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|  |
| --- |
| **agreement on exclusivity**  |

The agreement defines the framework for the continued negotiations between the parties in relation to the specific project and a period of exclusivity is agreed.

This template should be used taking into consideration that it should be adjusted to the specific project and the parties.

***Important Information***

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This Agreement on Exclusivity (the “Agreement”) is made on the ¦[date]| between

¦[Name]**|**

¦[Address]|

¦[City]|

[Country]

[Business Registration No.]

(hereinafter (“Customer”)

and

[Name]

[Address]

[City]

[Country]

[Business Registration No.]

(hereinafter (“[●]”)

and

[Name]

[Address]

[City]

[Country]

[Business Registration No.]

(hereinafter (“[●]”)

and

[Name]

[Address]

[City]

[Country]

[Business Registration No.]

(hereinafter (“[●]”)

([●], [●] and [●] are hereinafter referred to as the “Supplier”)

(Customer, [●], [●] and [●] are hereinafter collectively referred to as the “Parties” and individually as a “Party”)

# Background

## ¦The Parties have discussed the project that is further outlined in Exhibit [●] (hereinafter the “Project”). [Include an outline description of the Project, including the key deliverables of the Project and milestones.]

## **[**The Parties have prior to this Agreement signed a separate Non-Disclosure Agreement dated [●] (the “NDA”) [and/or] a separate Letter of Intent dated [●] (the “LoI”) [and/or] a separate Memorandum of Understanding dated [●] (the “MoU[[1]](#endnote-1)”).**]**

## The Supplier has dedicated resources and incurred costs and expenses in relation to the early stages of the Project and is prepared to further invest in the Project with a view to enter into a binding agreement for the delivery of the Project.

## In consideration hereof, the Customer agrees, subject to the terms and conditions of this Agreement, to grant the Supplier exclusivity for the duration of this Agreement and to enter into good faith negotiations with the view to enter into binding agreements concerning the Project.

# Obligations

## The Customer agrees from the date of this Agreement and up to and including [date] (hereinafter the “Exclusivity Period”) not to enter into, continue or facilitate discussions with any third party regarding the Project or part hereof, including without limitation enter into an agreement or any other arrangement with such third party concerning the Project.

## The Customer agrees not to make available any information regarding the Project to any third party or representatives unless expressly provided for in this Agreement or otherwise agreed in writing with the Supplier from time to time.

## The Customer undertakes to procure that directors, employees, agents or advisors of the Customer comply with the obligations set out in clauses 2.1-2.2.

## The Customer represents on the date of this Agreement that neither the Customer nor any of the Customer’s directors, employees, agents or advisors, nor any other affiliated company of the Customer, are now, directly or indirectly, in discussions or negotiations with any third party (other than the Supplier) concerning the Project or parts hereof, and the Customer acknowledge that the Supplier will be incurring costs and expenses in connection with the Project in reliance on this representation and the other terms and conditions set out in this Agreement.

## The Customer agrees to enter into good faith negotiations with the Supplier in order to enter into a binding agreement on the basis of the key terms set out in Exhibit[[2]](#endnote-2) [●] (hereinafter “Head of Terms”).

## The Customer agrees not to withdraw from the negotiations unless it becomes apparent that the Project will not be achieved as a result of[[3]](#endnote-3) [include specific description of circumstances] and the Customer undertakes not to do or omit to do anything which will frustrate or affect the ability of the Parties to enter into an agreement on the basis of the Head of Terms.

## The Supplier acknowledges that the Customer will be required to initiate a [public procurement procedure / tender] for the delivery of the Project. Therefore, the Customer may award the contract for the Project to a third party without infringing the terms and conditions of this Agreement, subject to the understanding that the third party has offered the[[4]](#endnote-4) **[**lowest price / most economically advantageous offer.**]**

# Confidentiality

## Prior to this Agreement, the Parties have signed a separate Non-Disclosure Agreement dated [●] (the “NDA”). The confidentiality obligations that are set out in the NDA shall also apply to this Agreement and any Confidential Information (as defined) that is exchanged between the Parties going forward[[5]](#endnote-5).

# Term and Termination

## The obligations (save any arising out of accrued breach) contained in clause 2 of this Agreement shall cease to have effect on the expiry of the Exclusivity Period or, if earlier, [subject to clause 2.6 being included] if the Supplier notify the Customer in writing that the Supplier will not be able to deliver the Project on the Head of Terms.

## This Agreement can be terminated by a Party with immediate effect if *(i)* the other Party is in material breach of the obligations laid down in this Agreement, and such material breach has not been remedied within a period of [insert] calendar days from receipt of notice by the other Party, or *(ii)* if the other Party suspends payments, is wound up, files a voluntary petition in bankruptcy, is adjudicated bankrupt and/or a court assumes jurisdiction of the assets of the other Party under any relevant insolvency legislation.

## Moreover, this Agreement can be terminated by the Supplier with immediate effect if the Customer fails to make such progress necessary for the due performance of the Customer’s obligations in clause 2[[6]](#endnote-6).

## Without prejudice to any other rights that the Supplier may have, in the event of a material breach by the Customer of the obligations set out in clause 2, the Customer must reimburse the Supplier all reasonable **[**external**]** costs or expenses (duly documented) that the Supplier has incurred in relation to the Project in the period from entering into force of this Agreement and up until the termination of this Agreement[[7]](#endnote-7). **[**The maximum amount to be reimbursed pursuant to this clause cannot exceed [insert][[8]](#endnote-8).**]**

## Notwithstanding the foregoing, the Customer will not be required to reimburse the Supplier if the Supplier notify the Customer in writing that the Supplier will not be able to deliver the Project on the Head of Terms in accordance with clause 2.6[[9]](#endnote-9), [or if the contract for the Project is awarded by the Customer to a third party pursuant to a public procurement procedure as mentioned in clause 2.7.]

## Save as provided for in this clause 4, the Parties shall in case of termination have no further obligations or liabilities towards each other.

# Limitation of liability

## A Party shall not be liable for any failure to fulfil any term or condition of this Agreement due to an event outside its reasonable control (force majeure). If such event continues for [insert] calendar days or more, the non-affected Party may terminate the Agreement by written notice and without liability to the affected Party.

## In no event shall a Party be liable to the other Party for consequential, incidental, special, punitive or exemplary loss, including, but not limited to, loss of profit, loss of revenue, loss of business, loss of goodwill, loss of anticipated savings or cost of procuring substitute goods or services.

# Miscellaneous

## The Agreement may not be amended except by written agreement signed by both Parties.

## The provisions of clauses 3 (Confidentiality) and 7 (Governing Law and Arbitration) shall survive termination of the Agreement for any reason.

# Governing LAW AND ARBITRATION

## This Agreement and any dispute arising out of or in connection with this Agreement, shall be governed by and construed in accordance with the laws of Denmark, excluding conflict of law principles.

## Any dispute between or by Parties arising out of or in connection with this Agreement shall be finally settled by arbitration in accordance with the rules of the Danish Institute of Arbitration (Danish Arbitration). The arbitration procedure shall take place in [●] and shall be carried out in the [English] language.

## Notwithstanding the foregoing, a Party shall be entitled to initiate legal proceedings concerning injunctions before the ordinary courts with a view to enforcing clauses 1.4 and 2.1 concerning exclusivity.

## The proceedings and any award shall be kept confidential by the Parties.

# SIGNATURES

## This Agreement is signed in [●] original copies, one for each of the Parties.

|  |  |  |
| --- | --- | --- |
| ¦[Place]|, on ¦[Date]|: |  | ¦[Place]|, on ¦[Date]|: |
| For ¦[Customer]|: |  | For ¦[Part2]|: |
|  |  |  |
|  |  |  |
|  |  |  |
| ¦[Name and Title]| |  | ¦[Name and Title]| |

|  |  |  |
| --- | --- | --- |
| ¦[Place]|, on ¦[Date]|: |  | ¦[Place]|, on ¦[Date]|: |
| For ¦[Part3]|: |  | For ¦[Part4]|: |
|  |  |  |
|  |  |  |
|  |  |  |
| ¦[Name and Title]| |  | ¦[Name and Title]| |

# References

1. Amend clause as necessary. Please also see clause 3.1. [↑](#endnote-ref-1)
2. The key terms to be agreed upon between the parties should be set out in a separate exhibit. The key terms should be based on the final agreement to be entered into by the parties and should take into account the specific circumstances of the project, including the standards and specifications to be applied. [↑](#endnote-ref-2)
3. To be considered if the clause is relevant under the specific circumstances. Generally, it is recommended that the circumstances that may lead to a withdrawal are set out in more detail but a more “soft” approach may also be applied [↑](#endnote-ref-3)
4. The clause should only be included if the customer is required to award the contract for the project on the basis of a public procurement procedure or similar. Depending on the procurement rules that apply, the customer may be required to award the contract to the party that has offered the lowest price (or the most economically advantageous offer) and may not be possible to impose restrictions on the customer concerning the “quality” of the competing bid and/or the third party itself. The same applies to pre-emptive rights to enter into the contract on the terms offered by the third party. Subject to legal advice being obtained amend as necessary and consider to include (if possible) a provision that entitles the supplier to deliver the project on the same commercial terms and conditions as the third party that has been awarded the contract. [↑](#endnote-ref-4)
5. If the parties have not entered into a separate Non-Disclosure Agreement, separate provisions on “confidentiality” should be included as part of this Agreement. Please also see clause 1.2. [↑](#endnote-ref-5)
6. It may be considered to underline that failure to make the necessary progress may entitle the Supplier to terminate the agreement. [↑](#endnote-ref-6)
7. Include any specific repayments that should be made by the customer (e.g. separately agreed credit facilities, advance payments etc. [↑](#endnote-ref-7)
8. To be considered if reimbursement should be limited to external costs and/or if a cap should be introduced. [↑](#endnote-ref-8)
9. Subject to clause 2.6 being inserted. [↑](#endnote-ref-9)