

Energinet – Offshore Construction & Third Party Liability Insurance Tendering 2019 (Baltic Pipe, changes to Valve)

Non-Disclosure Agreement

by and between

Energinet, having its registered office at Tonne Kjærsvej 65, 7000 Fredericia, Denmark,

- hereinafter referred to as the "Employer" -

and

[name of tenderer], having its registered office at [address of tenderer],

- hereinafter referred to as the "Tenderer" -,

The Awarding Authority and Tenderer hereinafter referred to individually as "**Party**" and collectively as "**Parties**".

WHEREAS

The Tenderer participates in the procurement procedure "Public procurement of insurance services" that commenced with the TED-publication [number of TED-publication to be inserted] conducted by the Awarding Authority (hereinafter referred to as the "**Procurement Procedure**"). To ensure that the documents provided by the Awarding Authority within the Procurement Procedure are treated as confidential and used exclusively for the purposes of the Procurement Procedure (hereinafter referred to as the "**Permitted Purpose**"), the Parties conclude the following non-disclosure agreement (hereinafter referred to as the "**Agreement**"):

ARTICLE 1 - Confidential Information

For the purposes of this Agreement, confidential information means any information whether or not marked as confidential, of a technical, commercial or other nature whatsoever provided directly or indirectly to Tenderer in connection with the Procurement Procedure, whether such information is provided orally, electronically or in documentary or other tangible form or by demonstration and whether such information is provided on or after the date of this Agreement including, without limitation, financial statements, business plans, technical and operational information together with all analyses, compilations, data, studies, notes, interpretations, memoranda or other documents containing or based on any such provided information relating to the Awarding Authority or any company in its group of companies, information relating to staff, management and clients of the Awarding Authority or any company in its group of companies and the fact that discussions are taking place between the Awarding Authority and the Tenderer (hereinafter referred to as "**Confidential Information**").

ARTICLE 2 - No disclosure of Confidential Information

- 2.1 The Tenderer undertakes to treat the Confidential Information received by the Employer as confidential and keep it secret.
- 2.2 The Tenderer undertakes to use the Confidential Information for no other purpose than for the Permitted Purpose.
- 2.3 The Tenderer undertakes not to copy or reproduce Confidential Information in any form whatsoever except as may be necessary for the Permitted Purpose.
- 2.4 The Tenderer undertakes to take any precaution necessary to prevent the abuse of, unauthorized use or disclosure of or access to Confidential Information, and to immediately notify the Awarding Authority in writing in the event of any abuse of, unauthorized use or disclosure of or access to Confidential Information and take all reasonable steps to mitigate any harmful effects the Awarding Authority may sustain or incur as a result of such a breach of this Agreement.
- 2.5 Notwithstanding the above, if Confidential Information has been copied onto back-up computer systems or other back-up data storage systems used by the Tenderer which are not openly accessible and from which Confidential Information can only be deleted outside Tenderer's deletion routines with unreasonable efforts, the Tenderer's obligations to destroy or return Confidential Information are satisfied if all data records of Confidential Information are removed from the computer of any individual employee of, or contractor to, the Tenderer, provided that such data is kept confidential in accordance with this Agreement for so long as that Confidential Information is retained and is deleted in the course of deletion of back-up files in accordance with Tenderer's deletion routines. In any event, the Tenderer shall have the right to keep copies of Confidential Information to the extent retaining such is required by law or by public authorities having jurisdiction over the Tenderer or its parent company and Tenderer has informed Employer about the extent and provided proof of the legal requirement.

ARTICLE 3 - Available Information and Permitted Disclosure

- 3.1 Information is not considered as Confidential Information, but information to which Article 2 does not apply:
 - (a) If the Tenderer is able to demonstrate that the information was known to it prior to the disclosure by the Employer, through no breach of a confidentiality obligation towards the Awarding Authority; or
 - (b) If the information has come into the public domain through no fault or negligence of the Tenderer; or
 - (c) If the Tenderer is able to demonstrate that the information was developed by the Tenderer or its Affiliates (as defined under Article 3.3) independently of any Confidential Information or based on information which is covered by the exceptions (a) and/or (b) above.
- 3.2 Notwithstanding Articles 1 and 2, the Tenderer may disclose information if required to do so under any applicable law or government order, or as may be required under the law and regulations to which the Tenderer is subject, or pursuant to any court, arbitral or

regulatory proceedings. The same applies to information required by the European Commission under the EEPR or otherwise required by the European Commission. In such cases the Awarding Authority shall, if possible, be informed of the requested disclosure and its extent, the circumstances and the legal background of the obligation in due time before the information is to be passed on, so that the Awarding Authority may prevent the disclosure by legal action, if appropriate. Moreover, if possible, the Tenderer shall agree with the Awarding Authority on the Confidential Information to be disclosed and the way of the disclosure (i.e. agree on the draft of the disclosure document).

3.3 Notwithstanding Articles 1 and 2, the Tenderer may also disclose Confidential Information if, in the event of disclosure by the Tenderer to directors, members of management, officers, employees, Affiliates (as defined hereunder), directors, members of management, officers or employees of Affiliates, agents, professional advisors, accountants, consultants or attorneys-at-law (hereinafter referred to as "**Representatives**"), the following conditions are met:

- (a) The Representative has a definite need to know such information for the execution of its assignment which must be related to the Permitted Purpose; and
- (b) The Representative is bound to respect the confidential nature of the Confidential Information under terms at least equivalent to the terms of this Agreement.

In the context of this Agreement "Affiliate" shall mean a corporation, company or other entity, now or hereafter, directly or indirectly, owned or controlled by, or owning or controlling, or under common control with the Tenderer, but such corporation, company or other entity shall be deemed to be an Affiliate only as long as such ownership or control exists. For purposes of this definition "control" of a corporation, company or other entity shall mean to have, directly or indirectly, the power to direct or cause the direction of the management and policies of a corporation, company or other entity, whether (i) through the ownership of voting capital or similar right of ownership providing for the right to elect or appoint, directly or indirectly, the majority of the board of directors, or a similar managing authority or (ii) by contract.

Upon request of the Employer, the Tenderer shall provide evidence that these conditions are fulfilled.

3.4 Further, for the avoidance of doubt an obligation of confidentiality does not apply if the Awarding Authority is obliged or entitled in accordance with public procurement rules, e.g. according to the principles of transparency and/or equal treatment, to provide all tenderers with certain information received by the Tenderer such as questions regarding the Procurement Procedure or the tender documents.

ARTICLE 4 - Term, entry into force

4.1 This Agreement enters into force as of the last date of signature.

4.2 This Agreement shall remain in force for five (5) years after its entry into force.

ARTICLE 5 - Miscellaneous

- 5.1 The Tenderer acknowledges and agrees that all property, including intellectual property, in Confidential Information disclosed to it under this Agreement shall remain with and be vested in the Awarding Authority.
- 5.2 This Agreement does not include, expressly or by implication, any representations, warranties or other obligations:
- (a) to grant the Tenderer any license or rights other than as may be expressly stated in this Agreement;
 - (b) to require the Awarding Authority to disclose, continue disclosing or update any Confidential Information;
 - (c) to require either Party hereto to negotiate or continue negotiating with the other Party hereto with respect to any further agreement, and either Party may withdraw from such negotiations at any time without liability in respect of 2014/25/EU and other relevant European legislation
- 5.3 Each Party agrees that no failure or delay by the other Party in exercising any right, power or privilege hereunder will operate as a waiver thereof, nor will any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any right, power or privilege hereunder.
- 5.4 This Agreement shall not be assigned by operation of law or otherwise, without the prior written consent of both Parties.
- 5.5 If one or more of the provisions of this Agreement are declared to be invalid, illegal or unenforceable in any respect under any applicable rule of law or public policy, the validity, legality and enforceability of the remaining provisions contained herein shall not in any way be affected and these provisions shall remain in full force and effect as long as the economic or legal substance of the present Agreement is not affected in any material manner adverse to any Party. In such event the Parties shall use their reasonable efforts to negotiate immediately and in good faith a legally valid replacement provision having the same economic effect.
- 5.6 This Agreement may be signed in counterparts, each of which shall be an original, with the same effect as if the signatures thereto and hereto were upon the same instrument.
- 5.7 This Agreement shall be governed by and construed in accordance with the laws of Denmark without recourse to its conflict of law rules.
- 5.8 In case of a dispute the Tenderer shall attempt to settle such dispute amicably with the Awarding Authority before commencement of the dispute resolution procedures set out below. Upon request of a Party a senior management representative of each Party shall participate in the attempt of amicable settlement. Each Party shall be entitled to terminate the attempt of amicable settlement by written notification to the other Party at any time.

Disputes shall be settled by the competent Danish Courts of the greater Copenhagen area, Denmark.

5.9 Each Party agrees that monetary damages would not be a sufficient remedy for any breach of this Agreement by the other Party, and, such non-breaching Party shall be entitled to equitable relief, including injunction or specific performance, in the event of any such breach, in addition to all other remedies available at law or in equity.

[place], [date]

[place], [date]

(authorized signature)

(authorized signature)

Awarding Authority

Tenderer

Energinet

[name of tenderer]