

## MUTUAL NON-DISCLOSURE AGREEMENT

by and between

### **Bafositse (PTY) Ltd,**

a company established under the laws of South Africa with its physical office at , 249 Basden Avenue, Crystal Park One – Block J, Littleton Manor – Centurion, 0002, South Africa, with Registration Number 2014/095663/07 (hereinafter referred to as “BAFOSITSE” or “Party”)

and

\_\_\_\_\_,  
a company established under the laws of South Africa with its physical office at \_\_\_\_\_, with Registration Number \_\_\_\_\_ (hereinafter referred to as “\_\_\_\_\_” or “Party”)

### **WHEREAS**

BAFOSITSE renders construction, mining, energy & Environmental Technologies, petroleum services and products to third parties.

and \_\_\_\_\_ provides

\_\_\_\_\_ services to BAFOSITSE and to third parties,

the Parties intend to make available between themselves certain of their proprietary information, as well as proprietary information belonging to third parties, for the purposes of collaborating in pursuing business opportunities

### **NOW THEREFORE**

the Parties hereto agree as follows:

#### **1 Affiliate**

means, with respect to any entity, any other entity Controlling, Controlled by or under common Control with such entity. The term “Affiliate” shall also include a “subsidiary” of an entity with the term “subsidiary” meaning a subsidiary as defined in Section 3 of the South African Companies Act 71 of 2008, as amended, and including any foreign company, which if it were registered in terms of the South African Companies Act 71 of 2008, as amended, would fall within the ambit of such term;

#### **2 Commercially Reasonable Efforts**

means taking such steps and performing in such a manner as a well managed company would undertake where such company was acting in a determined, prudent and reasonable manner to achieve the particular result for its own benefit provided always that such steps are within the reasonable control of the Party.

#### **3 Control**

Control and its derivatives means with regard to any entity the right or power to dictate the management of and otherwise control such entity by any of:

- 3.1 holding directly or indirectly the majority of the issued share capital or stock (or other ownership interest if not a corporation) of such entity ordinarily having voting rights;
- 3.2 controlling the majority of the voting rights in such entity; or

- 3.3 having the right to appoint or remove directors holding a majority of the voting rights at meetings of the board of directors of such entity;

#### **4 Confidential Information**

means any information or data of any nature, tangible or intangible, oral or in writing and in any format or medium, which by its nature or content is or ought reasonably to be identifiable as confidential and/or proprietary to the Disclosing Party or which is provided or disclosed in confidence, and which the Disclosing Party or any person acting on behalf of the Disclosing Party may disclose or provide to the Receiving Party or which may come to the knowledge of the Receiving Party by whatsoever means. Without limitation, the Confidential Information of the Disclosing Party shall include the following even if it is not marked as being ‘confidential’, restricted or proprietary (or any similar designation) –

- 4.1 information relating to the Disclosing Party’s current and existing strategic objectives and plans for its existing and future construction, engineering, mining, processing, business processing and business process outsourcing;
- 4.2 information relating to the Disclosing Party’s business activities, business relationships, products, services, processes, data, and personnel;
- 4.3 information contained in or constituting the Disclosing Party’s strategies, resources, technical capabilities, including third party products and associated material;
- 4.4 the Disclosing Party’s technical, scientific, commercial, financial and market information and trade secrets;
- 4.5 the Disclosing Party’s data concerning its business relationships, architectural information, demonstrations, processes and machinery;
- 4.6 Intellectual property that is proprietary to the Disclosing Party or that is proprietary to a third party and in respect of which the Disclosing Party has rights of use or possession, including but not limited to third party products and data relating to the customers of the Disclosing Party;
- 4.7 the Disclosing Party’s plans, designs, drawings, processes, process maps, functional and technical requirements and specifications;
- 4.8 Agreements to which the Disclosing Party is a party;
- 4.9 Information relating to the Disclosing Party’s construction services and facilities;

- 4.10 information concerning faults or defects in the Disclosing Party's construction services and facilities or the incidence of such faults or defects;
  - 4.11 any and all, methodologies, formulae, related information and trade secrets in developed software and processes and other business of the Disclosing Party; and
  - 4.12 the global business-processing business plans, strategy documents, financial information (including valuations and forecasts) and business process outsourcing knowledge of the Disclosing Party;
- Confidential Information excludes information or data which –
- 4.13 is lawfully in the public domain at the time of disclosure thereof to the Receiving Party; or
  - 4.14 subsequently becomes lawfully part of the public domain by publication or otherwise; or
  - 4.15 is or becomes available to the Receiving Party from a source other than the Disclosing Party which is lawfully entitled without any restriction on disclosure to disclose such Confidential Information to the Receiving Party; or
  - 4.16 is disclosed pursuant to a requirement or request by operation of law, regulation or court order but then only to the extent so disclosed and then only the specific instance and under the specific circumstances in which it is obliged to be disclosed;
- provided that –
- 4.17 the onus shall at times rest on the Receiving Party to establish that such information falls within such exclusions; and
  - 4.18 the information disclosed will not be deemed to be within the foregoing exclusions merely because such information is embraced by more general information in the public domain or in a Party's possession; and
  - 4.19 any combination of features will not be deemed to be within the foregoing exclusions merely because individual features are in the public domain or in a Party's possession, but only if the combination itself is in the public domain or in a Party's possession;
- The determination of whether information is 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.

## 5 Disclosing Party

means the party disclosing its Confidential Information.

## 6 Enterprise Market

means the market consisting of natural and legal persons who usually purchase, lease or rent construction/engineering equipment, or related services for business purposes.

## 7 Personnel

means officers, employees, agents, partners, directors, advisors or independent contractors of either of the Parties.

## 8 Receiving Party

means a party in receipt of or exposed to Confidential Information of another.

## 9 Third Party

means any entity or person other than the Parties or their Affiliates.

## 10 Acknowledgment of Importance of Confidential Information

The Receiving Party acknowledges the great importance of the Confidential Information to the Disclosing Party and, where applicable, third party proprietors of such information, and recognizes that the Disclosing Party and/or third party proprietors may suffer irreparable harm or loss in the event of such information being disclosed or used otherwise than in accordance with this Agreement.

## 11 Non-Disclosure

The Receiving Party agrees:

- 11.1 Except as permitted by this Agreement, not to disclose to any third party or to publish any Confidential Information in any manner, for any reason or purpose whatsoever without the prior written consent of the Disclosing Party and provided that in the event that the Confidential Information is proprietary to a third party, it will also be incumbent on the Receiving Party to obtain the consent of such third party. Notwithstanding the foregoing, the Parties may disclose such information to one or more third parties performing services contemplated in the WHEREAS-clause where:
  - 11.1.1 such disclosure is necessary or otherwise naturally occurs in that entity's scope of responsibility; and
  - 11.1.2 the entity agrees in writing to assume the obligations described in this Agreement.
- 11.2 Except as permitted by this Agreement, not to utilize, employ, exploit or in any other manner whatsoever use the Confidential Information for any purpose whatsoever without the prior written consent of the Disclosing Party and provided that in the event that the Confidential Information is proprietary to a third party, it will also be incumbent on the Receiving Party to obtain the consent of such third party;
- 11.3 To restrict the dissemination of the Confidential Information only to those of its personnel who are actively involved in activities for which use of Confidential Information is authorised and then only on a "need to know" basis and the Receiving Party will initiate, maintain and monitor internal security procedures reasonably acceptable to the Disclosing Party to prevent unauthorized disclosure by its personnel;
- 11.4 To take all practical steps, both before and after disclosure, to impress upon its personnel who are given access to Confidential Information the secret and confidential nature thereof.
- 11.5 That it accepts full responsibility and liability for its personnel's and Affiliates' compliance with the terms of this Agreement..

## 12 Further Acknowledgments

- 12.1 The Receiving Party acknowledges that all Confidential Information disclosed by the Disclosing Party to the Receiving Party or which otherwise comes to the knowledge of the Receiving Party is proprietary to the Disclosing Party or where applicable the relevant third party proprietor.
- 12.2 The Receiving Party also acknowledges that nothing in this Agreement confers any rights or license to Confidential Information on the Receiving Party.
- 12.3 The Disclosing Party, or where applicable the third party proprietor, does not guarantee, or make any representation regarding the accuracy, completeness or "fitness for purpose" of the Confidential Information disclosed by it.

### **13 Standard of Care**

- 13.1 The Receiving Party will protect the Confidential Information in the manner, and with the endeavour, that it employs to protect its own Confidential Information.
- 13.2 In no event will the Receiving Party use less than Commercially Reasonable Efforts to protect the confidentiality of the Confidential Information.

### **14 Return of Confidential Information**

The Disclosing Party may at any time on written request to the Receiving Party require that the Receiving Party immediately return to the Disclosing Party any Confidential Information and may, in addition, require that the Receiving Party furnish a written statement to the effect that upon such return it has not retained in its possession or under its control, either directly or indirectly, any such Confidential Information or material. Alternatively, the Receiving Party will, as and when required by the Disclosing Party on written request to the Receiving Party, destroy all such Confidential Information and material and furnish the Disclosing Party with a written statement certifying that the same has been destroyed. The Receiving Party will comply with any request in terms of this clause 14 within seven (7) days of receipt of such request.

### **15 Retention of Confidential Information**

A Party may retain Confidential Information to the extent required by, and for the duration of, any services performed for the other Party in terms of agreements between the Parties, provided that the entitled Party has not waived performance of the services under such other agreements and subject to the rights of the Disclosing Party to recover the Confidential Information at any time in terms of clause 14.

### **16 Procure Undertakings from Personnel**

The Receiving Party will procure from its own and Affiliate personnel who have access to Confidential Information, confidentiality undertakings no less onerous than contained in this Agreement. The Receiving Party (and not the Disclosing Party) will sanction any failure of its own or its Affiliate personnel to comply with the terms of such confidentiality undertaking.

### **17 Exceptions**

- 17.1 The Parties acknowledge that this Agreement will not be applicable to attorneys or auditors bound by professional duties of confidentiality, provided that such disclosure is reasonably required by the Receiving Party for the purposes of conducting Receiving Party's business activities.
- 17.2 The Parties further acknowledge that each may disclose Confidential Information to its Affiliates provided, however, that the Disclosing Party shall be responsible for its Affiliate's compliance with the terms of this Agreement.

### **18 Disclosure Required by Law, Regulation or Court Order**

In the event that the Receiving Party is required to disclose the Confidential Information pursuant to a requirement or request by operation of law, regulation or court order but only to the extent of such requirement or request and only in the specific instance and under the specific circumstances in which it is required to be disclosed, the Receiving Party:

- 18.1 Will advise the Disclosing Party thereof prior to disclosure, if possible;

- 18.2 Will take such steps to limit the extent of the disclosure to the extent that it lawfully and reasonably practically can;
- 18.3 Will afford the Disclosing Party a reasonable opportunity, if possible, to intervene in the proceedings; and
- 18.4 Will comply with the Disclosing Party's reasonable requests as to the manner and terms of any such disclosure.

### **19 Loss of Confidential Information**

In the event of any disclosure or loss of, or inability to account for, any Confidential Information of the Disclosing Party, the Receiving Party will promptly, at its own expense:

- 19.1 notify the Disclosing Party in writing;
- 19.2 take such actions as may be necessary or reasonably requested by the Disclosing Party to minimize the violation; and
- 19.3 cooperate in all reasonable respects with the Disclosing Party to minimize the violation and any damage resulting therefrom.

### **20 Duration of Obligations**

The obligations of the Receiving Party with respect to each item of Confidential Information shall endure for a period of five (5) years from receipt of that item of Confidential Information. The obligations referred to in this clause 20 shall endure notwithstanding any termination of this Agreement, any other agreement entered into between the Parties, or any Relationship or negotiations between the Parties.

### **21 Indemnity.**

- 21.1 The Receiving Party hereby indemnifies and holds the Disclosing Party harmless against any loss, action, expense, claim, harm or damage of whatsoever nature suffered or sustained by the Disclosing Party pursuant to a breach by the Receiving Party or the Receiving Party's Personnel or Affiliate, of the provisions of this Agreement.
- 21.2 Without prejudice to any other rights or remedies which the Parties may have, they acknowledge and agree that damages would not be an adequate remedy for any breach of this Agreement and the remedies of injunction, specific performance and any other equitable relief are appropriate for any threatened or actual breach of any such provision and no proof of special damages shall be necessary for the enforcement of the rights under this clause 21.

### **22 Applicable Law**

This Agreement shall be governed by and construed in accordance with the law of the Republic of South Africa and all disputes, actions and other matters relating thereto shall be determined in accordance with such law.

### **23 Jurisdiction**

The Parties consent and submit to the non-exclusive jurisdiction of the High Court of the Republic of South Africa (South Gauteng Division) in respect of applications for urgent or interim relief under this Agreement, and the enforcement of an arbitration decision in terms of clause 24.

### **24 Arbitration**

- 24.1 Any difference, claim or dispute arising from this Agreement shall, if not settled by an amicable effort on the part of both Parties, be submitted to and

finally decided by arbitration in accordance with the rules for commercial arbitrations of the Arbitration Foundation of Southern Africa (“AFSA”), by one or more arbitrator(s) appointed in accordance with the rules.

24.2 The language of the arbitration shall be English. The place of arbitration shall be Johannesburg, South Africa. The procedural law of this place shall apply where the Rules are silent

24.3 This clause 24 shall survive termination of the Agreement for whatsoever reason.

**25 Whole Agreement**

25.1 This Agreement constitutes the whole of the agreement between the Parties relating to the subject matter hereof and the Parties shall not be bound by any terms, conditions or representations whether written, oral or by conduct and whether express or tacit not recorded herein.

25.2 No addition to, variation, consensual cancellation or novation of this Agreement, including this clause 25 shall be of any force or effect unless reduced to writing and signed by the duly authorised representatives of both Parties.

**26 Contra Proferentem**

The rule of information that in the event of any uncertainty in any provision in any agreement, such agreement shall, in construing/interpreting the uncertainty, be construed or interpreted against the drafter of such agreement, shall not be applicable to this Agreement.

**27 Assignment**

Neither Party shall be entitled to cede and delegate (“assign”) or otherwise transfer the benefit or burden of all or any part of this Agreement without the prior written consent of the other.

**28 Non-Waiver**

28.1 No waiver of any of the terms and conditions of this Agreement will be binding or effectual for any purpose unless expressed in writing and signed by the Party hereto giving the same, and any such waiver will be effective only in the specific instance and for the purpose given.

28.2 No failure or delay on the part of either Party in exercising any right, power or privilege hereunder will operate as a waiver thereof, nor will any single or partial exercise of any right, power or privilege preclude any other or further exercise thereof or the exercise of any other right, power or privilege.

**29 Severability**

Should any of the terms and conditions of this Agreement be held to be invalid, unlawful or unenforceable, such terms and conditions will be severable from the remaining terms and conditions, which will continue to be valid and enforceable. If any term or condition held to be invalid is capable of amendment to render it valid, the Parties agree to enter into negotiations to resolve the invalidity.

**30 Domicilium**

The Parties select as their respective domicilia citandi et executandi the physical addresses listed in the preamble above.

**31 Costs**

Each Party shall bear and pay its own costs of, or incidental to, the drafting, preparation and execution of this Agreement.

**32 Effective Date**

This Agreement shall be effective as of the date of the last signature(s) below and shall automatically expire after two (2) years.

**33 Signatures**

Signed by the authorised signatories of the Parties, each signatory warranting his/her authority hereto:

Company	For:	For: <b>Bafositse (Pty) Ltd</b>
Name		<b>Mr. Jan Hlongwane</b>
Position		<b>Managing Director (MD)</b>
Date		
Signature		
Place		