

**EXAMPLE OF LEGISLATION
TO ESTABLISH AN INDEPENDENT ROADS CONTRACTOR COMPANY**

B I L L

**To provide for the establishment of the Roads Contractor Company Limited to undertake roads maintenance and construction; and to provide for matters incidental thereto.
(Introduced by the Minister of Works, Transport and Communication)**

ARRANGEMENT OF SECTIONS

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BE IT ENACTED by the Parliament of the Republic of Namibia,
as follows:

Draft dated 20/05/97

Definitions

1. In this Act, unless the context otherwise requires -

"Company" means the Roads Contractor Company Limited established
by section 2;

"Minister" means the Minister responsible for transport;

"Ministry" means the Ministry responsible for transport;

"Shareholding Minister" means the Minister responsible for trade and any other Minister
designated in a proclamation contemplated in section 3(3);

"this Act" includes the regulations made thereunder;

"transfer date" means the date on which the Minister gives effect to the provisions of section 10 (1)
, and which shall be published by the Minister by notice in the *Gazette*.

Establishment of the Roads Contractor Company Limited

2. (1) There shall be established a public company to be known as the Roads Contractor Company Limited.
- (2) Notwithstanding sections 54 and 60 of the Companies Act, 1973 (Act 61 of 1973), the Shareholding Minister shall on behalf of the State sign the memorandum of association and the articles of association of the Company.
- (3) On receipt of the memorandum and articles so signed the Registrar of Companies shall register the said memorandum and Draft dated 20/05/97 articles as contemplated in section 63 of the said Companies Act, 1973, and endorse thereon a certificate that the Company is incorporated.
- (4) No fees shall be payable in terms of the said Companies Act, 1973, in respect of the checking of documents, the reservation of the name, the registration of the said memorandum and articles and the issue of a certificate to commence business.
- (5) Sections 66, 174, 190 and 344(d) of the said Companies Act, 1973, shall not apply to the Company as long as the State is the sole member and shareholder of the Company.
- (6) The Shareholding Minister shall table the memorandum and articles of association of the Company, and all amendments thereto, in the National Assembly within 14 days after their registration if the National Assembly is then in ordinary session or, if the National Assembly is not then in ordinary session, within 14 days after the commencement of its next ensuing ordinary session.

Shareholding in Company

3. (1) Upon its incorporation the Company shall issue to the State one share with a nominal value of one Namibia dollar.
- (2) Subject to subsection (5) , the State shall be the holder of all the shares in the Company.
- (3) The rights attached to the shares of which the State is the holder shall be exercised by the Shareholding Minister on behalf of the State.
- (4) The President may by proclamation in the Gazette direct that any power or duty conferred or imposed by this Act upon the Shareholding Minister shall, either generally or in relation to any matter specified in the proclamation, be exercised or performed by the Minister in or after consultation with such other Minister or Ministers as may be designated in the proclamation.
- (5) The Shareholding Minister shall not, without the prior consent of the Cabinet, alienate any shares held by the State and the Company shall not, without the prior consent of the Cabinet, issue any shares to any person other than the State.

Objective of Company

4. (1) Subject to the provisions of this Act, the objective of the Company is to undertake work relating to the maintenance and construction of roads in accordance with sound and generally accepted business principles.

(2) The provisions of subsection (1) shall not prohibit the Company from pursuing any other business with the consent of the Shareholding Minister.

(3) Notwithstanding the provisions of any other law, all work relating to the maintenance and construction of roads which was, immediately before the commencement of this Act, usually performed by the Department of Transport of the Ministry shall, subject to such conditions and for such period as the Minister may determine in consultation with the Shareholding Minister, only be performed by the Company.

Powers, duties and functions of Company

5. (1) Subject to the provisions of the said Companies Act, 1973, the Company shall have all such powers as are reasonably required to give effect to the provisions of this Act and the memorandum and articles of association of the Company.

(2) The functions of the Company shall be to achieve its objects with the means at its disposal.

(3) The Company shall -

(a) refrain from abusing its monopoly position by virtue of section 4 (3) by performing any act which, in accordance with any regulation made by the Minister by notice in the Gazette, is deemed to constitute such abuse;

(b) not without the consent of the Shareholding Minister, alienate or in any way encumber any assets of the Company representing more than 10 per cent of the total market value of all the assets of the Company otherwise than in the normal course of its business;

(c) not without the consent of the Shareholding Minister, alter the objectives or nature of business of the Company;

(d) not without the consent of the Cabinet, amalgamate with any other company;

(e) invest the moneys of the Company only with a banking institution or a building society which is registered in accordance with the relevant law;

(f) only utilize the proceeds of the sale of surplus assets to reduce the loan account of the State referred to in paragraph (b) of section 11(1).

(4) The Company may -

- (a) enter into an agreement with any person, body, organization or authority to perform a particular act or render a particular service on behalf of or in favor of the Company, and may let or subcontract any facility or service it is required or entitled to provide or render, but any such contract shall not be inconsistent with the objectives of the Company;
- (b) in writing delegate any of its powers, including a delegated power, to such person, body, organization or authority if the Company deems it necessary for the efficient performance of any act or service contemplated in paragraph (a).
- (5) The chief executive officer, who shall serve as the manager of the Company, shall be appointed for such period and on such terms and conditions as may be determined by the said board of directors in consultation with the Minister.
- (6) The chief executive officer shall not be a director of the Company.

Performance agreement

6. (1) The Company shall at least one month before the commencement of each financial year, and in accordance with such procedures as may be determined by the Shareholding Minister, submit a draft performance agreement to the Shareholding Minister and which shall contain particulars of the following:

- (a) The expectations of the Government in respect of the Company's scope of business, efficiency and financial performance;
- (b) the principles to be followed by the Company for the purposes of business planning;
- (c) the Company's dividend policy;
- (d) the Company's pricing policy which shall include -policy principles on the fixing of competitive prices which will ensure cost-efficiency and enhance sustained corporate profitability and shareholder gain;
- (e) such measures which are, in the opinion of the Minister, necessary to protect the financial soundness of the Company;
- (f) the management and financial systems to be implemented by the Company and the principles to be applied in budgeting for administrative expenditure;
- (g) the procedures to be followed by the Company in the evaluation of and awarding of tenders to, and negotiations of agreements with, any person, body, organization or authority;
- (h) the measures by which the performance of the Company can be assessed including such measures as may relate to its -

- (i) financial performance;
 - (ii) operational and service level performance;
 - (iii) management of human resources;
 - (iv) strategies in encouraging employees of the Company to establish independent road maintenance and construction enterprises;
- (i) the implementation of sound employment practices with a view to -
- (i) ensure the fair treatment of employees;
 - (ii) advance the working conditions of employees including their health and safety at work;
 - (iii) promote and facilitate the training of employees and the improvement of their skills; and
 - (iv) ensure the appointment and promotion of suitably qualified persons;
- (j) any other matter relating to the exercise or performance of the Company's powers, duties and functions under this Act which the Minister may require.
- (2) The Shareholding Minister shall upon receipt of the draft performance agreement, either approve it or return it to the Company with directions to amend it.
- (3) The Shareholding Minister and the Company may, *mutatis mutandis* in accordance with subsection (1), amend a performance agreement from time to time.
- (4) The Company shall, before finalization of a performance agreement, consult with the Minister and every other interested person as the Shareholding Minister may determine, on any relevant matter.
- (5) A performance agreement and any amendment thereof shall be open to inspection at the registered office of the Company and shall, subject to the directions of the Minister, be published in condensed form in at least two daily newspapers circulating nationwide.
- (6) The failure of the Company to comply with any provision of a performance agreement or any amendment thereof shall not affect the validity or enforceability of any act, deed, agreement, right, obligation or liability performed, entered into, acquired or incurred by the Company.

Performance statement

7. (1) The Company shall, after consultation with the Minister and Shareholding Minister and before the commencement of each financial year, prepare a performance statement which shall contain the strategies which the Company intends to employ in, and the methods by which the Company intends to assess its performance in relation to, the exercise and performance of its powers, duties and functions in order to achieve the objectives of this Act, and which shall include particulars of the following in respect of the ensuing financial year and each of the two immediately following financial years:

- (a) The road construction and maintenance projects and programmes which the Company proposes to undertake or continue and the expected operational performance of the Company;
 - (b) the proposed pricing structure of the Company;
 - (c) the estimated amount of administrative expenditure;
 - (d) any other matter relating to -
 - (i) the financial state of affairs of the Company;
 - (ii) the exercise or performance of the Company's powers, duties and functions under this Act, as may be required by the Minister.
- (2) The Company may, after consultation with the Minister and the Shareholding Minister, amend a performance statement from time to time during the course of a financial year.
- (3) The Company shall forthwith forward each performance statement or amended performance statement to the Shareholding Minister upon finalization.
- (4) Subsections (4), (5) and (6) of section 6 shall apply *mutatis mutandis* to a performance statement: Provided that the Company shall, for the purposes of the application of the said subsection (5) of section 6, not be obliged to disclose the particulars contemplated in paragraphs (a) and (b) of subsection (1) of this section.

Annual report

8. (1) Notwithstanding the provisions of Chapter XI of the said Companies Act, 1973, the Company shall, within three months after the end of each financial year, submit to the Shareholding Minister a report on the activities of the Company during that financial year and which shall include -
- (a) an auditor's report and the audited and approved annual financial statements contemplated in that Chapter in respect of all the business of the Company; and
 - (b) a report on -

- (i) the Company's performance in relation to the Company's performance agreement; and
- (ii) such other matters as the Shareholding Minister may require.

(2) Subject to the proviso to section 7 (4) , the annual report referred to in subsection (1) shall, together with the relevant performance agreement and performance statement referred to in sections 6 and 7, respectively, or any amendment thereof be tabled in the National Assembly by the Shareholding Minister within 28 days after the receipt of the last outstanding document if the National Assembly is then in ordinary session or, if the National Assembly is not then in ordinary session, within 28 days after the commencement of its next ensuing ordinary session.

Power of Minister to demand information

9. Notwithstanding any provision to the contrary in any other law, the Shareholding Minister may at any time require the Company to furnish him or her with such information relating to the affairs of the Company as he or she may reasonably require for the purposes of the exercise or performance of his or her powers, duties or functions in terms of this Act.

Transitional provisions

10. (1) Subject to the provisions of this section and section 11, the Minister shall, after consultation with the Shareholding Minister and the Minister responsible for finance and on such conditions as the Minister may determine, transfer such State assets, liabilities, rights or obligations, which relate to or are connected with the construction and maintenance of roads by the Department of Transport of the Ministry, to the Company as the Minister may determine.

(2) Notwithstanding any provision to the contrary in any other law, the Company shall, with effect from the transfer date, be vested with the ownership of the assets and rights and be charged with the liabilities and obligations transferred or assigned to it by virtue of the provisions of subsection (1).

(3) A certificate issued by the Minister in which it is stated that any State land or a servitude or other real right or lease or any other asset or right described in such certificate has been transferred to the Company in terms of subsection (1), shall be sufficient proof that the asset or right so described vests in the Company.

(4) Upon the submission of a certificate referred to in subsection (3) to the Registrar of Deeds or to any other person in charge of any other office where a register or record is being kept of the ownership of or entitlement to an asset or right described in such certificate, the Registrar or such person, as the case may be, shall make such entries in or on any relevant register, title deed or other document in his or her office or submitted to him or her as may be necessary to effect the transfer in the name of the Company.

(5) Notwithstanding any legal provision to the contrary, no servitude or other right of any kind in respect of State land transferred to the Company in terms of subsection (1) shall be acquired by prescription.

(6) The Company shall be substituted for the State as a contracting party in respect of any agreement transferred to the Company in terms of subsection (1) , without such substitution bringing about a notation of such agreement.

(7) Any litigation, including arbitration proceedings, in respect of which the cause of action arose before the transfer date and to which any State authority is a party by virtue of its undertaking of roads construction and maintenance work, shall be conducted by or against the State, as the case may be.

(8) The value of assets and liabilities transferred to the Company in terms of subsection (1) shall be determined by the Minister with the concurrence of the Minister responsible for finance on the basis of reasonable market values.

(9) For the purposes of the Income Tax Act, 1981 (Act 24 of 1981), the assets acquired by the Company by virtue of subsection (1) shall be deemed to have been acquired by it at a cost equal to the value determined under subsection (8).

(10) Notwithstanding any provision to the contrary in any other law, no stamp duties, transfer duties or registering fees payable in terms of any law for acquisition or transfer of assets or rights shall be payable in respect of the transfer of assets or rights by the State to the Company in terms of subsection (1).

(11) Notwithstanding anything to the contrary contained in any other law, the Minister may, on or before the transfer date, in consultation with the Prime Minister and in accordance with the provisions of an agreement concluded with the Company, transfer to the Company any staff member in the Public Service as defined in section 1 of the Public Service Act, 1995 (Act No. 13 of 1995), but subject to such member's consent.

Issue of additional shares to State

11. (1) The Company shall compensate the State, for the transfer to the Company of the assets, liabilities, rights and obligations in terms of section 9 and for the provision of working capital, as may be agreed upon by the Minister and the Minister responsible for finance and the Company, either -

- (a) by the issue to the State of additional fully paid-up shares; or
- (b) by the issue to the State of additional fully paid-up shares as well as the creation in favor of the State of a loan account, to a value determined by the Minister with the concurrence of the Minister responsible for finance.

(2) Shares to be issued to the State in terms of subsection (1) shall -

- (a) have such nominal value and be issued at such premium, if any; and
- (b) be allotted and issued at such time and on such conditions, as the Minister may, with the concurrence of the Minister responsible for finance, determine.

(3) The Company is exempt from the payment -

- (a) of any stamp duty in respect of shares issued to the State;
- (b) of any moneys in terms of section 63 or 75 of the Companies Act in respect of the creation of, or increase in, the share capital of the Company, as long as the State is the sole shareholder of the Company.

Short title and commencement

12. (1) This Act shall be called the Roads Contractor Company Act, 1997, and the provisions thereof shall come into operation on a date fixed by the Minister by notice in the *Gazette*.

(2) Different dates may be so fixed in respect of different provisions of this Act.