

Request for Proposal (RfP)

Heavy Duty Vehicle Efficiency Programme: Rolling Resistance Optimisation System Project Appendix C - Non Disclosure Agreement

The Non-Disclosure Agreement (NDA) protects the confidential information of the Respondents and the ETI during the period of the Project Commissioning Process. For the successful Respondent(s), the confidentiality provisions in the Project Contract (when executed) will supersede this NDA.

Notes

In order to ensure parity across different groups of Respondents, the ETI will not enter into negotiations on the terms of this NDA.

NDA Execution Process / Instructions

In the case of a proposed Sole/Prime Contractor as Respondent (no Information (as defined in the RfP) to be disclosed to Subcontractors):

- The Sole/Prime Contractor should complete Schedule 1 of a single electronic NDA with its company (legal) details and a postal address for return by the ETI of a fully executed NDA.
- The Sole/Prime Contractor should print and sign **TWO** paper copies of the NDA. **The NDA must not be dated on the front page.**
- The Sole/Prime Contractor should scan a copy of a signed and undated NDA and email it to the ETI at the address on the front of the RfP.
- The Sole/Prime Contractor should post both original signed and undated copies to the ETI.
- On receipt, the ETI will countersign and date the two original copies of the NDA. The ETI will retain one of these copies and post the other to the Sole/Prime Contractor at the address provided by the Sole/Prime Contractor at Schedule 1 of the completed NDA.

Where a proposed Prime Contractor wishes to provide Information (as defined in the NDA) to any proposed Subcontractor(s), those Subcontractor(s) should also sign the NDA (see Section 7.1.2 of the RfP main body). In this case, the ETI intends to execute the NDA in counterparts as follows:

- The proposed Prime Contractor should complete Schedule 1 of a single electronic NDA with the legal company details of the Prime Contractor and (each of) the proposed Subcontractor(s), together with the Prime Contractor's postal address for return by the ETI of fully executed NDAs.
- The Prime Contractor should circulate electronically the NDA with the fully completed Schedule 1 to (each of) the Subcontractor(s) **and to the ETI** (at the email address on the front page of this RfP).
- The Prime Contractor and the Subcontractor(s) should **each** print and sign **TWO** paper copies of the NDA. **The NDA must not be dated on the front page.**
- The Prime Contractor and the Subcontractor(s) should **each** scan one of its respective signed undated counterpart NDAs and send it by email to the ETI at the address on the front of this RfP.
- The Prime Contractor and the Subcontractor(s) should **each** send to the ETI by post **ONE** original undated counterpart signed NDA. The ETI recommends that the other original undated signed NDA is

sent by (each of) the Subcontractor(s) to the Prime Contractor so that the Prime Contractor may hold a complete set of original counterpart NDAs, one signed by each of the Prime Contractor and (each of) the Subcontractor(s), on behalf of the Prime Contractor and Subcontractor(s).

- On receipt of a complete set of original counterpart NDAs (one signed by each of the Prime Contractor and (each) Subcontractor), the ETI will sign and date two further counterpart copies of the NDA. The ETI will notify the Prime Contractor of the date of the NDA (i.e. the date of the ETI's signature) so that the original Prime Contractor and Subcontractor(s) counterparts held by the Prime Contractor may be dated on the front page.
- The ETI will retain one of the original counterpart NDAs signed and dated by the ETI; the ETI will return the other original ETI counterpart NDA to the Prime Contractor to hold on behalf of the Prime Contractor and Subcontractor(s).

The ETI and the Prime Contractor should each then have a complete set of original, dated, counterpart NDAs.

In the case of Respondents intending to submit a Proposal as a Consortium, the ETI intends to execute the NDA in counterparts as follows:

- The proposed Lead Coordinator should complete Schedule 1 of a single electronic NDA with the legal company details of all Respondents (the Lead Coordinator and each of the other proposed Consortium Members), together with a **single** postal address for return by the ETI of fully executed NDAs.
- The Lead Coordinator should circulate electronically the NDA with the fully completed Schedule 1 to all Respondents **and to the ETI** (at the email address on the front page of this RfP).
- Each of the Respondents (all proposed Consortium Members including the Lead Coordinator) should print and sign **TWO** paper copies of the NDA. **The NDA must not be dated on the front page.**
- For each Respondent, one of the signed undated counterpart NDAs should be scanned and sent by email to the ETI at the address on the front of this RfP.
- For each Respondent, **ONE** original undated counterpart signed NDA should be sent to the ETI by post. The ETI recommends that the other original undated signed NDA is sent by the Respondents to the Lead Coordinator so that the Lead Coordinator may hold a complete set of original counterpart NDAs, one signed by each Respondent, on behalf of the Respondents.
- On receipt of a complete set of original counterpart NDAs (one signed by each Respondent), the ETI will sign and date two further counterpart copies of the NDA. The ETI will notify the Lead Coordinator of the date of the NDA (i.e. the date of the ETI's signature) so that the original Respondent counterparts held by the Lead Coordinator may be dated on the front page.
- The ETI will retain one of the original counterpart NDAs signed and dated by the ETI; the ETI will return the other original ETI counterpart NDA to the Lead Coordinator to hold on behalf of the Respondents.
- The ETI and the Lead Coordinator should each then have a complete set of original, dated, counterpart NDAs.

Where the proposed Lead Coordinator and/or any other proposed Consortium Member wishes to disclose Information (as defined in the NDA) to any proposed Subcontractor(s), the Subcontractor(s) must also sign the NDA in accordance with the above (as though the Subcontractor(s) were a Respondent/Consortium Member).

CONFIDENTIALITY AGREEMENT

THIS AGREEMENT is made on _____ of _____ 2015

BETWEEN:

- (1) **ENERGY TECHNOLOGIES INSTITUTE LLP**, a limited liability partnership (company no. OC333553) whose registered office is at Holywell Building, Holywell Way, Loughborough, Leicestershire, LE11 3UZ (the “**ETI**”); and
- (2) **The parties named in Schedule 1 of this Agreement** (the “**Respondents**”),
(collectively the “**Parties**” and individually a “**Party**”)

BACKGROUND:

The Parties intend to exchange certain Information on or after the Effective Date for or in relation to the Purpose. The Parties agree to receive such Information, and to treat it as confidential information, on the following terms and conditions.

IT IS AGREED:

In consideration of the above and for other good and valuable consideration the receipt and sufficiency of which is hereby acknowledged, and intending to be legally bound, the Parties agree as follows:

- 1 In this Agreement, unless the context requires otherwise, the following words shall have the following meanings:

“**Disclosing Party**” means any Party that discloses Information under this Agreement;

“**Effective Date**” means the date of execution of this Agreement;

“**ETI Affiliates**” means the Secretary of State for Business, Innovation and Skills (and any successor governmental department or agency from time to time) and any other entity which is entitled to appoint the directors or otherwise having the ability to direct management policies of the ETI (together with any affiliates of those entities), together with their respective officers, employees, agents and consultants;

“**Information**” means any and all confidential information or data exchanged, submitted or otherwise disclosed in respect of or further to the Purpose or prepared for or in relation to the Purpose, including but not limited to written proposal documentation, due diligence materials, contractual documentation, reports, confidential intellectual property (including subject matter and embodiments thereof), and the fact that the Parties have entered into this Agreement and are discussing and considering a business relationship;

“**Project**” means the proposed project under the ETI Heavy Duty Vehicle Efficiency Programme entitled “Rolling Resistance Optimisation System Project”;

“**Project Commissioning Process**” means the ETI’s commissioning process for the Project as defined in the RfP or as later may be notified or published by the ETI;

“**Project Contract**” means a Project Contract as such term is defined in the RfP;

“**Proposal**” means a Proposal as such term is defined in the RfP;

“**Purpose**” means:

- a the preparation and/or submission of any Proposals/Submission and related documents in

- response to the RFP;
- b the Project Commissioning Process;
- c any activities related to the assessment by or on behalf of the ETI of any Proposals / Submissions for the Project; and
- d any related exchanges of Information, clarifications, clearances, discussions, due diligence, meetings, and/or negotiations in respect of the RFP, the Project Commissioning Process and/or the Project, in each case between the Respondent(s) and the ETI (or any of them);

“Receiving Party” means any Party that receives Information under this Agreement;

“RFP” means the request for proposals relating to the Project, issued by the ETI on 18th March, 2015; and

“Submission” means a Submission (and the components thereof) as defined in the RfP.

2 The Receiving Party shall with regard to any Information disclosed under this Agreement by or on behalf of a Disclosing Party on or after the Effective Date:

- a hold the Information in confidence and, except as is otherwise stated herein or agreed in writing by the Disclosing Party, shall not disclose or make available the Information by publication or otherwise to any third party (including for the avoidance of doubt, disclosure in any patent application or to any patent office) and shall use any Information disclosed to it pursuant to this Agreement only for carrying out the Purpose;
- b make copies of the Information (or any further information derived from the Information) in whatever form or medium only to the extent that the copies are reasonably necessary for the Purpose and clearly mark all such copies as confidential;
- c take all necessary and proper security precautions (and at least as great as those it takes to safeguard its own information) to safeguard every part of the Information to prevent it from being disclosed or otherwise made available to any third party except as permitted by this Agreement; and
- d at the request and direction of the Disclosing Party, and without delay, return or destroy any Information provided to it pursuant to this Agreement and any copies of such Information, except that one copy may be kept by the Receiving Party for archival purposes and for the purpose of defending itself against any claims arising in connection with this Agreement.

3 The obligations set out in clause 2 shall not apply to Information that:

- a the Receiving Party can prove (using written or electronic records), was lawfully known to the Receiving Party or in its possession prior to its communication by or at the direction of the Disclosing Party and was not communicated to the Receiving Party subject to any restrictions on disclosure or use; or
- b is or becomes a part of the public domain through no wrongful act of the Receiving Party or any person on its behalf, provided that this clause 3(b) shall only apply from the date that the relevant Information so enters the public domain; or
- c the Receiving Party receives from a third party without similar obligations of confidence in circumstances where the third party did not obtain that Information as a result of a breach of an obligation of confidence; or
- d subject to clause 4, is required to be disclosed or made available by the Receiving Party pursuant to any applicable law, governmental regulation, or decision of any court or tribunal of competent jurisdiction or any government body, agency or regulatory body.

4 If a Receiving Party believes it is required by law to disclose any Information under clause 3(d) above, the Receiving Party shall (in each case and to the extent not prohibited in law):

- a provide the Disclosing Party with prompt written notice of such requirement or obligation (together with a copy of any relevant access request, court order or other evidence giving rise to such belief) in advance of the required disclosure, to enable the Disclosing Party to seek appropriate protective relief and/or to take other steps to resist or narrow the scope of any required disclosure;
- b where it is not permitted in law to notify the requirement for disclosure in advance of the required disclosure, notify the Disclosing Party as soon as reasonably practicable after the disclosure confirming the nature of and extent of the disclosure; and
- c co-operate with the Disclosing Party with respect to such matters,

and in any event disclose only such Information as it has ascertained, after taking legal advice, it is legally compelled to disclose.

5 The ETI shall be entitled to disclose or make available any Information it receives from the Respondents (or any of them) to:

- a such of the ETI Affiliates, and either the ETI's or the ETI Affiliates' employees, officers, secondees, agents, consultants, subcontractors, proposed subcontractors, professional advisers and proposed professional advisers where such disclosure is necessary for the Purpose, provided that all such aforementioned persons to whom any Information is disclosed by the ETI are bound by obligations of confidentiality and the ETI shall be responsible for breaches of the obligations by such persons. Each ETI Affiliate may enforce this clause in accordance with the Contracts (Rights of Third Parties) Act 1999; and
- b the Department of Business, Innovation and Skills (or other relevant government department), the European Commission and such other bodies and/or individuals (including without limitation professional advisers) as may reasonably be required for the notification of, to seek advice in relation to, as part of an assessment of, or otherwise in relation to, State aid.

6 The ETI shall be entitled to disclose or make available any Information it receives from a Respondent to any other Respondent where it is necessary for the Purpose (and, for the avoidance of doubt, such other Respondent shall receive such Information as a Receiving Party).

7 Each Respondent shall be entitled to disclose or make available any Information it receives from the ETI or any other Respondent to such of its employees, officers, and professional advisers where such disclosure is necessary for the Purpose provided that all such persons to whom any Information is disclosed are bound by obligations that are no less restrictive than those in this Agreement. The Respondent disclosing Information shall be responsible to the ETI for breaches of the obligations by such persons; for the avoidance of doubt, this Clause 7 does not permit disclosure by a Respondent to agents, consultants or subcontractors (or proposed agents, consultants or subcontractors).

8 Each Respondent shall be entitled to disclose or make available any Information it receives from the ETI to any other Respondent where it is necessary for the Purpose (and, for the avoidance of doubt, such other Respondent shall receive such Information as a Receiving Party).

9 Each Party as Receiving Party expressly agrees and accepts that except in the case of fraud, no representation or warranty, express or implied, is made by the Disclosing Party as to the accuracy, completeness, reasonableness or otherwise in respect of the use of the Information, and that neither the Disclosing Party or any of its affiliates nor any of its or their respective employees, officers, secondees, agents, consultants, subcontractors and professional advisers (as applicable) shall have any liability to the Receiving Party as a result of the Receiving Party's possession or use of the Information.

10 The Parties agree that money damages would not be a sufficient remedy for any breach of this Agreement and that the Disclosing Party shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach. Such remedy shall not be deemed to be the exclusive remedy for breach of this Agreement, but shall be in addition to all other remedies available at law or equity.

11 No rights or obligations other than those expressly set out in this Agreement are to be implied and nothing contained in this Agreement:

- a constitutes an offer by or on behalf of the Disclosing Party; or
 - b confers upon the Receiving Party a licence or other transfer of rights in respect of any Party's interest in any Information or in any present or future patent or patent application; or
 - c affects the present or prospective rights of the Disclosing Party under the patent laws of any country or precludes the filing or prosecution of any patent applications by the Disclosing Party.
- 12 This Agreement represents the entire agreement between the Parties in relation to the subject matter contained herein and supersedes all other agreements and representations, whether oral or written, between the Parties relating to such subject matter. This Agreement may only be modified if such modification is in writing and signed by a duly authorised representative of each Party. Each Party also agrees that it shall have no remedies or claims under this Agreement for any innocent or negligent misrepresentation based on statements made prior to the Effective Date.
- 13 The Parties agree that the ETI may disclose that one or more of the Respondents are involved in discussions with the ETI and the subject matter of the discussions provided that the ETI will provide a copy of any press release or other announcement to the Respondents and seek the approval of the Respondents prior to its publication or release. Other than as set out in this clause, none of the Parties will make any public announcements, statements or otherwise publicise the subject matter of this Agreement (or its existence) without the prior written consent of the other Parties and no Party will use the business names or trade marks of any other Party in any way without that Party's prior written consent.
- 14 This Agreement shall come into force on the Effective Date and shall continue in full force and effect, notwithstanding the completion of the Purpose, for a period of seven years from the Effective Date unless extended, superseded or otherwise varied by a subsequent written agreement between the Parties.
- 15 The Respondents (and each of them) (i) acknowledge that certain Information disclosed by or on behalf of the ETI may be proprietary and/or confidential to one or more ETI Affiliates, and (ii) agree that the terms of this Agreement (including without limitation clause 2) may be enforced by such ETI Affiliate(s) in their own right; save as aforesaid, it is not intended that a third party (other than an ETI Affiliate) should have the right to enforce a provision of this Agreement pursuant to the Contracts (Rights of Third Parties) Act 1999.
- 16 The rights of a Disclosing Party under this Agreement are in addition to and not exclusive of rights under the general law and may be waived only in writing and specifically. Delay in exercising or non-exercise of any right under this Agreement is not a waiver of that or any other right, partial exercise of any right under this Agreement shall not preclude any further or other exercise of that right or any other right under this Agreement and waiver of a breach of any term of this Agreement shall not operate as a waiver of breach of any other term or any subsequent breach of that term.
- 17 If any provision of this Agreement is or becomes illegal, invalid or unenforceable in any jurisdiction, that shall not affect:
- a the legality, validity or enforceability in that jurisdiction of any other provision of this Agreement; or
 - b the legality, validity or enforceability in any other jurisdiction of that or any other provision of this Agreement.
- 18 Nothing in this Agreement is intended to or shall operate to create a partnership or joint venture of any kind between the Parties (or any of them), or to authorise any Party to act as agent for another, and no Party shall have authority to act in the name or on behalf of or otherwise to bind any other in any way.
- 19 Except as provided otherwise, no person may assign any of its rights under this Agreement or any document referred to in it.
- 20 This Agreement may be executed in any number of counterparts, each of which when executed and delivered shall constitute an original of this Agreement, but all the counterparts shall together constitute the same agreement. No counterpart shall be effective until each Party has executed at least one

counterpart.

21 This Agreement shall be construed in accordance with and governed by English law and the Parties hereby submit to the non-exclusive jurisdiction of the English Courts.

The Parties have caused this Agreement to be executed by their duly authorised representatives.

ENERGY TECHNOLOGIES INSTITUTE LLP

By: _____

Name: _____

Title: _____

Date: _____

SCHEDULE 1

Respondent	Signature
Company Name: Company No: Address of Company:	By: Name: Title:
Company Name: Company No: Address of Company:	By: Name: Title:
Company Name: Company No: Address of Company:	By: Name: Title:
Company Name: Company No: Address of Company:	By: Name: Title:
Company Name: Company No: Address of Company:	By: Name: Title:

The ETI will return a copy of the executed Non Disclosure Agreement to the Sole/Prime Contractor or Lead Coordinator of a Consortium (whichever appropriate). Please provide the relevant name and address for this correspondence below.

Contact for return of executed Non Disclosure Agreement	Send to [name]: At postal address:
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