accounts and records for a minimum period of five (5) years after the Completion Date;
- 6.2.4 be solely responsible for the administration of its own business affairs;
- 6.2.5 conduct itself in a professional manner;
- 6.2.6 perform all Services promptly and without delay;
- 6.2.7 not engage in any conduct which is calculated to bring the DBSA, or any third parties with which the DBSA has dealings, into disrepute; and
- 6.2.8 ensure that any employees, agents or subcontractors of the Service Provider who enter the premises of the DBSA and the IPP-Office adhere to the safety standards, policies and procedures of the DBSA;
- 6.2.9 be required to be registered with the relevant regulatory body specific to the professional service being procured;
- 6.2.10 to be able to work closely with the Department, National Treasury and DBSA.

## **7 FEES AND PAYMENTS**

### **7.1 Fees and expenses**

- 7.1.1 Service Provider shall be paid such Fees as stated in Annexure A for the Services rendered.
- 7.1.2 The Fees payable to Service Provider for the Services shall be the maximum amount payable to Service Provider, except as provided in clause 7.1.3 or where expressly agreed to in writing by the DBSA.

- 7.1.3 Service Provider shall, in addition to the Fees payable, and subject to the DBSA's prior written approval, be reimbursed for such expenses properly incurred in rendering the Services as published on the [www.ipp-projects.co.za](http://www.ipp-projects.co.za) website.

7.1.4 Payment of Fees based on Performance

- 7.1.5 Service Provider shall invoice the IPP Office c/o the DBSA monthly in arrears for the Services rendered.

- 7.1.6 The invoice submitted must contain, if applicable, the following information:

7.1.6.1 the date and number of the invoice;

7.1.6.2 the period of the service invoiced;

7.1.6.3 the name of the creditor (Service Provider);

7.1.6.4 the name of the debtor (The IPP Office care of the DBSA).;

7.1.6.5 the VAT number of Service Provider;

7.1.6.6 purchase order number of the IPP-Office

7.1.6.7 the deliverables according to the purchase Order

7.1.6.8 an updated Deliverables and Invoice Acceptance Form

- 7.1.7 Service Provider shall invoice the IPP Office care of the DBSA on milestones or monthly basis as may be specified in the purchase order, which invoice shall be submitted to the IPP Office, within 1 (one) business days after month end either via electronic mail or hand delivery.

- 7.1.8 The DBSA shall, process and settle the invoice received within 26 (twenty six) calendar days from approval of the invoice against deliverables. Invoices for services delivered which are older than six months will not be paid.

- 7.1.9 Payment of the Fees shall be subject to satisfactory performance by Service Provider, as assessed by the IPP Office care of the DBSA.

- 7.1.10 The Service Provider acknowledges that the DBSA will not be in a position to make any payments to the Service Provider until such time as the Service Provider has

provided the DBSA with all such valid documents as are reasonably required by the DBSA in order to facilitate payment, and undertakes to supply all such documents timeously, including but not limited to:

7.1.10.1 proof of the Service Provider's banking details;

7.1.10.2 the Service Provider's broad based black economic empowerment certificate;

7.1.10.3 tax clearance certificates; and

7.1.10.4 duly completed supplier information forms.

## **8 RELATIONSHIP BETWEEN THE PARTIES**

8.1 It is recorded that this Agreement shall not create an employment contract or employer-employee relationship between the Parties.

8.2 The relationship between the Parties is that of independent contracting parties and in the circumstances shall not imply any partnership, nor shall it constitute any Party to be the agent or authorised representative of another Party.

8.3 Service Provider shall not be entitled to bind or attempt to bind the DBSA or the IPP Office to represent or attempt to represent the DBSA, nor to portray to any other third party that it has the authority to bind and/or represent the DBSA or IPP Office or to confer any obligation on the DBSA or IPP Office.

## **9 CO-OPERATION, SUPPORT AND REPORTING**

9.1 The Parties and the IPP-Office shall periodically exchange views and furnish all such information as may be reasonably requested by the other Party, regarding the performance of the Parties respective obligations and other related matters to the purposes and objectives of the Services.

9.2 Notwithstanding the foregoing Service Provider shall comply from time to time with any reporting requests by the DBSA.

9.3 Service Provider shall:

9.3.1 co-operate in absolute good faith, comply with and accurately and timeously adhere to all reasonable requests of the DBSA.

9.3.2 permit the DBSA to inspect and/or audit accounts and records and other documents relating to the this Agreement and the performance and management of the Services;

9.3.3 participate and co-operate fully in the confidential surveys that may be conducted from time to time either by the DBSA, or a third party appointed by the DBSA, provided that Service Provider's information made available for such purposes shall remain confidential, and the DBSA shall seek Service Provider's prior written consent before using any such information for promotional purposes.

9.4 The Parties undertake at all times to do all such things, perform all such actions and take all such steps and to procure the doing of all such things, the performance of all such actions and the taking of all such steps as may be open to them and necessary for or incidental to the putting into effect or maintenance of the terms, conditions and/or import of this Agreement.

## 10 **SUBCONTRACTING**

10.1 Service Provider may employ subcontractors for the execution of any portion of its obligations under this Agreement, but such subcontracting shall not relieve the Service Provider of its obligations under this Agreement and the Service Provider shall remain liable for any acts or omissions of such subcontractors. Service Provider shall further ensure that all sub-contractors perform in terms of all applicable provisions of this Agreement.

10.2 DBSA shall have the right during the continued duration of this Agreement to direct Service Provider to replace such sub-contractor upon 14 (fourteen) days written notice if the sub-contractor's performance is materially deficient, or good faith doubts exist concerning the sub-contractor's ability to render future performance because of inter alia changes in the ownership, management, or the financial condition of the sub-contractor.

10.3 Any substitution of resources and or sub- contractors will be subject to the approval of the DBSA and the IPP Office.

## 11 **CONFLICT OF INTERESTS**

11.1 Service Provider shall maintain, at all times, the highest degree of good faith towards the DBSA and shall not engage, either directly or indirectly, during this Agreement, in any business or activities, which would be in conflict with the activities assigned to it in terms of this Agreement.

11.2 In the event of a conflict of interest arising, the Service Provider undertakes to immediately advise the DBSA of same, upon which advice the DBSA shall, in its sole and absolute discretion, decide whether to proceed with the Agreement or to terminate it forthwith. Failure by the Service Provider to immediately advise the DBSA of any conflict of interest shall amount to a material breach of the Agreement and shall entitle the DBSA to terminate the Agreement forthwith.

- 11.3 The Service Provider is a consulting firm with professionals and other Personnel who consult locally and or in multiple jurisdictions, most of whom will not be participating in the engagement contemplated in this Agreement. Because of the types of clients the Service Provider, as global firm, advises and the types of engagements in which it is involved, it may be requested to act for other persons on other matters where the interests of the other persons may differ from those of the IPP Office, DBSA, the Government of South Africa in this or other matters. The Service Provider is undertaking this engagement for the IPP Office based upon the agreement that, to the extent permitted by law and subject to Clause 11.5, this engagement, and any other engagements the Service Provider may accept from the IPP Office or DBSA, will not preclude the Service Provider from acting for others on matters (including mergers and acquisitions matters, negotiations, project developments and financings) that are not substantially related to the representation of the IPP Office as contemplated under this or such other engagements, even though the interests of such persons may differ from those of the IPP Office, DBSA, the Government of South Africa in this matter or in other matters.
- 11.4 Notwithstanding clause 11.3, the parties agree that IPP Programmes initiated by the IPP Office during the term of this engagement, or that are substantially similar to those in respect of which the Service Provider advised the IPP Office during the term of this engagement, are deemed to be substantially related to the Service Provider's representation of the IPP Office as contemplated under this engagement and shall therefore not be covered by the terms of Clause 11.3. However, Personnel of the Service Provider may represent other Persons whose interests differ from those of the IPP Office in respect of such matters subject to compliance with Clause 11.5 and, if any such matters involve the Service Provider acting as adviser to a bidder, potential bidder or other financier to a development under any such IPP Programme, subject to receipt of consent of the IPP Office (not to be unreasonably withheld or delayed).
- 11.5 During the term of this agreement the Service Provider shall implement and ensure that measures are put in place so that appropriate "Chinese walls" are established between the Service Provider's professionals involved in the matters contemplated under this Agreement and those engaged in the other matters described in Clause 11.3 or Clause 11.4. In particular, the Service Provider shall put in place such measures if any of its professionals are acting for bidders, potential bidders, or other financiers in connection with the various IPP Programmes initiated now and in the future during the term of this engagement, or that are substantially similar to those in respect of which the Service Provider advised the IPP Office during the term of this engagement. Such "Chinese-wall" procedures shall include (a) procuring that the Service Provider's professionals who render any of the Services under this Agreement are "ring-fenced" and do not do any work for or in connection with such bidders, potential bidders, or other financiers in respect of any of the IPP Programmes being contemplated; and (b) that access to and storage of Confidential Information (whether electronically or otherwise) is fully "ring-fenced", and only accessible by, the Service Provider's professionals who are to render the Services.

- 11.6 Service Providers may approach the IPP Office via the DBSA with a request for relieve of a particular “ring-fencing”, which the IPP Office will consider at its sole discretion.
- 11.7 Provided that the Service Provider adheres to the terms of Section 11.5, the possession by some Service Provider Personnel of Confidential Information under this engagement will not prevent the Service Provider from representing another of its clients. By the same token, the parties hereto acknowledge that, to the extent permitted by applicable law and rules, Service Provider Personnel may, from time to time, possess information derived from other client engagements that may be relevant or material to this engagement but that the Service Provider and its Personnel will be prohibited by the rules of the applicable jurisdiction from disclosing to the IPP Office and the DBSA and from using for their benefit or to inform their advice to the IPP Office and the DBSA.”

## 12 INSURANCE

- 12.1. Service Provider shall, for the continued duration of this Agreement, have and maintain sufficient professional indemnity insurance to cover its obligations and liabilities under this Agreement. The Service Provider shall provide the DBSA with a certificate of existence of such insurance.
- 12.2. The terms of any insurance or the amount of cover shall not relieve Service Provider of any liabilities under this Agreement.
- 12.3. If Service Provider or its subcontractors are involved in any occurrence which to their knowledge may give rise to a claim under any insurance policy effected by the DBSA, Service Provider shall without delay:
- 12.3.1. notify the DBSA of the circumstances giving rise to such occurrence, the nature of the occurrence and the estimate of any loss or damage which may be suffered as a result of such occurrence; and
  - 12.3.2. provide the DBSA and its insurance brokers with any assistance reasonably required to formulate its claim.

## 13 INTELLECTUAL PROPERTY

- 13.1 For the purpose of this clause 13, “**Intellectual Property**” means any trademarks, all patents and generally all other registered and unregistered trademarks, service marks, copyright, designs, and applications for any of the foregoing in any part of the world, any know-how and trade secrets, and all data, information and knowledge of whatever nature relating to the Services, owned or controlled by the DoE and the IPP-Office, including technical information,

production data, drawings, specifications, engineering and scientific information, manufacturing and tooling information, testing and quality control procedures, secret processes, marketing and application information, and all other proprietary or confidential information relating to the Services.

- 13.2 The DoE and IPP-Office grants Service Provider a non-exclusive, royalty-free right to use the Intellectual Property solely for the purposes of fulfilling its obligations to provide the Services to the IPP Office.
- 13.3 The right to use as envisaged in clause 13.1 does not place any limitation on the rights of the DoE and IPP-Office and does not limit the DoE's and IPP-Office's right of use of the Intellectual Property or future right of use of the Intellectual Property.
- 13.4 Service Provider shall, not later than upon termination or expiration of this Agreement, immediately cease to use and promptly return to the DoE and IPP-Office any and all documentation, materials and Intellectual Property owned by the DoE and IPP-Office.
- 13.5 Service Provider acknowledges that the DoE and IPP-Office is the sole proprietor of the Intellectual Property and acknowledges that the use thereof is for the benefit of the DoE and IPP-Office.
- 13.6 Any and all intellectual property owned, developed or acquired by a Party prior to the Effective Date shall remain the sole and exclusive property of the Party who is the lawful proprietor thereof, and any and all rights of the Parties in terms of this Agreement shall be subject to the other Party's intellectual property rights.
- 13.7 Any intellectual property generated by the Service Provider for the use of the DoE and IPP-Office in terms of this Agreement shall become the Intellectual Property of the DoE and IPP-Office upon payment by the DBSA of the Fees.

## **14 CONFIDENTIALITY**

- 14.1 Subject to clause 14.3 below, each Party undertakes to keep confidential and not to disclose to any third party, save as may be required in law (including by the rules of any securities exchange on which the shares of either of the Parties may be listed, where applicable) or permitted in terms of this Agreement, the nature, content or existence of this Agreement and any and all information given by a Party to the other Party pursuant to this Agreement.
- 14.2 No announcements of any nature whatsoever will be made by or on behalf of a Party relating to this Agreement without the prior written consent of the other Party, save for any announcement

or other statement required to be made in terms of the provisions of any law, in which event the Party obliged to make such statement will first consult with the other Party to enable them in good faith to attempt to agree the content of such announcement, which (unless agreed) must go no further than is required in terms of such law or rules. This will not apply to a Party wishing to respond to the other Party which has made an announcement of some nature in breach of this clause 14.2.

- 14.3 This clause 14 shall not apply to any disclosure made by a Party to its professional advisors or consultants, provided that they have agreed to the same confidentiality undertakings, or to any judicial or arbitral tribunal or officer, in connection with any matter relating to this Agreement or arising out of it.
- 14.4 Service Provider shall ensure that all its agents, including but not limited to subcontractors or third parties, are made aware prior to the disclosure of any part of the Confidential Information that the same is confidential and that they owe a duty of confidence to the DBSA as contained in this Agreement. In addition, Service Provider shall ensure that each agent that is not an employee of the Service Provider with access to Confidential Information shall sign an agreement acknowledging the duty of confidence ("Confidentiality and Non-disclosure Agreement") in the form prescribed in Annexure C to the Agreement. Service Provider shall at all times remain liable for any actions of such Agents that would constitute a breach of this Agreement.
- 14.5 The Parties hereby agree that Service Provider's Representatives are required and expected to keep all information disclosed to both the Service Provider and the Service Provider's Representatives in whatever form (including during discussions relating to the IPP Procurement Programmes) in the strictest confidence. For this purpose, Service Provider's Representatives are required to sign a declaration of interest (the "Declaration of Interest") substantially in the form of Annexure "D" hereto. Service Provider undertakes to ensure that the Service Provider's Representatives do not, without prior written consents of DBSA and that of the IPP Office, respectively, use any Confidential Information except for the purposes of conducting the Services, or disclose said Confidential Information to any person, firm, or corporation and the Service Provider further undertakes to make all reasonable efforts to ensure that the Service Provider's Representatives and any other party who (at the instance of the Service Provider), shall be given access to, or receive disclosure of, any of the said Confidential Information and shall maintain same in strictest confidence;
- 14.6 It is the intention of the Parties that the Declaration of Interest document be incorporated into this Agreement by reference and that in the event of conflict between the Declaration of Interest document and this Agreement, the provisions of this Agreement shall prevail;



## 15 REPRESENTATIONS AND WARRANTIES

15.1 Each Party represents and warrants to the other Party that:

15.1.1 it has the legal capacity and, if applicable, has taken all necessary corporate action required to empower and authorise it to enter into this Agreement;

15.1.2 this Agreement constitutes an agreement valid and binding on it and enforceable against it in accordance with its terms;

15.1.3 the execution of this Agreement and the performance of its obligations hereunder does not and shall not:

15.1.3.1 contravene any law or regulation to which it is subject;

15.1.3.2 contravene any provision of its constitutional documents, if applicable; or

15.1.3.3 conflict with or constitute a breach of any of the provisions of any other agreement, obligation, restriction or undertaking which is binding on it;

15.1.3.4 to the best of its knowledge and belief, it is not aware of the existence of any fact or circumstance that may impair its ability to comply with all of its obligations in terms of this Agreement;

15.1.3.5 it is entering into this Agreement as principal (and not as agent or in any other capacity);

15.1.3.6 the natural person who signs and executes this Agreement on its behalf is validly and duly authorised to do so;

15.1.3.7 no other party is acting as a fiduciary for it; and

15.1.3.8 it is not relying upon any statement or representation by or on behalf of the other Party, except those expressly set forth in this Agreement.

15.1.4 The Service Provider warrants that all information and representations regarding itself made or disclosed in any procurement documents which preceded and/or gave rise to this Agreement, are and shall for the duration of this Agreement remain both true and correct.

15.1.5 Each of the representations and warranties given by the Parties in terms of clause 15.1 shall:

15.1.5.1 be a separate warranty and will in no way be limited or restricted by inference from the terms of any other warranty or by any other words in this Agreement;

15.1.5.2 continue and remain in force notwithstanding the completion of any or all the transactions contemplated in this Agreement; and

15.1.5.3 *prima facie* be deemed to be material and to be a material representation inducing the DBSA to enter into this Agreement.

## 16 BREACH

16.1 In the event of either Party (the “**Defaulting Party**”) failing to comply with its obligations in terms of this Agreement, for which no specific remedy has been provided, the other Party (the “**Aggrieved Party**”) may, by written notice addressed to the Defaulting Party, require the Defaulting Party to remedy its breach within 15 (fifteen) business days of the date of such notice. If the Defaulting Party fails to remedy its breach within the aforesaid period, the Aggrieved Party may, without prejudice to any rights it may otherwise have against the defaulting Party, either:

16.1.1 claim specific performance of the obligations of the Defaulting Party, in terms of this Agreement; or

16.1.2 where such breach is material, cancel this Agreement and recover damages for breach of contract, from the defaulting Party.

## 17 DISPUTE RESOLUTION

17.1 Any dispute arising out of or relating to this Agreement concerning the interpretation of the terms and conditions of this Agreement or of compliance by any Party with the terms/conditions of this Agreement which is not resolved amicably through consultations or negotiations shall, subject to the other provisions of this Agreement, be settled by arbitration in terms of the arbitration laws for the time being in force in the Republic of South Africa; provided that a claim by the DBSA for the repayment of any monies due under this Agreement shall not be regarded as a dispute for the purpose of this clause and neither Party shall therefore be obliged to refer such a claim to arbitration.

- 17.2 In case of arbitration, a tribunal shall be composed of one arbitrator who shall be appointed by the Parties by agreement or failing such agreement within 5 (five) Business Days after the date on which the arbitration is requested by a Party, by the Arbitration Society of South Africa, who shall, in appointing such arbitrator, have regard to the qualifications and experience of the appointee in relation to the nature of the dispute over which he/she has to adjudicate. In case the arbitrator resigns or becomes unable to act, a successor shall be appointed in the same manner as herein prescribed for the appointment of the original arbitrator and the successor shall have all the powers and duties of his/her predecessor.
- 17.3 Unless otherwise expressly agreed to in writing by the Parties:
- 17.3.1 the arbitration proceedings shall be held at Midrand;
  - 17.3.2 the arbitration shall be conducted in accordance with the Uniform Rules of the High Court of South Africa promulgated under the Supreme Court Act, 1950, and/or such other rules as may be agreed upon by the Parties;
  - 17.3.3 the arbitrator, may, if he/she deems appropriate, conduct the arbitration in an informal and summary manner and without requiring pleadings or discovery of documents and without observing the rules of evidence. The proceedings shall be confidential and neither the Parties nor the arbitrator shall disclose to third parties any information regarding the proceedings, the award, or settlement terms unless the Parties otherwise agree in writing; and
  - 17.3.4 the costs of arbitration shall be costs in the cause.
- 17.4 After the institution of arbitration proceedings the tribunal may proceed with the arbitration notwithstanding any failure, neglect or refusal of either Party to comply with the provisions hereof or to take part or to continue to take part in the arbitration proceedings. The arbitrator shall within 30 (thirty) days of the termination of the proceedings render a final and binding written award including an award for specific performance, an interdict, damages or a penalty or otherwise as he or she in his or her sole discretion may deem fit and appropriate and to deal as he or she deems fit with the question of costs, including, if applicable, costs on the attorney and client scale, or own client scale, and his or her own fees and furnish the Parties with written reasons for his/her judgment. Any award made by the arbitrator may be made an order of any court to whose jurisdiction the Parties are subject on application to such court by any Party to the dispute, after due notice to the other Party.
- 17.5 The Provisions of this clause:

17.5.1 constitute an irrevocable consent by each Party to any proceedings in terms hereof and no Party shall be entitled to withdraw therefrom or claim any such proceedings that it is not bound by such provisions; and

17.5.2 are severable from the rest of the Agreement and shall remain in effect despite the termination of or invalidity for any reason of this agreement.

17.6 Nothing in this clause 17 will preclude either Party from obtaining immediate relief on an urgent basis from a court of competent jurisdiction, pending the decision of the arbitrator.

## **18 TERMINATION**

18.1 The DBSA may, in its sole discretion, on not less than 30 (thirty) days written notice of termination to Service Provider, terminate the provision of any Services, should:

18.1.1 Service Provider fail to remedy a failure in the performance of the Services, within 15 (fifteen) business days of receipt of such notice, or within such further period as the DBSA may approve, in writing;

18.1.2 Service Provider breach its duty of care to the IPP Office.

18.1.3 Service Provider fail, in the absence of any review or appeal proceedings, to comply with any final decision reached as a result of any legal or arbitration proceedings;

18.1.4 Service Provider commits an act of insolvency or is placed under a provisional or final winding-up or judicial management order, business rescue, makes an assignment for the benefit of creditors, or fails to satisfy or take steps to have set aside any judgment taken against it within 7 (seven) business days after such judgment has come to its notice;

18.1.5 as a result of Force Majeure, Service Provider be unable to perform a material portion of the Services for a continuous period of not less than 60 (sixty) business days; and

18.1.6 Service Provider, in the judgment of the DBSA has engaged in corrupt or fraudulent practices in competing for or in executing the Agreement.

18.1.7 Service Provider or its representatives are in breach of the Confidentiality and Non-Disclosure Agreement (Annexure C) or the Declaration of Interest (Annexure D).

- 18.2 Should the DBSA terminate this Agreement pursuant to clause 18.1, the DBSA shall be liable for the payment of all outstanding fees and disbursements payable to Service Provider, as at the date of such termination.
- 18.3 In addition to the right to terminate set out in clause 18.1, DBSA reserves the right to terminate this agreement for any reason whatsoever by giving the Service Provider 30 (thirty) days written notice to that effect.

## **19 INDEMNIFICATION**

- 19.1 Service Provider shall keep the DBSA, both during and after this Agreement, indemnified against all indirect, consequential, special or direct losses, damages, expenses, costs and claims ("**Losses**"), including, but not limited to, legal fees and expenses, suffered by the DBSA, or any third party, where such loss, damage, expense or cost is the result of any wrongful action or omission, negligence or breach of any contract by Service Provider.
- 19.2 The DBSA shall not be liable for any Losses incurred by Service Provider as a result of any unnecessary or irrelevant work done by Service Provider, including work done after an extension.
- 19.3 The DBSA shall not be liable for any Losses incurred by Service Provider as a result of any conduct whatsoever.

## **20 MISCELLANEOUS**

- 20.1 This Agreement is the whole agreement between the Parties in regard to its subject matter.
- 20.2 No addition to or variation or consensual cancellation of this Agreement, including this clause, has effect unless in writing and signed by the Parties.
- 20.3 No indulgence by a Party to another Party, or failure strictly to enforce the terms of this Agreement, is to be construed as a waiver or be capable of founding an estoppel.
- 20.4 The Parties undertake to do everything reasonable in their power necessary for or incidental to the effectiveness and performance of this Agreement.
- 20.5 Save as is specifically provided in this Agreement, Service Provider is not entitled to cede any of its rights or delegate any of its obligations under this Agreement without the prior written consent of the DBSA.
- 20.6 Any illegal or unenforceable provision of this Agreement may be severed and the remaining provisions of this Agreement continue in force.

- 20.7 Each Party will bear and pay its own legal costs and expenses of and incidental to the negotiation, drafting, preparation and implementation of this Agreement.

## 21 NOTICES AND DOMICILIA

### 21.1 Notices and addresses

#### 21.1.1 Notices

Any notice, consent, approval or other communication in connection with this Agreement (“**Notice**”) will be in writing in English.

#### 21.1.2 Addresses

Each Party chooses the physical address, fax number and/or email address corresponding to its name below as the address to which any Notice must be sent.

##### 21.1.2.1 **DBSA:**

Physical address:	1258 Lever Road Headway Hill Midrand 1685 South Africa
Tel number:	+27 11 313 3911
Fax number:	+27 11 313 3086
Email address:	<a href="mailto:claimadmin@dbsa.org">claimadmin@dbsa.org</a>
Attention:	Group Executive: Financing Operations and General Manager: Legal; and

##### 21.1.2.2 **Service Provider:**

Physical address:	[insert] [insert] [insert]
Tel number:	[insert]
Fax number:	[insert]
Email address:	[insert]
Attention:	[insert]

- 21.1.3 Any Party may by Notice to the other Party change its address and/or the person, if any, for whose attention any Notice must be marked in clause 21.3.

## 21.2 Effective on receipt

21.2.1 Any Notice takes effect when received by the recipient (or on any later date specified in the Notice) and, unless the contrary is proved, is deemed to be received:

21.2.1.1 on the day of delivery, if delivered by hand to a responsible person at the recipient's physical address in clause 21.1.2. If delivery is not on a Business Day, or is after ordinary business hours on a Business Day, the Notice is deemed to be received on the Business Day after the date of delivery;

21.2.1.2 on the first Business Day after the date of transmission, if sent by fax to the recipient's fax number in clause 21.1.2; and

21.2.1.3 on the Business Day on which an acknowledgement of receipt is issued by the recipient, if sent by email to the recipient's email address in clause 21.1.2.

21.2.2 Despite anything to the contrary in this Agreement, a Notice actually received by a Party is effective even though it was not sent, or delivered, or sent and delivered to its address in clause 21.1.2, unless otherwise provided in this Agreement.

## 21.3 Service of legal process

21.3.1 Each Party chooses its physical address referred to in clause 21.1.2 as its address at which legal process and other documents in legal proceedings in connection with this Agreement may be served (*domicilium citandi et executandi*).

21.3.2 Any Party may by Notice to the other Party change its address at which legal process and other documents in legal proceedings in connection with this Agreement may be served to another physical address in South Africa.

## 22 APPLICABLE LAW

This Agreement is governed by South African law.

## 23 JURISDICTION

The Parties unconditionally consent and submit to the non-exclusive jurisdiction of the High Court of South Africa (South Gauteng High Court, Johannesburg) in regard to all matters arising from this Agreement.



Signed at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ 2016

For and on behalf of

**Development Bank of Southern Africa Limited**

\_\_\_\_\_

Name:

Capacity:

Who warrants authority

Signed at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ 2016

For and on behalf of

**[insert]**

\_\_\_\_\_

Name:

Capacity:

Who warrants authority

## Annexure A - Fees and Expenses

### 1. FEES

- 1.1 The Fees and expenses payable to the Service Provider by the DBSA for Services rendered under this Agreement will be charged inclusive of VAT as set out in Table A.
- 1.2 The Fees and expenses are made up as follows: [INSERT TABLE A, detailed hourly rate per resource as contained in the bid submission] and only these rates may be used for invoicing and quotations/ scope of work.
- 1.3 Annual escalation in fees will take place in April each year with the first escalation in April 2018.
- 1.4 Annual escalation will be based on the Consumer Price Index as published by Statistics SA for South African Companies and the Consumer Price Index as published by the country of origin of services for foreign companies.
- 1.5 Fees for foreign based companies will be payable in ZAR at an exchange rate fixed at the time of The IPP Office issuing the Purchase Order as confirmation of the instruction of work. The IPP Office will use the daily rate as published by Standard Bank South Africa: <http://ws15.standardbank.co.za/finSnapShot/GetforexServlet>(selling rate T/T).

### 2. DETAILS OF SERVICE PROVIDER

- 2.1 Service Provider Bank nominates the following bank account for payment of all Fees and Expenses:  
 Bank: [insert]  
 Branch Name: [insert]  
 Branch Code: [insert]  
 Account Number: [insert]  
 Account Name: [insert]  
 SWIFT No: [insert]
- 2.2 Service Provider represents and warrants to the DBSA that the details of the bank accounts contained in this Schedule are correct, and hereby indemnifies the DBSA against any loss, damage or cost which Service Provider may incur or suffer as a result of such bank account details being incorrect.

## **Annexure B - Scope of Services**

### **1. Services and Deliverables**

All services delivered will be according to agreed Statement of Works (SOW) and confirmed by a purchase order issued by the IPP Office.

### **2. Change Management**

- 1.6 During the period of this Agreement, the DBSA or the Service Provider ("**Requestor**") can make written suggestions for amendments or additions to the Services or Deliverables.
- 1.7 Either Party will advise the Requestor within 14 (fourteen) days or such other period as mutually agreed within the said 14 (fourteen) days whether the amendment is possible and what effect it will have on this Agreement. Requests for changes must be sufficiently detailed to enable the other Party to assess, ascertain and evaluate the impact of the requested change on the charges, timetable or any other aspect of the Agreement and the Parties agree to work together to consider, and if appropriate, seek to agree on any changes.
- 1.8 Unless otherwise agreed, until a change is agreed in writing all Parties will continue to act in accordance with the latest signed version of the Agreement, as the case may be.
- 1.9 Once agreement has been reached regarding the required amendments, the Parties shall amend the Agreement. No change will be affected before agreement has been reached in writing and signed by both Parties.

**Annexure C - Confidentiality Agreement**

**CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT**

between

**Development Bank of Southern Africa Limited**

and

**[insert]**

## 1. PARTIES

1.1 The Parties to this Agreement are:

1.1.1 **The Development Bank of Southern Africa Limited**, reconstituted and incorporated in terms of section 2 of the Development Bank of Southern Africa Act, 1997 (“**DBSA**”); and

1.1.2 **[insert]**, details of the service provider **[insert]**

**The Parties agree as follows:**

## 2. INTERPRETATION

2.1 The headings to the clauses, schedules and annexures of this Agreement are for reference purposes only and shall in no way govern or affect the interpretation of nor modify nor amplify the terms of this Agreement nor any clause, schedule or annexure hereof.

2.1 Unless the context dictates otherwise, the words and expressions set forth below shall bear the following meanings and cognate expressions shall bear corresponding meanings:

2.1.1 “**Agreement**” means this confidentiality and non-disclosure agreement;

2.1.2 “**Confidential Information**” means all and any information or data in whatever form (including in oral, written, electronic and visual form) relating to the Disclosing Party and the Proposed Transaction which by its nature or content is identifiable as, or could reasonably be expected to be, confidential and/or proprietary to the Disclosing Party;

2.1.3 “**Disclosing Party**” means the Party who disclosed the Confidential Information;

2.1.4 “**Exclusions**” means the circumstances in which the undertakings given by the Receiving Party in this Agreement are not applicable, as described in clauses 7.3.1 to 7.3.4 below;

2.1.5 “**Parties**” means the parties to this Agreement being EY and the DBSA and “**Party**” shall refer to either one as the context may require;

2.1.6 “**Permitted Disclosees**” means:

2.1.6.1 any Representatives of the Parties who are directly concerned with any investigation in relation to the Proposed Transaction; and

2.1.6.2 any other person to whom the Parties disclose Confidential Information with the prior written consent of the other Party;

2.1.7 “**Permitted Purpose**” means the consideration, evaluation and negotiation of the Proposed Transaction;

- 2.1.8 “**Proposed Transaction**” means the evaluation of the Economic Development Independent Monitors (“**EDIM**”);
  - 2.1.9 “**Receiving Party**” means the Party to whom the Confidential Information is disclosed;
  - 2.1.10 “**Representatives**” means, in relation to any person, its directors, officers, employees and professional advisers;
  - 2.1.11 “**Signature Date**” means the date of signature of this Agreement by the Party last signing; and
  - 2.1.12 “**South Africa**” means the Republic of South Africa.
- 2.2 In this Agreement:
- 2.2.1 clause headings and the heading of the Agreement are for convenience only and are not to be used in its interpretation;
  - 2.2.2 an expression which denotes:
    - 2.2.2.1 any gender includes the other genders;
    - 2.2.2.2 a natural person includes a juristic person and *vice versa*;
    - 2.2.2.3 the singular includes the plural and *vice versa*;
    - 2.2.2.4 a Party includes a reference to that Party’s successors in title and assigns allowed at law; and
    - 2.2.2.5 a reference to a consecutive series of two or more clauses is deemed to be inclusive of both the first and last mentioned clauses.
- 2.3 Any reference in this Agreement to:
- 2.3.1 “**business hours**” shall be construed as being the hours between 08h30 and 17h00 on any business day. Any reference to time shall be based upon South African Standard Time;
  - 2.3.2 “**days**” shall be construed as calendar days unless qualified by the word “**business**”, in which instance a “**business day**” will be any day other than a Saturday, Sunday or public holiday as gazetted by the government of South Africa from time to time;
  - 2.3.3 “**laws**” means all constitutions; statutes; regulations; by-laws; codes; ordinances; decrees; rules; judicial, arbitral, administrative, ministerial, departmental or regulatory judgements, orders, decisions, rulings, or awards; policies; voluntary restraints;

guidelines; directives; compliance notices; abatement notices; agreements with, requirements of, or instructions by any Governmental Body; and the common law, and “**law**” shall have a similar meaning and

- 2.3.4 “**person**” means any person, company, close corporation, trust, partnership or other entity whether or not having separate legal personality.
- 2.4 The words “**include**” and “**including**” mean “**include without limitation**” and “**including without limitation**”. The use of the words “**include**” and “**including**” followed by a specific example or examples shall not be construed as limiting the meaning of the general wording preceding it.
- 2.5 Any substantive provision, conferring rights or imposing obligations on a Party and appearing in any of the definitions in this clause 2 or elsewhere in this Agreement, shall be given effect to as if it were a substantive provision in the body of the Agreement.
- 2.6 Words and expressions defined in any clause shall, unless the application of any such word or expression is specifically limited to that clause, bear the meaning assigned to such word or expression throughout this Agreement.
- 2.7 Unless otherwise provided, defined terms appearing in this Agreement in title case shall be given their meaning as defined, while the same terms appearing in lower case shall be interpreted in accordance with their plain English meaning.
- 2.8 A reference to any statutory enactment shall be construed as a reference to that enactment as at the Signature Date and as amended or substituted from time to time.
- 2.9 Unless specifically otherwise provided, any number of days prescribed shall be determined by excluding the first and including the last day or, where the last day falls on a day that is not a business day, the next succeeding business day.
- 2.10 If the due date for performance of any obligation in terms of this Agreement is a day which is not a business day then (unless otherwise stipulated) the due date for performance of the relevant obligation shall be the immediately preceding business day.
- 2.11 Where figures are referred to in numerals and in words, and there is any conflict between the two, the words shall prevail, unless the context indicates a contrary intention.
- 2.12 The rule of construction that this Agreement shall be interpreted against the Party responsible for the drafting of this Agreement, shall not apply.
- 2.13 No provision of this Agreement shall (unless otherwise stipulated) constitute a stipulation for the benefit of any person (*stipulatio alteri*) who is not a Party to this Agreement.

- 2.14 The use of any expression in this Agreement covering a process available under South African law, such as winding-up, shall, if any of the Parties is subject to the law of any other jurisdiction, be construed as including any equivalent or analogous proceedings under the law of such other jurisdiction.
- 2.15 Any reference in this Agreement to “**this Agreement**” or any other agreement or document shall be construed as a reference to this Agreement or, as the case may be, such other agreement or document, as amended, varied, novated or supplemented from time to time.
- 2.16 In this Agreement the words “**clause**” or “**clauses**” and “**annexure**” or “**annexures**” refer to clauses of and annexures to this Agreement.

### 3 INTRODUCTION

- 3.1 It is the intention of the Parties to enter into discussions relating to the Proposed Transaction.
- 3.2 In the course of such discussions, the subsequent implementation of any agreement or arrangement which may arise out of such discussions and in any future interactions between the Parties, the Parties will disclose certain Confidential Information to each other.
- 3.3 The Parties are willing to provide each other with an undertaking to maintain the confidentiality of the Confidential Information, on the terms and conditions set out in this Agreement.
- 3.4 The Parties wish to record their agreement in writing.

### 4 DISCLOSURE AND USE OF CONFIDENTIAL INFORMATION

- 4.1 Pursuant to the discussions contemplated in clause 3.1 above, the Disclosing Party will disclose to the Receiving Party such Confidential Information as may be in their possession and as will, in their sole and absolute discretion be necessary for the Parties to conduct such discussions.
- 4.2 The Receiving Party acknowledges that:
- 4.2.1 the Confidential Information is a valuable, special and unique asset of the Disclosing Party; and
- 4.2.2 the Disclosing Party may suffer irreparable harm or substantial economic and other loss in the event of such Confidential Information being disclosed or
- 4.2.3 used otherwise than in accordance with this Agreement.



- 4.3 All Confidential Information disclosed by the Disclosing Party to the Receiving Party or which otherwise comes to the knowledge of the Receiving Party, is acknowledged by the Receiving Party:
- 4.3.1 to be proprietary to the Disclosing Party; and
  - 4.3.2 not to confer any rights of whatsoever nature in such Confidential Information on the Receiving Party.
- 4.4 The Receiving Party irrevocably and unconditionally agrees and undertakes:
- 4.4.1 to treat and safeguard the Confidential Information as strictly private, secret and confidential;
  - 4.4.2 not to use or permit the use of the Confidential Information for any purpose other than the Permitted Purpose and, in particular, not to use or permit the use of the Confidential Information, whether directly or indirectly, to obtain a commercial, trading, investment, financial or other advantage over the Disclosing Party or otherwise use it to the detriment of the Disclosing Party;
  - 4.4.3 except as permitted by this Agreement, not to disclose or divulge, directly or indirectly, the Confidential Information in any manner to any third party for any reason or purpose whatsoever without the prior written consent of the Disclosing Party, which consent may be granted or withheld in the sole and absolute discretion of the Disclosing Party; and
  - 4.4.4 to keep all Confidential Information safely and securely and to take all such steps as may be reasonably necessary to protect it against theft, damage, loss, unauthorised access (including access by electronic means) and to prevent Confidential Information from falling into the hands of unauthorised third parties.

## **5 PERMITTED DISCLOSEES**

- 5.1 The Receiving Party shall be entitled to disclose the Confidential Information only to Permitted Disclosees, and then only to the extent that such disclosure is necessary for the Permitted Purpose and on a “*need to know*” basis.
- 5.2 The Receiving Party shall, both before and after the disclosure of any Confidential Information to a Permitted Disclosee, inform such Permitted Disclosee of, and take all practical steps to impress upon the Permitted Disclosee, the secret and confidential nature of the Confidential Information and the Receiving Party’s obligations under this Agreement.

- 5.3 The Receiving Party shall be responsible for procuring that the Permitted Disclosees abide by the provisions of this Agreement and agrees to be bound by the confidentiality undertakings given to the Disclosing Party by the Receiving Party in this Agreement. The Receiving Party shall be responsible for any breach of the terms and conditions of this Agreement by any Permitted Disclosee.
- 5.4 The Receiving Party shall (if requested to do so by the Disclosing Party) procure that the Permitted Disclosees (other than directors, officers and employees of the Receiving Party) give a written undertaking in favour of the Disclosing Party in regard to the Confidential Information on substantially the same terms and conditions contained in this Agreement.
- 5.5 A Party's failure to obtain receipt of the written undertaking referred to in clause 5.4 above shall in no way detract from the Receiving Party's obligations in terms of this Agreement and particularly in terms of the provisions of this clause 5.

## 6 RETURN OF CONFIDENTIAL INFORMATION

- 6.1 The Receiving Party shall, at its own expense, within 5 (five) business days of termination of the discussions concerning the Proposed Transaction, and in any event within 5 (five) business days of written demand from the Disclosing Party:
- 6.1.1 return or destroy (as stipulated by the Disclosing Party), and procure the return or destruction of all Confidential Information and all copies of it (whether in paper, electronic or other format) held by the Receiving Party or by a Permitted Disclosee without keeping any copies or partial copies thereof;
  - 6.1.2 destroy, and procure the destruction of all analyses, compilations, notes, studies, memoranda or other documents ("**Working Papers**") prepared by the Receiving Party or by any Permitted Disclosee which contain or otherwise reflect or are generated from the Confidential Information;
  - 6.1.3 delete or procure the deletion of all Confidential Information from any computer, word processor or other device in the possession or control of the Receiving Party or any Permitted Disclosee; and
  - 6.1.4 confirm in writing to the Disclosing Party that the Receiving Party, to the best of its knowledge, information and belief having made all reasonable enquiries, that all Permitted Disclosees have complied with the provisions of clauses 6.1.1 to 6.1.3.
- 6.2 The Receiving Party and its Representatives shall be permitted to retain such copies of the Confidential Information and Working Papers for so long as required by law, court or regulatory agency or authority or its internal audit or internal compliance procedures, and such copies of

any computer records and files containing any Confidential Information which have been created pursuant to its automatic back-up procedures for the period that the Receiving Party or its Representatives, as the case may be, normally archives back-up computer records. Any Confidential Information that is not returned or destroyed, including, without limitation, oral Confidential Information, shall remain subject to the confidentiality obligations set forth in this Agreement.

## **7 EXCLUSIONS**

- 7.1 The determination of whether information constitutes Confidential Information shall not be affected by whether or not such information is subject to, or protected by, common law or statute related to copyright, patent, trade marks or otherwise.
- 7.2 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.
- 7.3 The undertakings given by the Receiving Party in this Agreement and in particular in clause 4 above shall not apply to any information which:
  - 7.3.1 is or becomes generally available to the public other than by the negligence or default of the Receiving Party and/or any Permitted Disclosee, or by the breach of this Agreement by any of them;
  - 7.3.2 the Disclosing Party confirms in writing is disclosed on a non-confidential basis; or
  - 7.3.3 has lawfully become known by or come into the possession of the Receiving Party on a non-confidential basis from a source other than the Disclosing Party having the legal right to disclose same, provided that such knowledge or possession is evidenced by the written records of the Receiving Party existing at the Signature Date;
  - 7.3.4 is or was independently developed by the Receiving Party or its Representatives without the use of, or reliance in any way upon, the Confidential Information, provided that:
    - 7.3.4.1 the onus shall at all times rest on the Receiving Party to establish that such information falls within the Exclusions;
    - 7.3.4.2 information will not be deemed to be within the Exclusions merely because such information is embraced by more general information in the public domain or in the Receiving Party's possession; and

- 7.3.4.3 any combination of features will not be deemed to be within the Exclusions merely because individual features are in the public domain or in the Receiving Party's possession, but only if the combination itself and its principle of operation are in the public domain or in the Receiving Party's possession.

## **8 FORCED DISCLOSURE**

- 8.1 In the event that the Receiving Party is required to disclose Confidential Information pursuant to a requirement or request by operation of law, regulation, court order or rules of a stock exchange upon which the securities of a Party are listed, it will:
- 8.1.1 advise the Disclosing Party thereof in writing prior to disclosure, if possible and if permitted by law;
  - 8.1.2 take such steps to limit the disclosure to the minimum extent required to satisfy such requirement and to the extent that it lawfully and reasonably can;
  - 8.1.3 afford the Disclosing Party a reasonable opportunity, if possible, to intervene in the proceedings;
  - 8.1.4 comply with the Disclosing Party's reasonable requests as to the manner and terms of any such disclosure; and
  - 8.1.5 notify the Disclosing Party of the Receiving Party of, and the form and extent of, any such disclosure or announcement immediately after it is made.

## **9 DURATION**

The obligations of the Receiving Party with respect to each item of Confidential Information shall commence on the Signature Date and shall terminate on the second anniversary of the Signature Date.

## **10 BREACH**

- 10.1 Without prejudice to the other rights of the Disclosing Party, in the event of any unauthorised disclosure or use of the Confidential Information which is or is likely to constitute a breach of any provision of this Agreement, the Receiving Party shall, at the sole cost of the Receiving Party:
- 10.1.1 immediately notify the Disclosing Party in writing and take such steps as the Disclosing Party may require in order to remedy or mitigate the effects of such actual or threatened breach; and

10.1.2 use its best commercial endeavours to assist the Disclosing Party in recovering and preventing the use, dissemination, sale or other disposal of such Confidential Information.

10.2 The Parties acknowledge and agree that:

10.2.1 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

10.2.2 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 may be appropriate for any threatened or 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).

## **11 NO WARRANTY OR OFFER**

11.1 Unless otherwise specifically stated in writing, the Disclosing Party:

11.1.1 does not give or make any warranty, representation or undertaking, express or implied, as to the accuracy or completeness of any of the Confidential Information or other information received by the Receiving Party or its Permitted Disclosees or as to the reasonableness of any assumptions on which any of the same is based;

11.1.2 does not accept any responsibility or liability for the use of the Confidential Information by the Receiving Party or its Permitted Disclosees; and

11.1.3 is under no obligation to update or correct any inaccuracies which may become apparent in any of the Confidential Information.

11.2 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.

## **12 PUBLICITY**

12.1 Subject to clause 12.3 below, each Party undertakes to keep confidential and not to disclose to any third party, save as may be required in law (including by the rules of any securities exchange on which the shares of either of the Parties may be listed, where applicable) or permitted in

terms of this Agreement, the nature, content or existence of this Agreement and any and all information given by a Party to the other Party pursuant to this Agreement.

- 12.2 No announcements of any nature whatsoever will be made by or on behalf of a Party relating to this Agreement without the prior written consent of the other Party, save for any announcement or other statement required to be made in terms of the provisions of any law, in which event the Party obliged to make such statement will first consult with the other Party to enable them in good faith to attempt to agree the content of such announcement, which (unless agreed) must go no further than is required in terms of such law or rules. This will not apply to a Party wishing to respond to the other Party which has made an announcement of some nature in breach of this clause 12.2.
- 12.3 This clause 12 shall not apply to any disclosure made by a Party to its professional advisors or consultants, provided that they have agreed to the same confidentiality undertakings, or to any judicial or arbitral tribunal or officer, in connection with any matter relating to this Agreement or arising out of it.

### 13 BENEFIT

- 13.1 The undertakings given by the Receiving Party in this Agreement shall be for the benefit of and may be enforced by the Disclosing Party, and any *successors-in-title*. The undertakings shall be deemed to have been imposed as a *stipulation alteri* for the benefit of any *successor-in-title* and such benefit may be accepted by such person at any time. The fact that any undertaking may not be enforceable by one of them will not affect its enforceability by any other party.
- 13.2 For the purposes of clause 13.1, the term "*successors-in-title*" shall include any third party which acquires:
- 13.2.1 the business of the Disclosing Party or any part thereof; or
- 13.2.2 pursuant to any cession, the right to enforce the undertakings embodied in this Agreement.

### 14 NOTICES AND DOMICILIA

#### 14.1 Notices and addresses

##### 14.1.1 Notices

Any notice, consent, approval or other communication in connection with this Agreement ("**Notice**") will be in writing in English.

#### 14.1.2 Addresses

Each Party chooses the physical address, fax number and/or email address corresponding to its name below as the address to which any Notice must be sent.

##### 14.1.2.1 **DBSA:**

Physical address: 1258 Lever Road  
 Headway Hill  
 Midrand  
 1685  
 South Africa

Tel number: +27 11 313 3911

Fax number: +27 11 313 3086

Email address: [claimadmin@dbsa.org](mailto:claimadmin@dbsa.org)

Attention: Group Executive: **[relevant division]** and  
 General Manager: Legal

##### 14.1.2.2 **[insert]:**

Physical address: **[insert]**  
**[insert]**  
**[insert]**

Tel number: **[insert]**

Fax number: **[insert]**

Email address: **[insert]**

Attention: **[insert]**

14.1.3 Any Party may by Notice to the other Party change its address and/or the person, if any, for whose attention any Notice must be marked in clause 14.3.

## 14.2 Effective on receipt

14.2.1 Any Notice takes effect when received by the recipient (or on any later date specified in the Notice) and, unless the contrary is proved, is deemed to be received:

14.2.1.1 on the day of delivery, if delivered by hand to a responsible person at the recipient's physical address in clause 14.1.2. If delivery is not on a Business Day, or is after ordinary business hours on a Business Day, the Notice is deemed to be received on the Business Day after the date of delivery;

14.2.1.2 on the first Business Day after the date of transmission, if sent by fax to the recipient's fax number in clause 14.1.2; and

14.2.1.3 on the Business Day on which an acknowledgement of receipt is issued by the recipient, if sent by email to the recipient's email address in clause 14.1.2.

14.2.2 Despite anything to the contrary in this Agreement, a Notice actually received by a Party is effective even though it was not sent, or delivered, or sent and delivered to its address in clause 14.1.2, unless otherwise provided in this Agreement.

## 14.3 Service of legal process

14.3.1 Each Party chooses its physical address referred to in clause 14.1.2 as its address at which legal process and other documents in legal proceedings in connection with this Agreement may be served (*domicilium citandi et executandi*).

14.3.2 Any Party may by Notice to the other Party change its address at which legal process and other documents in legal proceedings in connection with this Agreement may be served to another physical address in South Africa.

## 15 APPLICABLE LAW AND JURISDICTION

15.1 This Agreement will in all respects be governed by and construed under the laws of South Africa.

15.1 The Parties hereby consent and submit to the non-exclusive jurisdiction of the High Court of South Africa (South Gauteng High Court, Johannesburg) in any dispute arising from or in connection with this Agreement.

## 16 GENERAL

16.1 Whole Agreement



16.1.1 This Agreement constitutes the whole of the agreement between the Parties relating to the matters dealt with herein and, save to the extent otherwise provided herein, no undertaking, representation, term or condition relating to the subject matter of this Agreement not incorporated in this Agreement shall be binding on either of the Parties.

16.1.2 This Agreement supersedes and replaces any and all agreements between the Parties (and other persons, as may be applicable) and undertakings given to or on behalf of the Parties (and other persons, as may be applicable) in relation to the subject matter hereof.

#### 16.2 Variations to be in Writing

No addition to or variation, deletion, or agreed cancellation of all or any clauses or provisions of this Agreement will be of any force or effect unless in writing and signed by the Parties.

#### 16.3 No Indulgences

No latitude, extension of time or other indulgence which may be given or allowed by any Party to the other Parties in respect of the performance of any obligation hereunder, and no delay or forbearance in the enforcement of any right of any Party arising from this Agreement, and no single or partial exercise of any right by any Party under this Agreement, shall in any circumstances be construed to be an implied consent or election by such Party or operate as a waiver or a novation of or otherwise affect any of the Party's rights in terms of or arising from this Agreement or estop or preclude any such Party from enforcing at any time and without notice, strict and punctual compliance with each and every provision or term hereof.

#### 16.4 Provisions Severable

All provisions and the various clauses of this Agreement are, notwithstanding the manner in which they have been grouped together or linked grammatically, severable from each other. Any provision or clause of this Agreement which is or becomes unenforceable in any jurisdiction, whether due to voidness, invalidity, illegality, unlawfulness or for any other reason whatever, shall, in such jurisdiction only and only to the extent that it is so unenforceable, be treated as *pro non scripto* and the remaining provisions and clauses of this Agreement shall remain of full force and effect. The Parties declare that it is their intention that this Agreement would be executed without such unenforceable provision if they were aware of such unenforceability at the time of execution hereof.

#### 16.5 Continuing Effectiveness of Certain Provisions

The expiration or termination of this Agreement shall not affect such of the provisions of this Agreement as expressly provide that they will operate after any such expiration or termination

or which of necessity must continue to have effect after such expiration or termination, notwithstanding that the clauses themselves do not expressly provide for this.

**16.6 No Assignment**

Neither this Agreement nor any part, share or interest herein nor any rights or obligations hereunder may be ceded, delegated or assigned by either Party without the prior written consent of the other Party, save as otherwise provided herein.

**17 COSTS**

Each Party will bear and pay its own legal costs and expenses of and incidental to the discussions, drafting, preparation and implementation of this Agreement.

**18 SIGNATURE**

18.1 This Agreement is signed by the Parties on the dates and at the places indicated below.

18.2 This Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same Agreement as at the date of signature of the Party last signing one of the counterparts.

18.3 The persons signing this Agreement in a representative capacity warrant their authority to do so.

18.4 The Parties record that it is not required for this Agreement to be valid and enforceable that a Party shall initial the pages of this Agreement and/or have its signature of this Agreement verified by a witness.

Signed at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ 2016

For and on behalf of

**Development Bank of Southern Africa Limited**

\_\_\_\_\_

Name:

Capacity:

Who warrants authority

Signed at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ 2016

For and on behalf of

**[insert]**

\_\_\_\_\_

Name:

Capacity:

Who warrants authority

## Annexure D - Declaration of Interest

### **Declaration of Interest statement in respect of the IPP Procurement Programme**

1. In this Declaration of Interest, the following terms shall have the following meanings:
  - 1.1. **“Advisor”** means the firm or firms advising a Bidder on the raising of debt and equity finance in respect of its Bid Response and the project;
  - 1.2. **“Bidder”** means any entity or consortium that submits a Bid Response, which was or must be either a project company or a consortium of legal entities, all of whom became or shall become shareholders in a project company;
  - 1.3. **“Bid Response”** means any bid submitted or to be submitted by a Bidder in response to the invitation contained in the request for qualifications and proposal in respect of the IPP Procurement Programme;
  - 1.4. **“Lender”** means any financial institution that is party to a term sheet that was or is submitted by a Bidder as part of its Bid Response for the provision of external debt finance to a project;
  - 1.5. **“Member”** in relation to any Bidder, any legal entity and / or natural person which became or will become a shareholder (either itself or through an intermediary entity) once the project company is incorporated, and if the project company has already been incorporated, then any shareholder.

2. For purposes of this Declaration of Interest:

- 2.1. a "family member" means a parent, child or spouse of the person executing the Declaration of Interest, and includes a partner living with that person as if they were married to each other;
- 2.2. an "associate" means a business enterprise of whatever form or a trust, in which you have an employment, financial or ownership interest, or are a director or trustee, including in the case of advisors, the firm which you represent;
- 2.3. an "interest" means:
  - 2.3.1. any shareholding held in a participant, except where the participant is a company listed on a stock exchange;
  - 2.3.2. being employed by, a director, partner, trustee or representative of, or being otherwise engaged in any capacity relating to the IPP Procurement Programme, by any participant;
  - 2.3.3. rendering professional services to any participant in relation to the IPP Procurement Programme;
  - 2.3.4. receiving, or having concluded any agreement to receive, any gifts, favours, payments (other than payments arising from interests already disclosed including payment for professional services), sponsorships, subsidies, or any other benefits from any participant in its capacity as such, within the last 12 months preceding the date of signature of this Declaration of Interest;

**DECLARATION:**

I, the undersigned,

\_\_\_\_\_ **(Full Name)**

\_\_\_\_\_ **(Identity No.)**

hereby declare that:

1. The interests that I or any of my family members or associates may have, as far as I am aware, in any of the participants or other entity associated with a bidder are described in full below:

*[If none, state "None". If there are relevant interests, state the particulars]*

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2. The advisory mandates held by my associates, for or on behalf of any participant or other entity associated with a Bidder, as far as I am aware, are listed in full, in the table provided at **Annexure A** hereto;

3. I confirm that in both my personal and professional capacities, I have not advised any participant, or participated in any other manner with the preparation of any bid response submitted or to be submitted in respect of the IPP Procurement Programme, other than to the extent disclosed below:

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- 4. I acknowledge and accept that, after participating in the IPP Procurement Programme as a Service Provider, I will not be permitted to advise any Bidder, their members, lenders, contractors or any other participant involved in any bid response, nor to participate in the IPP Procurement Programme in any other capacity including as a member of any Bidder, their Members, Lenders, Contractors or Advisors, without the written consent of the IPP Office; and
  
- 5. The information provided in this Declaration and in **Annexure A** hereto is true and correct to the best of my knowledge. I declare further that in the event of any interests of the nature described in this Declaration arising during my engagement hereof, or of my becoming aware of any such interests which may not have been previously declared, these shall promptly and accurately be declared in writing by me to the IPP Office.

Signed \_\_\_\_\_

Full name \_\_\_\_\_  
\_\_\_\_\_

Date \_\_\_\_\_

Witness \_\_\_\_\_

[illegible]