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BID CHALLENGE SYSTEM

MILLENNIUM CHALLENGE ACCOUNT NAMIBIA

(MCA NAMIBIA)

7 October 2009

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DEFINITIONS:

“Bidder”	means any Consultant, Contractor or Supplier participating in the procurement process to provide services, works or goods in furtherance of the Compact.
“Bidding Documents”	means any solicitation document for the procurement of services, works or goods in furtherance of the Compact.
“Bid Challenge”	means the execution of the right of all Bidders to seek review of procurement actions and decisions.
“Claim”	means the written allegation made by a Bidder who believe that they have suffered or may suffer loss or injury due to a breach of a duty by MCA-Namibia in the conduct of a procurement proceeding.
“Claimant”	means the Bidder who challenges the bidding process because they allege to have suffered or may suffer loss or injury due to a breach of a duty by MCA-Namibia in the conduct of a procurement proceeding.
“Independent Appeals Panel”	means the second and final review level. A Claimant may submit a Notice of Appeal to this Panel which is independent of MCA-Namibia.
“MCA-Namibia”	means the Millennium Challenge Account – Namibia, an organizational unit established within the National Planning Commission by the Government of the Republic of Namibia on March 18, 2008 pursuant to Cabinet Decision No. 5 th /18.03.08/004.
“Notice of Appeal”	means the notification submitted to MCA-Namibia as a result of the Claimant’s disagreement or dissatisfaction with the decision of the Review Panel.
“Review Panel”	means the first level of bid challenge review by MCA-Namibia.
“Standstill Period”	means the period between the notification of the intent to award and the actual signing of the contract.

PREAMBLE

Whereas, the United States of America, acting through the Millennium Challenge Corporation (**“MCC”**), and the Republic of Namibia executed the Millennium Challenge Compact (***as amended the “Compact”***) on July 28, 2008, that sets forth the general terms and conditions on which MCC will provide a five-year grant of up to US\$ 304,477,816 (**“MCC Funding”**) to the Government of the Republic of Namibia for a Millennium Challenge Account program to advance economic growth and reduce poverty in Namibia (***the “Program”***);

Whereas, MCA-Namibia is obliged to establish a Bid Challenge System (the ***“Bid Challenge System”*** or ***“BCS”***) that provides Bidders the ability to seek review of procurement actions and decisions;

Now therefore, in consideration of the covenants contained in the Compact and Supplemental Agreements, MCA-Namibia has established the rules set forth in this Bid Challenge System (***the “Rules”***) and agrees that challenges in relation to the bidding process shall be referred to the BCS in accordance with these Rules, and these Rules shall be incorporated by reference in all bidding documents lodged by Bidders.

Capitalized terms used but not defined herein shall have the meaning given to them in the Compact.

SECTION 1 – Scope of Application

- 1.1 These Rules shall govern the BCS, except that where any of these Rules are in conflict with provisions of the Compact (including the MCA-Namibia Procurement Rules) or the Program Implementation Agreement, the provisions of such documents shall prevail.

- 1.3 MCA-Namibia may modify these Rules in writing from time to time. For the avoidance of doubt, the Rules posted on the MCA-Namibia web site at the time a Claim is first filed initiating a Bid Challenge shall govern with respect to such Bid Challenge even if MCA-Namibia subsequently modifies the Rules.

SECTION 2 – MCA-Namibia Review Panel

- 2.1 MCA-Namibia shall establish a Panel (***“Review Panel”***) to review and decide on Claims lodged by Bidders on a procurement process. The Review Panel shall consist of the following four members: (1) MCA-Namibia Deputy Chief Executive Officer: Operations, (2) MCA-Namibia Procurement Director, (3) MCA-Namibia Legal Officer, and (4) a representative of the MCA-Namibia Procurement Agent.

SECTION 3 – “Standstill” Period

- 3.1 This BCS allows contract award decisions to be challenged before a contract is signed. The Standstill Period is intended to allow a Bidder a five (5) working day period between the award notification and the signing of the contract to submit a Claim if they have suffered or may suffer loss or injury due to a breach of a duty by MCA-Namibia in the conduct of procurement proceedings.

- 3.2 Contract-signing shall only take place at the end of the Standstill Period unless the procurement proceedings are suspended in accordance with Section 5.

SECTION 4 – Filing a Claim

- 4.1 Any Bidder who has suffered, or reasonably believes it has suffered, loss or injury due to a breach of MCA-Namibia’s duties under the MCA-Namibia Procurement Rules in the course of a procurement may file a Claim, subject to the following:

- (a) A Claim must be filed during the Standstill Period; or
- (b) Any Claim filed after the Standstill Period may be considered under this Bid Challenge System, but the procurement proceeding disputed under that Claim shall not be suspended under Section 5.

4.2 Each Claim and its filing shall be in English and in writing, which may be in electronic form, and shall:

- (i) include the name, address, telephone and facsimile numbers of the Claimant;
- (ii) identify the procurement bid in relation to which the Claim arises;
- (iii) describe the nature of the Claim and the facts supporting such Claim, including the MCA-Namibia Procurement Rules which were violated, and the timeliness of the Claim;
- (iv) provide justification for the Claim; and
- (v) state which steps in the procurement process (if any) the Claimant is requesting to be redone and what other remedies are sought by the Claimant.

4.3 Only a lead Bidder may submit a Claim under these Rules. No Claim may be submitted by a subcontractor or sub-consultant.

4.4 A Bidder shall not pay any fees or charges for the submission of a Claim to MCA-Namibia and the review and adoption of a decision by MCA-Namibia.

4.5 A Claim must be sent to MCA-Namibia at the following address:

Millennium Challenge Account-Namibia
Atlas House, 6th Floor
117 Sam Nuyoma Drive
Windhoek, Namibia
Attention: Chief Executive Officer

Facsimile: +264 61 410415
E-mail: info@mcanamibia.org

4.6 Within two (2) working days of receipt thereof the Chief Executive Officer shall forward a Claim to each member of the Review Panel.

4.7 The following shall not be subject to a Claim:

- (i) The selection of a method of procurement;
- (ii) The choice of selection procedure, or
- (iii) The decision to reject all Bids, proposals, offers or quotations.

4.8 The Review Panel shall review a Claim and make a decision within five (5) working days of the receipt of the Claim. A Claim shall be rejected if it fails to conform to the submission requirements of this Section 4.

SECTION 5 – Suspension of Procurement Proceedings

- 5.1 After the Review Panel receives a Claim that complies with the requirements of Section 4, the Review Panel shall suspend the disputed procurement proceeding until the Review Panel has issued a decision on the Claim in accordance with these Rules, unless the Review Panel considers that:
- (i) the Claim is frivolous or unjustified;
 - (ii) the Claimant will not sustain irreparable harm;
 - (iii) MCA-Namibia may sustain disproportionately greater damage by such suspension, compared to the damage to be possibly sustained by the Claimant; or
 - (iv) suspension of the proceeding is against the public interest.

SECTION 6 – Decision of the Review Panel

- 6.1 The Review Panel shall issue a written decision agreed to by a majority of the members on any Claim filed in accordance with Section 4 within five (5) working days of receipt of the Claim, which period may be extended at the discretion of the Review Panel for an additional five (5) working days by written notice from the Review Panel to the Claimant. The Review Panel shall deliver copies of the written decision to the MCA-Namibia Procurement Agent and the Claimant within 24 hours of rendering a written decision. If the Claim is rejected the Review Panel's decision shall state the justification for non-acceptance; likewise, if the Claim is considered valid, the decision shall state how the Claim shall be remedied.
- 6.2 In reaching its decision the Review Panel, at its discretion, may seek assistance from subject-matter experts. When such experts are consulted the Review Panel shall use its best efforts to appoint experts who are best qualified and shall ensure that there is no actual or perceived conflict of interest on the part of such experts in the outcome of the Claim.
- 6.3 MCA-Namibia shall not award a contract with respect to a procurement proceeding which is subject to a Claim until such time as the Claim is rejected or remedied, either through a decision by the Review Panel or the Independent Appeals Panel, except as indicated in Section 5.
- 6.4 Where MCA-Namibia decides to continue the procurement process the justification and the decision to continue shall be provided in writing to the Claimant at least five (5) working days after the time the decision comes into force. The decision shall be made available publicly through the media and on the MCA-Namibia website.
- 6.5 Any decision issued by the Review Panel shall state the grounds and justification for the decision and, if the Review Panel upholds the Claim in whole or in part, which steps in the procurement process shall be redone.
- 6.6 The decision of the Review Panel shall be final, binding and enforceable in any court with jurisdiction unless the Claimant submits a Notice of Appeal (in accordance with Section 7) in accordance with these Rules.

SECTION 7 – Appeal of Review Panel's Decision

- 7.1 The Claimant shall have the right to appeal the decision of the Review Panel to its Claim filed under Section 4.1(a) to the Independent Appeals Panel if:
- (i) the Review Panel failed to make a final decision within the timeframe stipulated in these Rules, or
 - (ii) the Claimant is not satisfied with the decision of the Review Panel.

Otherwise, a Claimant shall not have the right to appeal the decision of the Review Panel under this Bid Challenge System.

- 7.2 The Claimant may submit a Notice of Appeal, within three (3) working days of receipt of the decision of the Review Panel to MCA-Namibia at the following address:

Millennium Challenge Account-Namibia
Atlas House, 6th Floor
117 Sam Nuyoma Drive
Windhoek, Namibia
Attention: Chief Executive Officer

Facsimile: +264 61 410415

E-mail: info@mcanamibia.org

- 7.3 The MCA-Namibia Chief Executive Officer shall send the Notice of Appeal to the Independent Appeals Panel which shall comprise three independent experts who shall be selected in the following manner:
- (i) the Claimant and MCA-Namibia shall each select an expert, and
 - (ii) both experts shall select a third expert. Where the two experts do not agree on the choice of the third expert, the MCA-Namibia Chief Executive Officer shall nominate the third expert.

- 7.4 The Independent Appeals Panel shall decide on the appeal within fifteen (15) working days of the submission of the Notice of Appeal.

- 7.5 The Notice of Appeal shall be filed in English and shall include the following:

- (i) name and address of the Claimant;
- (ii) reference to the procurement bid in relation to which the Claim arises;
- (iii) general nature of the Claim; and
- (iv) relief or remedy sought.

- 7.6 If the Notice of Appeal does not conform to these submission requirements, the Notice of Appeal shall be rejected.

SECTION 8 – The Independent Appeals Panel

- 8.1 Independent Appeals Panel members shall be composed of qualified professionals. In no event shall any member have an interest in the outcome of the procurement or have been involved in the procurement process. The members of the Independent Appeals Panel will be paid a stipend for the time served on the panel. The reasonable costs of the appeal (including the stipend of the panelists, but excluding any legal and travel costs of the Parties) shall be covered by the MCA-Namibia and the Claimant in the proportion that the Independent Appeals Panel determines reasonable under the circumstances. The costs of the appeal shall be reasonable and consistent for similar proceedings in Namibia. MCA-Namibia shall provide the Claimant the estimated costs of the appeal at the time of the decision; provided that such estimate will not have any binding effect on the actual cost determined by the Independent Appeals Panel.
- 8.2 The Independent Appeals Panel shall be convoked no later than five (5) calendar days from the date the Independent Appeals Panel has been accepted by both MCA-Namibia and the Claimant. The timely submission of the Notice of Appeal temporarily suspends the pertinent procurement proceeding and contains a declaration which, if proven, demonstrates that the Claimant will suffer irreparable injury in the absence of a suspension of the procurement proceeding, unless MCA-Namibia has made a determination to continue with a procurement proceeding pursuant to any of the conditions set forth under Section 5.1(i)-(iv).
- 8.3 In the event that the Independent Appeals Panel determines that the procurement should be suspended, the Independent Appeals Panel shall inform all Bidders through the MCA-Namibia Procurement Agent of the suspension of the procurement proceeding and take such other measures as it deems necessary to maintain the integrity of the procurement process pending completion of the appeal.
- 8.4 The Independent Appeals Panel shall consider the facts of the Claim and all written representations made by the MCA-Namibia and the Claimant to determine whether or not the procurement was conducted in accordance with the bidding documents and the MCA-Namibia Procurement Rules.
- 8.5 The Independent Appeals Panel, at any time following receipt of a Notice of Appeal, may request, in writing, additional information relating to the relevant procurement, and must include the deadline within which the Claimant or MCA-Namibia shall provide such information.
- 8.6 MCA-Namibia and the Claimant, as the case may be, must furnish the information requested by the Independent Appeals Panel; provided that either Claimant or MCA-Namibia may refuse to disclose certain information if disclosure would be contrary to the public interest; or would prejudice the legitimate commercial interests or fair competition between Bidders; or would be in breach of a legal professional privilege or a confidentiality agreement binding on Claimant or MCA-Namibia. Any refusal to disclose information shall be justified in writing.

- 8.7 If the Independent Appeals Panel considers that the appeal cannot continue without the requested information, it may decide to terminate the appeal and declare the Notice of Appeal invalid.
- 8.8 If any confidential information of the Claimant is disclosed by the Claimant to the Independent Appeals Panel at the Independent Appeals Panel's request, the Claimant may request that such information only be made available to members of the Independent Appeals Panel. In such case, a statement is to be provided by the Claimant identifying the Claimant's confidential information, together with a copy of the confidential information (which is to be provided to the Independent Appeals Panel only; the address will be given to the Claimant at the time of the appeal) and one copy of the documents where the confidential information has been deleted.
- 8.9 The Independent Appeals Panel may ask the Claimant and MCA-Namibia to appear in person and present their appeal or justify their decision before the Independent Appeals Panel (such proceedings shall take place in Windhoek, Namibia). The Independent Appeals Panel may address the Claimant or MCA-Namibia by asking questions. The MCA-Namibia Procurement Agent may also be called for questioning at the discretion of the Independent Appeals Panel.
- 8.10 After hearing and reviewing all documents and statements, the Independent Appeals Panel will discuss the facts and merits of the appeal.
- 8.11 If the Independent Appeals Panel decides to compensate the Claimant for loss or damage, such compensation shall be limited to the cost of preparation of the bid challenge. The Claimant will not be compensated for anticipated profits.
- 8.12 The Independent Appeals Panel shall make a written report of its opinions or recommendations and issue a statement describing the basis of the opinion or recommendation to be undertaken. The Independent Appeals Panel shall issue this decision within ten (10) working days from the date the Independent Appeals Panel convened for the first time, stating the reasons for the decision and the remedies granted, if any. Further, the Independent Appeals Panel will determine the distribution of the costs between MCA-Namibia and the Claimant.
- 8.13 If the Independent Appeals Panel finds the Claim valid (in whole or in part), it may grant one or more of the following remedies:
- (i) Require MCA-Namibia to issue the relief (in whole or in part) requested by the Claimant;
 - (ii) Determine that MCA-Namibia was at fault (but not issue the relief), and require a corrective action;
 - (iii) Annul, in whole or in part, the procurement proceedings, and require MCA-Namibia to take specific action that the Independent Appeals Panel may consider appropriate within the framework of the MCA-Namibia Procurement Rules;
 - (iv) Decide on cost distribution of the proceedings, and require MCA-Namibia to pay compensation for any reasonable costs incurred by the Claimant in connection with the procurement proceedings; provided that such reasonable costs do not include lost profit,

travel costs, or punitive damages because of non-acceptance of a bid of the Claimant; and/or

- (v) Require that the procurement proceedings be terminated, and for MCA-Namibia to institute new procurement proceedings.

8.14 In the event that the Claim is considered invalid the Independent Appeals Panel shall render its decision in writing.

8.15 The decision of the Independent Appeals Panel shall be notified in writing (which may be by email or fax) by the MCA-Namibia Procurement Agent to the Claimant within two (2) working days of the decision. The decision of the Independent Appeals Panel shall be carried out by MCA-Namibia within fifteen (15) working days.

8.16 The decision of the Independent Appeals Panel is final, binding and enforceable and shall be published on the MCA-Namibia website.

SECTION 9 – Reporting to MCC

9.1 The Claimant shall have no right to appeal to MCC regarding decisions resulting from these Rules.

9.2 Within three (3) days after the decision, MCA-Namibia shall submit to MCC a report of the handling and disposition of the Bid Challenge.

9.3 MCC, at its sole discretion, has the right to be an observer to all bid challenge proceedings but does not have the obligation to participate in any bid challenge proceeding, in any capacity. The acceptance by MCC of the right to be an observer to the bid challenge shall not constitute consent to the jurisdiction of the courts or any other body of Namibia or any other jurisdiction.

SECTION 10 – Language Requirement

All claims, statements, notices, and other documents related to these Rules shall be written or translated to English.