****

**MODEL CONTRACT FOR THE RETAIL SECTOR -SUPPLY OF SERVICES**

# Introduction

1. Name (name of company)

|  |
| --- |
|  |

1. Legal form (e.g. limited liability company)

|  |
| --- |
|  |
|  |

1. Registration number

|  |
| --- |
|  |

1. Address (address of place of business of the Supplier, phone, fax, e-mail)

|  |
| --- |
|  |

1. Legal form (e.g. limited liability company)

|  |
| --- |
|  |

1. Address (address of place of business of the Client, phone, fax, email)

|  |
| --- |
|  |

1. Interpretation of the terms shall be in accordance with the general rules of interpretation.

**Collectively “the Parties”**

# Background

1. The Client carries on business in the (field/provision/supply of, specify)

|  |
| --- |
|  |
|  |
|  |

1. The Supplier undertakes as part of its business the provision of services in relation to (specify)

|  |
| --- |
|  |

1. The Client wishes to engage the Supplier to provide such services in relation to the Client’s business, and the Supplier is willing to provide such services accordingly, on the terms of this contract. (If necessary, give an additional short explanation of the reason for the contract)

|  |
| --- |
|  |
|  |

# Operative provisions

## Supply of the service

1. **Qualifications**: The Supplier shall provide the following service(s) to the Client, subject to the terms agreed in this contract and the more detailed specifications contained in **Schedule 1**: (describe service).

|  |
| --- |
|  |
|  |

1. The Supplier states that it has all necessary capacity and qualifications to supply the aforementioned services.
2. The service(s) to be provided to the Client by the Supplier under this contract shall be rendered on (specify date and time as agreed)

|  |
| --- |
|  |
|  |

1. The service(s) to be provided to the Client by the Supplier under this contract shall be rendered pursuant to schedule 1.
2. The Client may order additional services or ask for amendments/ alterations of services already agreed with the Supplier, or give instructions to the Supplier which will result in an amendment, alteration, reduction or extension of the services already agreed with the Supplier. In such case, the amended, altered, reduced or extended services must be expressly specified in **schedule 3**, and the possible impact of the Client’s orders or instructions on the fees and expenses to be paid to the Supplier must be expressly agreed by and between the Parties in **schedule 2** before the services are performed.

## Payment of fees

1. The Client shall pay the fees and expenses agreed with the Supplier, as specified in **schedule 2**, and any additional sums which are agreed between the Supplier and the Client for the provision of the service as a result of the Client’s additional or amended instructions or lack of instructions, the inaccuracy or inappropriateness of any material provided by the Client or any other cause attributable to the Client.
2. The Supplier shall be entitled to invoice the Client following the end of the periodin which the service is provided.
3. The Supplier’s standard charges and any additional sums payable shall be paid by the Client (together with any applicable value added tax, and without any set-off or other deduction, to be agreed) within 30 (specify any other day) days of the date of the Supplier’s invoice.
4. If payment is not made on the due date, the Supplier shall charge interest on the outstanding amount as agreed by the parties, absence of which the prevailing central Bank of Kenya rates shall apply.

## Warranties and liability

1. The Supplier warrants to the Client that the service will be provided using such care and skill as is reasonable.
2. The service will be provided in accordance with the specification agreed in **Schedule 1**, and on the time.
3. Where the Supplier supplies in connection with the provision of the service supplied by a third party, the Supplier does not give any warranty, guarantee or other term as to their quality, fitness for purpose or otherwise, but shall, where possible, assign to the Client the benefit of any warranty, guarantee or indemnity given by the person supplying the goods to the Supplier.
4. The Supplier shall have no liability to the Client for any loss, damage, costs, expenses or other claims for compensation arising from any material or instructions supplied by the Client which are incomplete, incorrect, inaccurate, illegible, out of sequence or in the wrong form, or arising from their late arrival or non-arrival, or any other fault of the Client, provided the Supplier has duly notified the Client within (specify time)days of receipt of such material or instructions.
5. **Conduct in Abuse of Buyer Power**
6. Where the Buyer has buyer power as defined in Section 2 of the Competition Act No. 12 of 2010, the following conducts by the Buyer shall amount to abuse of that buyer power and subject to the jurisdiction of the Competition Authority of Kenya:
7. Delays in payment of a supplier without justifiable reason in breach of agreed terms of payment;
8. Unilateral termination or threats of termination of the commercial relationship without notice or on an unreasonably short notice period, and without an objectively justifiable reason;
9. Refusal to receive or return any goods or part thereof without justifiable reason in breach of the agreed contractual terms;
10. Transfer of costs or risks to the Supplier by imposing a requirement for the Supplier to fund the cost of a promotion of the Buyers’ goods or services;
11. Transfer of commercial risks meant to be borne by the Buyer to the Supplier; demands for preferential terms unfavourable to the Supplier or demanding limitations on the Supplier to other Buyers;
12. Reducing price by small but significant margin where there is difficulty in substitutability of alternative product or reducing prices below competitive levels; or
13. Bidding up of inputs by the Buyer with the aim of excluding competitors from the market.

## Breach of contract

1. There is a breach of contract where a party fails to perform any of its obligations under this contract, including defective, partial or late performance or engages in any of the conducts in clause 24 above.

## Term, termination and consequences of termination

1. This contract shall take effect on the date of its signature by both parties or, if signatures do not occur simultaneously, when the latest signature is given. Unless sooner terminated, pursuant to clauses 27, this contract shall continue for a period specified in clause 13.
2. The Supplier may forthwith terminate this contract by giving written notice to the Client if the latter fails to pay any sum payable by it under this contract within 7 days of the due date for payment.
3. Either party may (without limiting any other remedy) at any time terminate the contract by giving written notice to the other if the other commits any breach of this contract and (if capable of remedy) fails to remedy the breach within 10 days after being required by written notice to do so, or if the other goes into liquidation, becomes bankrupt, makes a voluntary arrangement with its creditors or has a receiver or administrator appointed.
4. A breach of any provision of this contract shall be considered capable of remedy if the party in breach can comply with the provision in question in all respects other than as to the time of performance.
5. The termination of this contract for any reason shall not affect: Either party’s accrued rights, remedies or liabilities including payments due at the effective date of termination; or the coming into force or the continuance in force of any provision of this contract which is expressly or by implication intended to come into or continue in force on or after termination.

## Confidentiality

1. Both parties understand and acknowledge that, by virtue of the present contract, they may both receive or become aware of information belonging or relating to the other party, its business, business plans, affairs or activities, which information is confidential and proprietary to the other party and/or its Suppliers and/or customers and in respect of which they are bound by a strict duty of confidence.
2. In consideration of such Confidential Information being disclosed or otherwise made available to either party for the purposes of the performance of the present contract, both parties hereby undertake that they will not at any time, either before or after the termination of the present contract, and either directly or indirectly, disclose, divulge or make unauthorized use of any Confidential Information, except to the extent to which such Confidential Information:
   1. Is publicly known at the time of its disclosure or being lawfully made available to them;
   2. After such disclosure or being made available to them, becomes publicly known otherwise than through a breach of this undertaking; and
   3. Is required by law, regulation or order of the Competition Authority of Kenya (including any regulatory or governmental body) to be disclosed by one of the Parties, provided that, where practicable, the other party is given reasonable advance notice of the intended disclosure.
3. Upon the request from the other party or the termination of this contract, each party shall return to the other all documents or records in any medium or format containing any Confidential Information which are in its possession or control and will not retain any copies of them.
4. This undertaking, and the obligations contained herein, will continue without limit of period.

## Force majeure

1. Means war, emergency, accident, fire, earthquake, flood, storm, industrial strike or other impediment which the affected party proves was beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of this contract or to have avoided or overcome it or its consequences.
2. A party affected by force majeure shall not be deemed to be in breach of this contract, or otherwise be liable to the other, by reason of any delay in performance, or the non-performance, of any of its obligations under this contract to the extent that the delay or non-performance is due to any force majeure of which it has notified the other party in accordance with clause 37(a).
3. The time for performance of that obligation shall be extended accordingly, subject to clause 13:
   1. If any force majeure occurs in relation to either party which affects or is likely to affect the performance of any of its obligations under this contract, it shall notify the other party within a reasonable time as to the nature and extent of the circumstances in question and their effect on its ability to perform.
   2. If the performance by either party of any of its obligations under this contract is prevented or delayed by force majeure for a continuous period in excess of (specify) months, the other party shall be entitled to terminate this contract by giving written notice to the party affected by the force majeure.
   3. Clause 37(b) notwithstanding, if the performance by either party of any of its obligations under this contract is prevented or delayed by force majeure for a continuous period in excess of (specify any other figure) ………. months, the Parties shall negotiate in good faith, and use their best endeavors to agree upon such amendments to this contract or alternative arrangements as may be fair and reasonable with a view to alleviating its effects, but if they do not agree upon such amendments or arrangements within a further period of 30 (specify any other figure) days, the other party shall be entitled to terminate this contract by giving written notice to the party affected by the force majeure.

## Change of circumstances (hardship)

1. The Parties should be free to consult each other in the event of a major change in circumstances particularly one creating hardship for a particular party.
2. Where the performance of this contract becomes more onerous for one of the Parties, that party is nevertheless bound to perform its obligations subject to the following provisions on change of circumstances (hardship).
3. If, however, after the time of conclusion of this contract, events occur which have not been contemplated by the Parties and which fundamentally alter the equilibrium of the present contract, thereby placing an excessive burden on one of the Parties in the performance of its contractual obligations (hardship), that party shall be entitled to request revision of this contract provided that:
   1. The events could not reasonably have been taken into account by the affected party at the time of conclusion of this contract;
   2. The events are beyond the control of the affected party; and
   3. The risk of the events is not one which, according to this contract, the party affected should be required to bear.
4. Each party shall in good faith consider any proposed revision seriously put forward by the other party in the interests of the relationship between the Parties.
5. If the Parties fail to reach an agreement on the requested revision within (specify time limit if appropriate) …………., a party may resort to the dispute resolution procedure provided in clause 56.
6. The Trade dispute committee *(in the case of the retail sector)* shall have the power to make any revision to this contract that it finds just and equitable in the circumstances, or to terminate this contract at a date and on terms to be fixed.

## No partnership or agency

1. Nothing in this contract shall:
   1. Be deemed to constitute a partnership in law between the Parties;
   2. Constitute either party the agent of the other for any purpose or
   3. Entitle either party to commit or bind the other (or any member of its respective group) in any manner.

## Assignment and subcontracting

1. This contract is personal to the Parties and (include only where relevant, except to the extent necessary for the collection of outstanding payments through a factoring agent, debt collector) neither party shall without the prior written approval of the other:
   1. Assign, mortgage, charge or otherwise transfer or deal in, or create any trust over, any of its rights; or
   2. Subcontract or otherwise delegate the whole or any part of its rights or obligations under this contract to another person.

## Notices

1. Any notice under this contract shall be in writing (which may include e-mail) and may be served by leaving it or sending it to the address of the other party as specified in clause 47 below in a manner that ensures receipt of the notice can be proved.
2. For the purposes of clause 46, notification details are the following, unless other details have been duly notified in accordance with this clause:

|  |
| --- |
|  |
|  |
|  |

## Entire agreement

1. This contract sets out the entire agreement between the Parties. Neither party has entered into this contract in reliance upon any representation, warranty or undertaking of the other party that is not expressly set out or referred to in this contract.
2. Clause 48 of this agreement shall not exclude any liability for fraudulent misrepresentation.
3. This contract supersedes any previous agreement or understanding relating to the subject matter.
4. This contract may not be varied except by an agreement of the Parties in writing, which may include e-mail.

## Effect of invalid or unenforceable provisions

1. If any provision of this contract is held by any court or other competent authority to be invalid or unenforceable in whole or in part, this contract shall continue to be valid as to its other provisions and the remainder of the affected provision, unless it can be concluded from the circumstances that, in the absence of the provision found to be null and void, the Parties would not have concluded this contract.
2. The Parties shall use all reasonable efforts to replace all provisions found to be null and void by provisions that are valid under the laws of Kenya and come closest to their original intention.

## Authorizations

1. This contract is conditional upon the following authorizations first being obtained (specify the authorization(s) or other conditions required e.g. of governmental or the regulatory authority.

|  |
| --- |
|  |
|  |
|  |
|  |

1. The relevant party shall use all reasonable efforts on its part to obtain such authorizations and shall notify the other party promptly of any difficulty encountered.

## Dispute resolution procedure

1. Any dispute, controversy or claim arising out of or relating to this contract, including its conclusion, interpretation, performance, breach, termination or invalidity, shall be settled through Alternative Dispute Resolution *(Arbitration, Mediation, Negotiation, Conciliation)* and appeals shall lie to the Competition Authority for matters arising under Section 24A of the Act.

## Applicable law and guiding principles

1. Questions relating to this contract that are not settled by the provisions contained in the contract shall be governed by the laws of the Republic of Kenya. This contract shall be performed in a spirit of good faith and fair dealing.

**Schedule 1:**

1. Specifications of the service(s) to be performed

|  |
| --- |
|  |
|  |
|  |
|  |

**Schedule 2:**

1. Fees and expenses
   1. The following services shall be charged on the basis of the time spent by the Supplier or as agreed

|  |
| --- |
|  |
|  |
|  |
|  |
|  |
|  |

1. The following services shall be charged for a total amount of (List the service)

|  |
| --- |
|  |
|  |
|  |
|  |
|  |
|  |

1. The Supplier shall not be entitled to vary the Supplier’s charges.
2. All charges quoted to the Client for the provision of the service are exclusive of any value-added tax (VAT), for which the Client shall be additionally liable at the applicable rate.

**Schedule 3:**

**Extension of services:**

|  |
| --- |
|  |
|  |
|  |
|  |
|  |

**DATE AND SIGNATURE OF THE PARTIES**

Supplier .......................................................... Date ...............................................

Client ............................................................... Date ...............................................