The Engineering Professions Association of Namibia

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To:

NATDAB Members

DABFORUM Members

Dear Sir or Madam,

OFFER FOR THE ESTABLISHMENT AND MANAGEMENT OF THE NATIONAL ADJUDICATORS' LIST BY THE ENGINEERING PROFESSIONS ASSOCIATION OF NAMIBIA

1 Introduction and Background

1) The Engineering Professions Association of Namibia gratefully acknowledges the Proposal submitted to the EPA jointly by the City of Windhoek, the Roads Authority, and the NATDAB and DABFORUM Members, dated 27 September 2007, for the EPA to establish and manage a National Adjudicators' List (NAL). The confidence shown in the EPA is highly appreciated, and the EPA has since pursued further consultations with stakeholders and investigations regarding this Proposal such as to do justice to the confidence shown.

2) The main milestones of developments that have taken place since the receipt of the aforementioned Proposal may briefly be summarised as follows:

   a) 2007-10-01 and 1007-11-02: Stakeholders' meeting to discuss implementation matters;

   b) 2007-11-01/08: Discussion of the Proposal at the EPA AGM and the subsequent EPA Council Meeting, establishing the EPA's commitment to the Proposal;

   c) 2007-11-12: Letter by the EPA to the CEO, City of Windhoek, expressing the EPA's support in principle to the Proposal, that the EPA would seek support for the Proposal among its members and other stakeholders, and that the EPA would express itself accordingly at the NAL Launch function;

   d) 2007-11-27: Launch of the NAL and EPA's management thereof, by the former Minister of Works, Transport and Communication, the Honourable J Kaapanda; in the acceptance speech by its President, the EPA acknowledged the sound basis that had already been laid for the NAL, but emphasised that much additional work was required, for which the EPA would have to mobilise the required resources and establish a sustainable funding basis;

   e) 2008-01-31: Open discussion of the NAL Proposal with EPA members and stakeholders at a sundowner meeting, at which the decision was taken that the NAL would have to be managed by a remunerated manager to make the provision of services as requested in the Proposal sustainable;

   f) 2008-02-21: Establishment of the NAL Implementation Committee, comprising representatives of the EPA, City of Windhoek, Roads Authority and InWEnt (Capacity Building International, Germany, as sponsor), to which NATDAB representatives of NamPower and NamWater had also been invited; meetings of the Committee were held in March and April 2008;

   g) 2008-04-04: Appointment of an NAL Implementation Coordinator, to prepare a business plan proposal for EPA's establishment and management of the NAL, and to undertake the initial implementation tasks required towards the presentation of an NAL Stakeholder Workshop, all supported by InWEnt sponsorship;

   h) 2008-05-16: NAL Stakeholders' Workshop, at which the EPA-NAL business plan was presented to and discussed with stakeholders; a report on the outcome of the Workshop is attached hereto; and

i) 2008-06-05: The outcome of consultations with stakeholders at the NAL Stakeholders' Workshop and otherwise was discussed at the monthly EPA Council Meeting.

3) The EPA's offer for the establishment and management of the NAL, as presented herein, is based on the decisions taken at the said Council meeting.

2 Conclusions drawn by the EPA Council from the NAL Stakeholders' Workshop and other Stakeholder consultations

1) The most relevant conclusions towards providing a direction for the way forward concern the current practice regarding adjudication and the nomination and appointment of adjudicators that has been generally adopted in the construction industry in Namibia. It serves to be emphasized that this has been found to be the actual practice; irrespective of whether this is the practice as envisaged in terms of the commonly used FIDIC forms of contract.

2) This practice can briefly be summarised as follows:

   a) When a construction contract is concluded between an Employer and a Contractor, the Employer requests the responsible consulting engineer to procure and submit a number of CVs from persons that would be suitable to serve as adjudicator(s) on the Dispute Adjudication Board (DAB) for the contract. This service of the consulting engineer does not involve any extra cost to the Employer.

   b) The consulting engineer obtains CVs as requested, submits these to the Employer, and the Employer and Contractor agree (apparently this is usually the case) on one of the adjudicators whose CVs have been submitted.

   c) The agreed upon adjudicator(s) is (are) informed of the decision, but not necessarily appointed immediately. It appears that the Employer and Contractor often appoint the adjudicator(s) only if a need for adjudication actually arises. The reason for this seems to be the rarity of a matter having to be referred to adjudication. It seems that in most cases the Engineer, in consultation with the Employer and Contractor, manages to amicably resolve "differences" arising on a contract, so that these hardly ever escalate into a formal dispute.

   d) Some Employers even dispense with the above procedure, and the nomination and appointment of adjudicators are only undertaken when a dispute needs to be referred to adjudication.

3) A need for the services of an independent adjudicator nominating body therefore arises only in very rare cases, namely when the Employer and Contractor cannot agree on the adjudicator(s) to be nominated to the DAB, and often only when a dispute arises that requires adjudication.

4) The conclusion that the EPA Council has drawn from this is that Employers would only rarely make use of the services of the EPA-NAL, and would generally approach the adjudicators on the NAL directly, or through their consulting engineers.

5) As long as the construction industry maintains the aforementioned practice, the revenue generated through and for the NAL would be minimal. Consequently, the rendering of most of the services that the EPA has in its NAL Business Plan proposed to render, would not be financially viable.

3 EPA Proposal for the Establishment and Management of the NAL

1) Firstly, regarding the provision of NAL services, the EPA Council has resolved to be guided by actual, current industry practice and needs. In this spirit, the EPA would regard it as inappropriate to attempt entering into agreements with adjudicators on the NAL to make their services available only through the EPA as a nominating body. Concerning Employers, the current need is evidently for an independent nominating body, which can be called upon to nominate adjudicators whenever the actual need for this arises; namely, when an Employer and Contractor cannot agree on an adjudicator nomination. The EPA proposes to render such a service at fees that are aimed at cost recovery for the service provision, and at Employers progressively taking financial responsibility for the development of adjudication and adjudicators in Namibia.

2) Secondly, the EPA Council has been guided by the sentiments expressed by stakeholders at the NAL Stakeholders' Workshop; namely, that a need for the development of adjudication and

adjudicators in Namibia does exist. The ideals expressed in the aforementioned Proposal for the management of the NAL, which had been submitted to the EPA and which have been accommodated in the proposed EPA-NAL Business Plan, would thus serve as an aim for the industry, together with the EPA, to strive towards. The EPA thus proposes to render adjudication capacity development services and facilitate an industry mind change towards supporting such capacity development, to the extent that it is able to procure sponsorship and industry support (through the use of and payment for the EPA-NAL services) for these purposes.

3) With regard to the above undertakings, it must be clearly appreciated that the EPA does not see for itself a role in subsidising the development and provision of adjudication services to the industry, but that the industry must take the financial responsibility therefor. Considering the vast sums that Employers are spending on construction contracts, the EPA believes that it is for Employers to assume that responsibility, being something they could readily afford to do.

4) To the various points in the Proposal for the management of the NAL, dated 27 November 2007, as submitted to the EPA, the EPA wishes to respond as follows.

5) <u>Regarding the administration and management of the NAL by the EPA:</u>

   a) The EPA acknowledges the contributions made by the City of Windhoek, the Roads Authority, InWEnt, NATDAB and DABFORUM members in establishing the core of adjudicators that currently form the NAL, and the rules and procedures for the evaluation of adjudicators to be admitted to the NAL[1]; and

   b) The EPA will:

      i) Maintain the NAL in its current form, and through it offer impartial adjudicator nomination services on a national level; on demand, subject to the availability of suitable adjudicators on the NAL, and against payment of appropriate fees for this service;

      ii) Take over and maintain the DABFORUM mailing list and facilitate the Forum as a means of information exchange among the members of the DABFORUM, but without the EPA providing any inputs into this Forum; i.e., the extent to which the Forum serves its purpose will depend on contributions by the members of the Forum;

      iii) Be prepared to conclude a Memorandum of Agreement with any Employer who wishes to subscribe on an annual basis to the services of the EPA-NAL, and offer to such an Employer adjudicator nominating services against a reduced nomination fee; this is aimed at facilitating Employers to assume responsibility for the development of adjudication in Namibia, while at the same time saving on nomination fees, if such Employer were to appoint adjudicators on a number of projects annually;

      iv) Be prepared to conclude a Memorandum of Understanding with any Adjudicator currently on the NAL, allowing the EPA to nominate such Adjudicator on demand by an Employer, in accordance with the nomination rules and procedures for the NAL as have already been established;

      v) Provide a web page on the EPA website, providing relevant information about the NAL and allowing to download application forms for Employer subscriptions, project registration, adjudicator nomination, and other forms as may be eventually implemented; and

      vi) Convene and consult with the NAL Stakeholder Committee as established at the NAL Workshop of 16 May 2008, regarding matters pertaining to the establishment and management of the NAL; with the proviso that the EPA will not incur any costs in connection with the Committee, other than secretarial services such as are normally provided by the EPA's secretary.

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[1] A copy of the current rules and procedures for the evaluation of adjudicators will be made available on request.

6) Regarding Adjudicator Selection, Fees and Standards:

   a) The EPA acknowledges and adopts the adjudicator nomination/selection rules procedures and standards, as already established, and the list of adjudicators as registered for a period of two years[2]; and

   b) The EPA will:

      i) Advise Employers that the recommended fees for adjudicators be as follows, in consideration of stakeholders' recommendations made at the NAL Stakeholders' Workshop; however, subject to negotiation between the Employer/Contractor and adjudicator depending on the exigencies of a specific appointment:

         (1) Junior Adjudicator 100 % of the gazetted fee

         (2) Adjudicator 120 % of the gazetted fee

         (3) Senior Adjudicator 140 % of the gazetted fee

      ii) Advise Employers that the recommended retainer fees and conditions be those of the City of Windhoek[3], as stated in the Proposal to the EPA.

7) The following services, as contained in the aforementioned Proposal, will at this stage **not be financially viable** to offer. The EPA **will provide such services** only to the extent that NAL fees paid by Employers and sponsorships offered to the EPA-NAL cover the cost of providing these services.

   a) Regarding the administration and management of the NAL by the EPA:

      i) A dedicated NAL web portal, through which adjudicator nomination services and servicing enquiries could be processed in an automated manner;

      ii) A committee for the evaluation of adjudicators; provided that the EPA will use the services of the panel that performed the initial evaluation and grading of adjudicators, as long as the members of this panel are willing to continue performing this service free of charge to the EPA; and

      iii) A dedicated person, who would be responsible for the management of the NAL and related matters.

   b) Regarding Adjudicator Selection, Fees and Standards:

      i) Ensure that adjudicators operate at appropriate international standards and in general acquire and maintain a high level of competency in adjudication; with Employers preferring to approach adjudicators directly, the responsibility for ensuring adjudicators' continued competence (beyond the assessed competence when registering an adjudicator on the NAL) will have to be shared by Employers and adjudicators;

   c) Regarding involvement of the industry:

      i) That the EPA establish ties with other similar institutions in the region and internationally, in order to stay abreast of trends in dispute resolution and adjudication;

      ii) That the EPA ensure that the industry remains informed on trends regionally and abroad;

      iii) That the EPA involve the larger organisations in matters pertaining to the NAL;

      iv) That the EPA ensure that industry role players acquire a high level of awareness regarding legal and contractual aspects and dispute resolution, etc;

      v) Notwithstanding, however, the EPA will within its means maintain the NATDAB Forum as a communication channel with the industry, taking into consideration the aforementioned needs as expressed in the Proposal to the EPA.

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[2] The list of NAL adjudicators and a copy of the adjudicator nomination/selection rules procedures and standards will be made available on request.

[3] The current recommended adjudicator fees, retainer fees and conditions will be made available on request to the EPA for an adjudicator nomination.

4 NAL Fees

1) The EPA will:

   a) Offer an impartial adjudicator nomination service on the request of any Employer who is not subscribed to the NAL, at a nomination fee of **N$ 2 000,00**.

   b) Offer Employers a subscription to the NAL, with the subscription grade being at the Employer's own discretion, which entitles the Employer to the EPA rendering an impartial adjudicator nomination service a reduced adjudicator nomination fee, as follows:

Subscribed as	Annual Subscription Fee	Per Nomination Fee
Major Employer	N$ 10 000,00	N$ 1 000,00
Minor Employer	N$ 3 000,00	N$ 1500,00

2) Nomination fees will be charged per adjudicator per Dispute Adjudication Board. Should the Employer and Contractor not be able to agree on an adjudicator nominated by the EPA for a DAB, then the EPA will nominate another adjudicator, subject to the availability of suitable adjudicators on the NAL, without an additional charge.

3) Subscription fees are for one year from the date of commencement of the subscription (e.g. 16 July 2008 – 15 July 2009).

4) A subscription as a Minor Employer may at any time within the subscription period be **upgraded** to that of a Major Employer, at an upgrade fee of **N$ 500,00**.

5) For example, an Employer may initially be uncertain about the total number of adjudicator nominations required, and therefore subscribe as a Minor Employer. Should the Employer find that the number of required nominations would make this financially attractive, the Employer may then upgrade to a Major Employer for the remaining period of the subscription. In this case, the Employer will be charged the upgrade fee and the difference in the annual subscription fee, and be credited with the difference in nomination fees already paid within that subscription period; i.e., except for the upgrade fee, the situation of the Employer would be the same as if the Employer had initially subscribed as a Major Employer for the whole subscription period.

6) No downgrade from Major Employer to Minor Employer, and no credits for past nomination fees in the case of an Employer who has not been previously subscribed to the NAL, will be offered.

7) Fees (and the services that the EPA-NAL will be able to offer subject to the revenue generated) will be revised annually in consultation with the NAL Committee.

5 Offer and Memorandums of Agreement and Understanding

The above constitutes the Offer that EPA is making with regard to the establishment and management of the National Adjudicators' List, and which forms the basis and must be read together with the Memorandum of Agreement that the EPA is willing to conclude with an Employer and the Memorandum of Understanding that the EPA is willing to conclude with an Adjudicator (irrespective of the latter's categorisation as Trainee, Junior or Senior).

Sincerely,

JA Cilliers

President, EPA

Attachment: Report on NAL Stakeholders' Workshop of 16 May 2008