FIRST ROUND AUCTION NDA

BVCA DRAFT

**Guidance for use:**

1. This NDA is intended for use in round 1 of an auction process where:
2. that process is likely to involve more than 10-15 bidders initially;
3. only limited information (e.g. an information memorandum and process letter) will be circulated to bidders in round 1 and, to the extent such information contains any personal data, the persons to whom such personal data relates have expressly consented to its circulation to bidders; and
4. the intention is to take a smaller group of bidders into round 2.
5. If additional information is likely to be circulated in round 1 (e.g. VDD reports or access to a data room) or the information to be circulated (as referred to in paragraph 1(ii) above) contains personal information and the relevant persons have not consented to its disclosure, the full form BVCA NDA should be used instead. This is particularly important if personal data is likely to be disclosed. It may also be appropriate to use the full form BVCA NDA for trade bidders or for those who would simply prefer to agree the full form.
6. This NDA has been drafted on a fair and equitable, short-form basis. Bidders should be encouraged to sign it without any negotiation. In particular the Appendix should not be amended. If a specific tailored provision is required, this should be included in the cover front page, so that parties know the main terms in the Appendix are not altered from this short form standard. If a bidder wants to negotiate the NDA, the full form BVCA NDA should be used instead so that two NDAs do not have to be negotiated as part of the process.
7. If bidders progress to round 2, they should then be asked to sign the longer form BVCA NDA (containing clauses on data protection and restrictive covenants) prior to obtaining access to a data room or any further information. This longer form NDA will need to be negotiated in the usual way but with far fewer parties.

**Guidance for circulation**

The following practice points should be considered when sending this NDA to bidders:

1. This NDA is split into two parts:
2. a cover letter which includes the prospective buyer's details and the agreement to be bound by the non-disclosure provisions set out in the Appendix (see (ii) below). Note that any amendments to the wording in the Appendix that may be agreed between the parties should be set out in the cover letter, as an exceptional change to what is otherwise a non-negotiable NDA. The parties agree to be bound by the terms of the NDA by signing the cover letter;
3. the short-form NDA provisions are set out in the Appendix to the cover letter and should always be circulated in PDF format (not as a word document). No changes should be made to the Appendix.
4. Explain to the bidder / Corporate Finance house that this NDA is designed to save time and money at the early stage of an auction process. It has received BVCA approval and is drafted fairly and equitably such that negotiation of the terms is not required. If the bidder is successful in making it through to the next round, they will then be required to sign a long-form NDA (which can be negotiated) prior to obtaining access to the data room and more detailed information relating to the Group.
5. If a Corporate Finance House has been appointed, you should ask them to include specific wording in their covering email to bidders, explaining the process. You might ask them to use something along these lines:

"Thank you for expressing an interest in Project [●]. To enable us to share more meaningful information with you (including an IM), please sign and return the attached first round NDA in the form provided.

Please note that you are **not** invited to provide comments on this NDA. It has been drafted on a fair and equitable basis, without inclusion of restrictive covenants or other onerous clauses, so that it can be signed without negotiation. This is so that we can share preliminary (round 1) information with you quickly and efficiently.

If you progress to the next phase of this process, you will be required to sign a long-form NDA prior to obtaining access to the data room and other more detailed information relating to the Group."

**[On Target Letterhead]**

To: [prospective buyer]
[address]

Dear Sirs

Project [●] – Round 1 Confidentiality Undertaking

You have expressed an interest in evaluating a potential acquisition of the entire issued share capital of [●] Limited (the "**Company**") and/or any of its subsidiary undertakings (together, the "**Group**" and each a "**Group Company**") (the"**ProposedTransaction**").

In consideration for the Company agreeing to make [an information memorandum and process letter regarding the Proposed Transaction] ("**Information**") available to you, you agree to be bound by the terms and conditions set out in the Appendix to this letter and each of the undertakings to be given by you therein. This letter, together with the Appendix shall be referred to as "**this Agreement**".[[1]](#footnote-1)

If you progress to the next phase of the Project [●] process, you will be required to agree and sign a long-form non-disclosure agreement (the "**NDA**") prior to obtaining access to the Project [●] data room and other more detailed information relating to the Group.

Capitalised terms used in the Appendix, unless otherwise defined therein, shall have the meaning given in this letter.

Please acknowledge your acceptance of, and entry into this Agreement by signing and returning a copy to [●] at [●] *[insert details of person collating the signed NDAs].*

Yours faithfully

 for and on behalf of
**[COMPANY]**

**Date:**

Agreed and accepted:

**By** for and on behalf of
**[BUYER]**

**Date:**

**APPENDIX**

**Non-disclosure Agreement**

Each of the undertakings in this Agreement is given by you in favour of each Group Company and the Company's shareholders (the "**Shareholders**").

Information may only be disclosed to those of your affiliates (excluding portfolio companies) and your and their directors, officers, employees and professional advisers (excluding potential providers of finance or insurance) who are directly concerned with your assessment of the Proposed Transaction ("**Recipients**") and may only be used by you and them for the purpose of evaluating the Proposed Transaction. You shall procure that each of your Recipients to whom Information is disclosed is made aware of and agrees to comply with the provisions of this Agreement as if it were a party hereto. Accordingly, you shall be responsible for any breach by any such person of the provisions of this Agreement.

You shall not, without our prior written consent, disclose to any person (except your Recipients) any Information except where such disclosure is required by law or regulatory or governmental authority in which case the disclosure shall, to the extent permitted by law, be made by you after taking into account our reasonable requirements as to its timing, content and manner. If you are unable to consult with us before the disclosure is made, you will, to the extent permitted by law, inform us of the circumstances, timing, content and manner of making the disclosure as soon as reasonably possible after such disclosure is made.

Within 20 days of a request from the Company, you and your Recipients will destroy all copies of any document or materials that contain Information save that this paragraph shall not apply to Information which: (i) you or your Recipients are required to retain pursuant to any applicable law, rule or requirement of any regulatory or governmental authority or stock exchange, including rules of a professional body or your own internal compliance policies and procedures; or (ii) is contained in an electronic file created pursuant to any routine back-up archiving procedure so long as such file is not generally accessible beyond the need for disaster recovery.

It is agreed that the undertakings in this Agreement shall not apply to Information that: (i) is or becomes publicly known, other than by breach of this Agreement by you or any of your Recipients; or(ii)is lawfully received by you or your Recipients from a third party who does not owe the Company or any of the Shareholders an obligation of confidence in relation to it.

You understand that the Information does not purport to be all-inclusive and that, subject to the terms of any definitive agreement(s) relating to the Proposed Transaction, no Group Company or Shareholders or any of their affiliates, directors, officers, employees or advisers: (i) makes any representation or warranty as to its accuracy, reliability or completeness; or (ii) has any obligation to provide further information, to update the Information, to correct any inaccuracies in the Information or to enter into or continue discussions or negotiations in respect of the Proposed Transaction. Nothing in this paragraph 6 shall exclude any liability for fraud or fraudulent misrepresentation.

The parties to this Agreement may, by written agreement, terminate or vary the terms of this Agreement without the consent of any of the other Group Companies, Shareholders or Recipients. No other person who is not party to this Agreement shall have any right, under the Contracts (Rights of Third Parties) Act 1999 (the "**1999Act**"), to enforce any terms of this Agreement.

The terms of this Agreement shall (unless terminated in accordance with paragraph 7) continue until the earlier of: (i) the first anniversary of the date of this Agreement (being the date it is signed by or on your behalf); and (ii) the entry into the NDA by you in which event the terms of this Agreement will lapse, save in respect of any antecedent breach of this Agreement.

This Agreement and any non-contractual obligations arising out of or in connection with it shall be governed by, and construed in accordance with, English law and the English courts shall have exclusive jurisdiction in relation to all disputes arising out of, or in connection with, this Agreement. Each party waives any objection to the exercise of that jurisdiction.

1. If a Target or Buyer specific provision is required, this should be included in this tailored section. The Appendix should not be amended. [↑](#footnote-ref-1)