



CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT

BETWEEN

GAUTRAIN MANAGEMENT AGENCY

a provincial entity, established in terms of Chapter 2 of the Gautrain Management Agency Act, 2006 (Act No. 5 of 2006), hereinafter referred to as “the **GMA**”

AND

[_____]

hereinafter referred to as “the [_____]”

(Jointly referred to as the “Parties”)

**CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT BETWEEN THE GMA
AND**

1 DEFINITIONS AND INTERPRETATIONS

Definitions

The following expressions shall bear the meanings assigned to them below, and cognate expressions shall bear corresponding meanings-

- 1.1 **“Agreement”** means this confidentiality and non–disclosure agreement;
- 1.2 **“Confidential Information”** means all information, documents, data and material of whatever nature of the GMA provided in writing, including, but not limited to-
- (a) information determined by the GMA to be privileged or confidential;
 - (b) information which if disclosed would violate a person's right to privacy;
 - (c) information declared to be privileged, confidential or secret in terms of any law including, but not limited to, information contemplated in sections 34(1); 35(1); 36(1); 37(1)(a); 38(a); 39(1)(a); 40 or 43(1) of the Promotion of Access to Information Act, 2000;
 - (d) all information relating to the Request for Proposal regarding the Public Private Partnership for the operation, maintenance, upgrade and modernisation of the Gautrain Rapid Rail Link System, which is stored in the GMA Data Room, as well as the TendaSwift;
 - (e) all information that may reasonably be regarded as confidential, being information not in the public domain, whether such information is oral or written, recorded or stored by electronic, magnetic, electro-magnetic or other form or process, or otherwise in a machine readable form, translated from the original form, recompiled, made into a compilation, wholly or partially copied, modified, updated or otherwise altered, originated or obtained by, or coming into the possession, custody or knowledge of either party;
 - (f) any information relating to either party's past, present and future research, analysis, compilations and studies, development of any system, business or financial activity, product, services, market opportunities, existing and potential customers and clients, marketing or promotion of any products, product pricing, contractual arrangements, technical knowledge, strategic objectives and planning, data, plans, designs, drawings, software or hardware, know-how, methods, trade secrets, trademarks,

**CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT BETWEEN THE GMA
AND**

techniques, functional and technical requirements and specifications, financial statements, budgets, costs and financial projections, accounting procedures or financial information.

- 1.3 **"Data"** means all data, information, texts, drawings, and other records, which are embodied in any medium, and will include, but not be limited to, Personal Data and Electronic Data;
- 1.4 **"Data Protection Legislation"** means POPIA, the GDPR, and any applicable data protection or data privacy legislation applicable in South Africa from time to time, during the subsistence of this Agreement;
- 1.5 **"Data Room"** means a virtual workspace, designed to facilitate the sharing of sensitive and confidential data with authorised potential bidders during the proposal preparation phase;
- 1.6 **"Data Subject"** means the person to whom Personal Data relates;
- 1.7 **"Effective date"** means the date of signature of the Party signing last;
- 1.8 **"Electronic Data"** means electronic representations of information in any form (as contemplated in the Electronic Communications and Transactions Act 25 of 2002) in relation to or arising from this Agreement;
- 1.9 **"Gautrain Rapid Rail System"** means the high-speed rail system linking Johannesburg, Tshwane and OR Tambo International Airport in Gauteng Province;
- 1.10 **"GDPR"** means the European Union (EU) General Data Protection Regulation (2016/679) replacing the EU Directive 95/46/EC;
- 1.11 **"Intellectual Property Rights"** means all patents, trademarks, designs, design rights, copyrights, source codes, inventions, trade secrets, Confidential Information, registerable business names, proprietary information and all other intellectual property rights and rights of a similar character (whether or not the same are registered or capable of registration) and all applications and rights to apply for protection of any of the same;
- 1.12 **"Parties"** means the parties to this Agreement, and the word "Party" means one of them;
- 1.13 **"Personal Data"** means personal information relating to -

**CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT BETWEEN THE GMA
AND**

- (i) the natural EU residents as far as the provisions of the GDPR apply; and
 - (ii) South African identifiable juristic person and/or an identifiable natural, living person, including but not limited to:
 - (a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person;
 - (b) information relating to the education or the medical, financial, criminal or employment history of the person;
 - (c) any identifying number, symbol, e-mail address, physical address, telephone number or other particular assignment to the person;
 - (d) correspondence sent by the person that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence;
 - (e) the name of the person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person;
 - (f) provided that such information is not in the public domain in the same or in a different format or held by a public body, and is publicly accessible;
- 1.14 “**POPIA**” means the Protection of Personal Information Act 4 of 2013, as amended from time to time;
- 1.15 “**Processing**” means any operation or set of operations, including collecting, recording, organising, storing, updating, modifying, retrieving, consulting, using, disseminating, analysing, or studying data, including the copying, transmission, distribution or making available to any third party in any form, merging, linking, as well as blocking, erasing or destroying any such data; and the words: "Process" and "Processed" will have corresponding meanings;
- 1.16 “**Project**” means the RFP in respect of the Public Private Partnership for the operation, maintenance, upgrade and modernisation of the Gautrain Rapid Rail Link System, and the assessment of its attractiveness for the preparation of response to the RFP;

**CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT BETWEEN THE GMA
AND**

- 1.17 “**Representative**” means a director, employee, agent, or professional adviser of a Party;
- 1.18 “**Receiving Party**” means a party receiving Confidential Information;
- 1.19 “**TendaSwift**” means the GMA’s automated tender System which is designed to-
- (i) ensure fairness, transparency and auditability of the bid submissions and simplicity for bidders and bid evaluators; and
 - (ii) assist prospective bidders to register online.
- 1.20 “**Trade secrets**” means any information belonging to either Party, including but not limited to technical or non-technical data, formulae, models, compilations, programmes, devices, methods, techniques, diagrams, processes which derive economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Interpretation

In this Agreement:

- 1.21 reference to any gender includes the other two genders, and the singular includes the plural and vice versa;
- 1.22 Clause headings in this Agreement are for convenience only and shall not be used in its interpretation.
- 1.23 Unless this Agreement clearly indicates a contrary intention, an expression which denotes any one gender includes the other genders, a natural person includes an artificial person and vice versa, and the singular includes the plural and vice versa.
- 1.24 Any provision conferring rights or imposing obligations on any Party, notwithstanding that it is only in the Definitions or Interpretation clause, shall be given effect as if it were a substantive provision of this Agreement.
- 1.25 Words and expressions defined in any clause will, for the purposes of the Agreement, bear the meaning assigned to the words and expressions in that clause.
- 1.26 The Parties will not be entitled to rely, in any dispute regarding this Agreement, on any

**CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT BETWEEN THE GMA
AND**

terms, conditions, warranties, guarantees or representations not expressly contained in this Agreement.

- 1.27 The rule of interpretation to the effect that, in the event of ambiguity, a contract must be interpreted against the Party responsible for drafting it, does not apply nor shall this Agreement be construed in favour of or against any Party by reason of the extent to which any such Party or its professional advisors participated in the preparation of this Agreement.

2 RECORDAL

- 2.1 The GMA has embarked on the Project and during the existence of this Agreement, the GMA will share the Confidential Information with the Receiving Party, relating to the Project.
- 2.2 The authorised purpose for which the Confidential Information is being disclosed is in respect of the Project.
- 2.3 The GMA is desirous to protect, through signature of this Agreement, the confidentiality of the information and data which it shall disclose to the Receiving Party.
- 2.4 The Parties wish to record herein the terms and conditions of their Agreement in writing.

3 COMMENCEMENT AND DURATION

- 3.1 This Agreement shall commence on the Effective Date and shall endure for a period of 3 (three) years, unless extended by the Parties.
- 3.2 Notwithstanding the provisions of clause 3.1, this Agreement may be terminated by a Party, giving the other Party 60 (sixty) days' written notice.
- 3.3 The termination of this Agreement shall not affect the enforceability of any rights accrued, and any obligations incurred, prior to the termination of this Agreement.

4 DISCLOSURE OF CONFIDENTIAL INFORMATION

- 4.1 The Receiving Party:

**CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT BETWEEN THE GMA
AND**

- 4.1.1 undertakes to keep the Confidential Information in strict confidence and acknowledges that the Confidential Information is being made available to it solely for the authorised purpose.
- 4.1.2 undertakes not to use the Confidential Information for any purpose other than for the Project;
- 4.1.3 undertakes to, in writing, inform its employees, agents, consultants, and/or service providers of its obligations of confidentiality arising from this Agreement and undertakes to cause such employees, agents, consultants, and/or service providers to adhere to the terms of this Agreement;
- 4.1.4 acknowledges that all such Confidential Information is valuable proprietary information to which the GMA retains exclusive rights and that all copyright in such Confidential Information vests in the GMA, notwithstanding its disclosure;
- 4.1.5 agrees that any documentation or records relating to the Confidential Information which comes into its possession:
 - 4.1.5.1 shall be deemed to form part of the Confidential Information of the GMA;
 - 4.1.5.2 shall be deemed to be the property of the GMA; and
 - 4.1.5.3 shall not be copied, reproduced, published or circulated by it, unless otherwise and specifically agreed to in writing by the GMA;
- 4.1.6 undertakes that, save as required by law, it will not disclose or permit to be disclosed Confidential Information to any persons other than persons authorised in terms of this Agreement, and even then, only to the extent necessary for the authorised purpose; and
- 4.1.7 warrants that it has adequate systems and procedures in place, to ensure the protection of all Confidential Information, including confidentiality undertakings from any Representative to whom Confidential Information is disclosed, and unconditionally indemnifies the GMA against any loss, harm or damage which the GMA may suffer as a result of the unauthorised disclosure of Confidential Information by it or its Representatives.
- 4.2 The undertakings in clause 4.1 shall not apply to any Confidential Information which is disclosed to satisfy an order of court or to comply with a legal requirement.

**CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT BETWEEN THE GMA
AND**

- 4.3 In the event that the Receiving Party, or its Representative, is required by law, to disclose Confidential Information, the Receiving Party shall promptly notify the GMA of the foregoing.
- 4.4 The Receiving Party acknowledges that the GMA does not make any representations as to the accuracy, reasonableness or completeness of the Confidential Information.
- 4.5 The GMA shall not be liable as a result of the Receiving Party relying on the Confidential Information.

5 USE OF DATA AND DATA PROTECTION

- 5.1 The Parties acknowledge that in the fulfilment of this Agreement, it may be necessary to share Personal Data of Data Subjects. The Parties undertake that Personal Data shall only be shared and processed in accordance with applicable legislation.
- 5.2 The Receiving Party acknowledges that to the extent that it processes Personal Data on behalf of the GMA, it shall ensure that, prior to forwarding such Personal Data to the GMA, such Personal Data is covered in consent forms. The Receiving Party shall include, in its consent forms, an indemnity clause relating to processing of personal information.
- 5.3 The Parties undertake to comply with Data Protection Legislation in connection with any Processing of Data pursuant to the provisions of this Agreement, including but not limited to the conclusion and execution of this Agreement.
- 5.4 The Receiving Party shall:
 - 5.4.1 not transfer Data Processed by it to a country outside South Africa without the prior written consent of the Party who is the responsible party or data controller for the purposes of applicable Data Protection Legislation;
- 5.5 Either Party undertakes to the other Party that it shall not, without the prior written consent of the other Party, Process any of the other Party's Data for any purpose not related to the purpose as stipulated in this Agreement, unless such Party is specifically required to do so in terms of any applicable legislation.

**CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT BETWEEN THE GMA
AND**

5.6 In relation to the Party's Data, which may be made available for Processing by either Party from time to time for the purposes of this Agreement, no title or other similar rights therein or thereto will pass to the other Party and, for the purposes of clarity and avoidance of doubt, any such Data will not constitute either Party's Data, other than as contemplated in this Agreement.

6 RETURN OF CONFIDENTIAL INFORMATION AND PERSONAL DATA

6.1 The GMA may, at any time, and in its sole discretion, request the Receiving Party to return any material, information and/or data in whatever form, pertaining to or relating to the Confidential Information disclosed pursuant to this Agreement.

6.2 The GMA may, in addition, request the Receiving Party to furnish a written statement to the effect that, upon such return, the Receiving Party has not retained in its possession, or under its control, either directly or indirectly, any such material, information and/or data, pertaining to the Confidential Information.

6.3 To the extent that it is not practically possible to comply with the provisions of clause 6.1, the Receiving Party shall destroy or ensure the destruction of all material, information and/or data in whatsoever form relating to the Confidential Information. The Receiving Party shall furnish the GMA with a written signed document to the effect that all GMA material, information and/or data has been destroyed.

6.4 The Receiving Party shall comply with any request by the GMA in terms of this clause, within 7 (seven) Business Days of receipt of such request.

6.5 The GMA shall, within 30 (thirty) Business Days after the termination of this Agreement, return to the Receiving Party its Personal Data collected during the existence of this Agreement.

7 INTELLECTUAL PROPERTY RIGHTS

7.1 All Intellectual Property Rights relating to any Confidential Information owned by the GMA shall at all times remain the sole property of the GMA.

7.2 The Receiving Party shall not in any manner alter or effect the display of the respective Intellectual Property Rights of the GMA, without the prior written approval of the GMA.

**CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT BETWEEN THE GMA
AND**

8 BREACH

8.1 In the event of breach of any term or condition of this Agreement, the GMA shall be entitled to:

8.1.1 apply to any court of competent jurisdiction, by way of urgent proceedings, to interdict or restrain the Receiving Party from perpetuating or continuing such breach or doing or permitting anything to be done, which constitutes a breach of any undertaking; and/or

8.1.2 whether or not the GMA elects to exercise its rights in terms of clause 8.1.1, claim, from the Receiving Party, all damages, both direct or consequential, which the GMA may suffer, as a result of such breach, including legal costs, on an attorney and own client scale, incurred by the GMA consequent upon the breach.

9 DISPUTE RESOLUTION

9.1 Any dispute arising under this Agreement shall be dealt with as follows:

9.1.1 Amicable **Settlement**

The Parties shall use their efforts to settle amicably all disputes arising from this Agreement.

9.1.2 **Arbitration**

9.1.2.1 If no resolution of the dispute has been reached by the Parties, in accordance with clause 9.1.1 and within a period of one (1) month after it arose, either Party may refer the matter to arbitration to be decided in accordance with the rules of the Arbitration Foundation of Southern Africa ("AFSA").

9.1.2.2 The appointment of the arbitrator will be agreed upon by the Parties, failing such an agreement, the arbitrator will be appointed by the Chairperson of AFSA.

9.1.2.3 Either Party to this Agreement may demand that a dispute be referred to arbitration by giving written notice to that effect to the other Party.

**CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT BETWEEN THE GMA
AND**

9.1.2.4 The arbitration shall be held in South Africa. The parties irrevocably agree that the decision in arbitration proceedings shall be final and binding upon the Parties and may be made an order of any court of competent jurisdiction.

9.2 This clause shall not preclude either Party from obtaining urgent interim relief from a court of competent jurisdiction in South Africa.

10 PARTIAL INVALIDITY

If any provision of this Agreement is or becomes illegal, invalid or unenforceable in any respect under the law of any jurisdiction, neither the legality, validity or enforceability of the remaining provisions of this Agreement shall in any way be affected or impaired.

11 DOMICILIUM AND NOTICES

11.1 Notices in terms of this Agreement must be in writing and may be delivered by hand and/or email, except in respect of notice of any breach of the Agreement which shall not be competent to be given by way of electronic mail, to the email or addresses of the Parties specified hereunder:

11.1.1 GAUTRAIN MANAGEMENT AGENCY

44 Grand Central Boulevard
Midrand, 1682
Email: info@gautrain.co.za

11.1.2 [_____

_____]

Email: [_____]

11.2 The *domicilium citandi et executandi* is chosen for the purpose of giving notice, the service of any process, documents or communications and for any other purpose arising from this Agreement.

**CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT BETWEEN THE GMA
AND**

- 11.3 Either party hereto shall be entitled, from time to time by written notice to the other, to vary its *domicilium* address to any other address within the Republic of South Africa.
- 11.4 Any notice shall be deemed to have been received, until the contrary is proved, if hand delivered during business hours on a business day, on the day of delivery; If sent by telefax or e-mail, on the date of sending of such telefax or e-mail; if posted by registered post from an address within the Republic of South Africa, on the seventh (7th) business day after the date of posting.
- 11.5 Any notice in terms of or in connection with this Agreement shall be valid and effective only if in writing and if received or deemed to be received by the addressee.

12 GOVERNING LAW

This Agreement shall be governed by and construed in accordance with the laws of the Republic of South Africa.

13 GENERAL

- 13.1 This Agreement constitutes the sole record of the agreement between the Parties with regard to the subject matter hereof. No Party shall be bound by any express or implied term, representation, warranty, promise or the like, on the subject matter hereof, unless reduced in writing and signed by both Parties.
- 13.2 No addition to, variation, or agreed cancellation of this Agreement shall be of any force and effect unless in writing and signed by or on behalf of the Parties.
- 13.3 No waiver of any right/s under this Agreement shall be effective unless reduced to writing and signed by the Party waiving such right/s.
- 13.4 No relaxation or indulgence, which any Party may grant to any other, shall constitute a waiver of the rights of that Party and shall not preclude that Party from exercising any rights which may have arisen in the past or which might arise in future.
- 13.5 No Party shall be entitled to cede, delegate or otherwise transfer all or any of its rights, interests or obligations under and in terms of this Agreement except with the prior written consent of the other Party.

**CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT BETWEEN THE GMA
AND**

14 COSTS

Each Party shall bear its own costs of and incidental to the negotiation, preparation and signature of this Agreement.

THUS DONE AND SIGNED AT MIDRAND ON THIS _____ DAY OF _____ 2023

Name:

For: **Gautrain Management Agency**

Capacity:

Who confirms that he is duly authorised as signatory for the GMA.

THUS DONE AND SIGNED AT _____ ON THIS _____ DAY OF _____ 2023

Name:

For:

Capacity:

Who confirms that he is duly authorised as signatory for the Receiving Party.