

TENDER FOR SUPPLY OF AUTOMOTIVE GASOIL THROUGH A GOVERNMENT TO GOVERNMENT ARRANGEMENT

The Petroleum (Importation) Regulations, 2023 (Legal Notice No. 3 of 2023) provides for the importation of petroleum products (Premium Motor Spirit, Automotive Gasoil and Jet A-1) under a Government to Government arrangement. The importation of petroleum through a Government to Government arrangement shall be centrally coordinated by the ministry responsible for petroleum.

The Ministry of Energy and Petroleum (MOEP) on behalf of the Government of Kenya (GoK) intends to enter into a Government to Government arrangement with prospective Governments for the supply of Petroleum Products under the Open Tendering System (OTS). The arrangement shall involve a Memorandum of Understanding (MoU) between GoK and the prospective Government, a Letter of Support (LoS) issued by GoK to the Supplier and a Master Framework Agreement between the Supplier and GoK.

The Supplier shall be required to enter into a Supply and Purchase Agreement with a nominated entity(ies) who is a licensed Oil Marketing Company (OMC) in Kenya eligible to participate and has demonstrated capability as a Seller under the OTS.

1. SECTION I: INVITATION TO SUPPLY AUTOMOTIVE GASOIL

- 1.1. Now therefore, the MOEP on behalf of Supply Coordination Committee (Supplycor) hereby invites bids for the supply of Automotive Gasoil (AGO) for a period of **two hundred and seventy (270) days (the Term)**.
- 1.2. Bids shall be delivered to the enclosed tender box at MOEP, State Department for Petroleum offices on **4th Floor, Kawi House, Nairobi** or sent by registered mail to "**Ministry of Energy and Petroleum P.O. Box 30582 - 00100 Nairobi, Kenya**" Or sent to pssdp@petroleum.go.ke and copied to downstream@petroleum.go.ke by 11:00 hours Nairobi Time on the bid closing day and shall be opened at 11:15 hours Nairobi time on the same day.
- 1.3. Bids shall neither close nor be opened on public holidays and weekends in Kenya.

1.4. MOEP reserves the right to accept or reject the bids fully or partially without assigning any reasons thereof.

SECTION II: INSTRUCTIONS TO BIDDERS

2. BID PURPOSE

2.1. GoK on behalf of Supplycor invites bids from Government owned entities for the supply of AGO for local consumption as well as for transit to the neighboring countries on a Cost, Insurance & Freight (CIF) Mombasa basis for the Term and in quantities mentioned under Clause 3 of this bid document.

2.2. The Bidder shall bear all costs associated with the preparation and submission of its bid and GoK shall in no case be responsible or liable for any cost regardless of the conduct or outcome of the bidding process.

3. QUANTITIES, QUALITY, BID DURATION AND QUOTATION

3.1. GoK on behalf of Supplycor invites bids as per Clause 2.1 above for a period of 9 months from 1st April 2023 to 31st December 2023 as follows:

PRODUCT	QUANTITY PER MONTH (METRIC TONS)	QUANTITY IN 9 MONTHS DURATION (METRIC TONS)
AGO	430,000 – 470,000	3,870,000 – 4,230,000

3.2. The Bidder shall quote for the Freight and Premium in United States Dollars per Metric Ton.

3.3. Quality of the AGO to be supplied shall comply with the prevailing specifications published by the Kenya Bureau of Standards (KEBS), OTS Agreement and any operational requirements of the receiving Terminal(s) most notable being the flash point requirement of 66 degrees Celsius.

4. BIDDER'S ELIGIBILITY

4.1. The following technical documents shall apply:

- a. Company registration certificate or its equivalent.

- b. A letter issued by an authorized Government institution confirming that the Bidder is a Government entity currently engaged in crude oil refining and/or trading and marketing of AGO.
- c. At least three (3) reference letters from companies or organizations to which the Bidder has supplied AGO along with the addresses of such companies or organizations.
- d. Proof of supply of AGO to the East African market.
- e. A letter of Power of Attorney of the Bidder's signatory who shall commit to the bid.

5. BIDDING DOCUMENTS

5.1. The content of the bidding documents shall comprise:

- a) Instructions to Bidders (ITB);
- b) Bid Form;
- c) Bid Security;
- d) Price Schedule; and
- e) Reference letters.

5.2. Failure to submit any of the documents as indicated above shall result in automatic rejection of the bid.

6. BID CLARIFICATION

6.1. A prospective Bidder requiring any clarification of the bidding documents may notify GoK in writing by registered letter, or email at the GoK's mailing address indicated in the Invitation to Supply AGO not later than two (2) working days prior to the deadline for bid submission. GoK shall respond in writing by registered letter, or email to any request for clarification of bidding documents which it receives, one (1) working day prior to the deadline for bid submission.

6.2. A written copy of GoK's response, including a description of enquiry but not identifying the source shall be sent to all prospective bidders.

6.3. GoK may in the course of evaluation of bids, individually request for clarification from Bidders. The request for clarification and the response thereof shall be in writing and shall be delivered by registered letter or email but no change in the price of the bid shall be sought, offered or permitted.

7. AMENDMENT OF BID DOCUMENTS

- 7.1. At any time prior to the deadline for submission of bids, GoK may, for any reason, whether at its own initiative or in response to a clarification requested by a prospective Bidder(s), modify or amend the Bidding Documents by issuing corrigenda or amendments.
- 7.2. The amendments or corrigenda will be notified in writing by registered letter or email to all prospective Bidders and shall be binding on them.
- 7.3. Prospective Bidders shall acknowledge receipt of amendment or corrigenda in writing by registered letter or email.
- 7.4. Bidders may modify or withdraw their bids by giving notice to GoK in writing before the deadline for submission of bids.
- 7.5. Erasion, alteration or other changes in the bid documents shall be initialed by the person signing the bid.

8. BID CANCELLATION OR REJECTION

- 8.1. GoK reserves the right to accept or reject the bid in whole or in part without assigning any reason thereof.

9. LANGUAGE

- 9.1. The bid shall be prepared in English and any communication submitted in connection with the bid shall be in English.

10. PREPARATION OF BID

- 10.1. The Technical Proposal should address deviations from the model Master Framework Agreement attached as **Annex 1**, other terms and conditions as required under Clause 4.1 and by the OTS Agreement attached as **Annex 2**.
- 10.2. The Financial Proposal should clearly indicate the Freight and Premium Component in USD per metric ton either on a month on month basis or a fixed figure over the Term. However for the sake of evaluating this bid, the average number over the Term shall apply.

11. BID FORM

- 11.1. The Bid Form is attached as **Annex 3** and should be filled and signed by the authorized representative of the bidder as per the Power of Attorney.

12. BID SECURITY

- 12.1. The bid should be accompanied by a Bid Security amounting to United States Dollars one

hundred thousand only (USD100,000) in the form of a Direct Bank Guarantee in accordance with the Bid Security Form attached as **Annex 4** and shall be valid for forty-five (45) days, from the date of bid opening.

- 12.2. The Bid Security for unsuccessful Bidders shall be returned as promptly as possible, but not later than seven (7) working days after bid award.
- 12.3. The Bid Security may be forfeited where a successful Bidder fails within the specified time as provided under Clause 21 acknowledge acceptance of bid award.

13. BID VALIDITY

- 13.1. Bidders shall confirm that their bids shall remain valid for forty five (45) days after the date of bid opening by GoK.
- 13.2. In exceptional circumstances, GoK may solicit the Bidder's consent to an extension of the period of bid validity. The request and the response thereto shall be made in writing and be sent by registered letter or email.

14. PAYMENT

- 14.1. Guarantee for payment to Bidder shall be through Letter of Credit (LC) issued by an investment grade international bank acceptable to the Bidder and under the instruction of the Bidder's counterparty against the presentation of Bidder's Commercial Invoices and shipping documents as provided under the OTS Agreement plus **one hundred and eighty (180) days Credit Period** from the date of Bill of Lading (BL), BL date being day zero.
- 14.2. GoK shall provide a Letter of Support for the transaction whose template is attached in the Master Framework Agreement.

15. BID PRICES

- 15.1. The Bidder shall indicate the Freight and Premium in United States Dollars per Metric Ton either month on month basis or a fixed figure over the Term.
- 15.2. A Bidder shall submit one bid denominated in USD and rounded to two (2) decimal places.
- 15.3. The pricing basis shall be AGO, Platt's Asia Pacific/Arab Gulf Marketscan under the heading 'FOB Arab Gulf' for 'Gasoil 0.005% S' (50 ppm) and actual United States Barrel to Metric Ton conversion as per Bill of Lading shall apply.
- 15.4. Bidders shall quote prices based on a **one hundred and eighty (180) days Credit Period**.

16. SEALING AND MARKING OF BIDS

16.1. The Bid Form together with the technical proposal, the Bid Security and the price schedule shall be:

- a) enclosed in a single sealed envelope and submitted together; or
- b) sent electronically to the email provided. Bids submitted electronically shall be password-protected and such password(s) shall be provided by the Bidder at the time of bid opening.

16.2. The bid submission sealed envelope shall be marked as follows:

a. The address:

"The Principal Secretary

State Department for Petroleum

Ministry of Energy and Petroleum,

P.O. Box 30582-00100

4th Floor, Kawi House, Off Popo Road,

Nairobi, Kenya"

Or any other physical address as advised by the Ministry of Energy & Petroleum.

Or sent to: pssdp@petroleum.go.ke and copied to downstream@petroleum.go.ke

b. Clear indication of the bid subject and clearly marked as follows ***"DO NOT OPEN BEFORE 3rd March 2023 AT 11:00 HOURS NAIROBI TIME "***

c. Indicate the full names and address (physical, postal and email) of the Bidder.

17. DEADLINE FOR BID SUBMISSION

17.1. Bids must be received by GoK at the address specified under Clause 16.2 above not later than **3rd March 2023 at 11:00 Hours, Nairobi Time.**

17.2. Bids presented after the deadline for bid submission shall be rejected and returned un-opened to the Bidder.

18. BID OPENING

18.1. The venue of the bid opening shall be at **Kawi House, 4th floor, off Popo Road, Nairobi** on 3rd

March 2023 at 11:15 Hours, Nairobi time. Bidders or their representatives may attend the bid opening meeting physically or virtually (MOEP shall provide the link).

- 18.2. Bidders or their representatives shall sign an attendance register prior to the bid opening. The Bidders' name and such other details as MOEP may consider appropriate shall be announced and recorded at the bid opening meeting.
- 18.3. Where bids were sent electronically, password(s) shall be provided by the respective Bidders at the bid opening meeting.
- 18.4. Bidders who do not provide password(s) for electronically submitted bids shall be deemed not to have placed a bid.
- 18.5. MOEP shall prepare a record of the bid opening meeting, including the information disclosed in accordance with Clause 18.2 above.

19. BID EVALUATION

- 19.1. MOEP shall examine the bids to determine material completeness, confirm that the required sureties have been furnished, check for any computational errors and confirm that the documents have been properly signed and sealed by the Bidder's authorized representative.
- 19.2 Financial bid evaluation shall be made on the basis of Freight and Premium in USD per metric ton. Where the bid is on a month on month basis, the average number over the Term shall apply.
- 19.3 In the event of a 'tie', i.e. two or more bidders quoting similar Freight & Premium and are the most competitive, then such Bidders shall be allowed an extra thirty (30) minutes at the bid opening meeting to review their bids. MOEP shall open the revised bids before announcement of the winning bid. The revised bid shall not be higher than the Freight & Premium previously submitted.

20. CANVASSING

- 20.1. Canvassing, lobbying or any other efforts by a Bidder to influence the bidding process shall result in automatic rejection of their bid.

21. BID AWARD

- 21.1. MOEP shall award the bid to the most responsive Bidder.
- 21.2. MOEP shall notify the successful Bidder of the award in writing by registered letter or email within two (2) working days after bid closing date.

- 21.3. The successful Bidder shall acknowledge and accept the notification of award in writing by registered letter or email within 24 hours after receipt of the notification of award.
- 21.4. Notwithstanding the provisions of Clause 21.2 above, MOEP reserves the right to accept or reject any bid and to annul the bid process and reject all bids, at any time prior to signing of the Master Framework Agreement, without assuming any responsibility for any costs or any liability to the affected bidders.

ANNEX 1: MODEL MASTER FRAMEWORK AGREEMENT

DATED: [DD_MONTH_YEAR]

THE [SUPPLIER'S NAME]

-AND-

**THE GOVERNMENT OF THE REPUBLIC OF KENYA
THROUGH
THE MINISTRY OF ENERGY & PETROLEUM**

**MASTER FRAMEWORK AGREEMENT
FOR THE IMPORTATION OF REFINED PETROLEUM PRODUCTS
FOR SALE IN KENYA AND TRANSIT MARKETS**

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This Master Framework Agreement is made the _____ day of

BETWEEN:

1. **[SUPPLIER'S NAME]**, Registration No. [XXXX], of [XXX] (Initials of Co.); **and**
2. **THE GOVERNMENT OF THE REPUBLIC OF KENYA** represented herein by the **MINISTRY OF ENERGY & PETROLEUM**, of P.O. Box 51614 - 00100, Nairobi, Kenya (GOK).

WHEREAS:

- A. The Government of the Republic of Kenya (GoK) through the Ministry of Energy & Petroleum (the MINISTRY) and [*Supplier's Government*] have entered into a Memorandum of Understanding dated [*dd_month_year*] relating to Cooperation in the Sale and Purchase of Petroleum Products through a Government to Government arrangement (hereinafter referred as the "MoU"),
- B. The MoU authorises GoK and [*Supplier's Government*] to enter into a Master Framework Agreement (the Agreement) through the MINISTRY and [*Supplier's Name*] respectively, for the sale of Petroleum Products to the SUPPLIER'S nominated Oil Marketing Company (OMC) for two hundred and seventy (270) days (the Term).
- C. GoK imports all its Petroleum Products requirements through the Open Tendering System (OTS) with an approximate monthly requirement of nine hundred and fifty thousand (950,000) Metric Tons. All the imports are paid for in United States Dollars (USD), putting a strain on GoK's foreign exchange reserves. GoK therefore intends to ease the pressure by entering into a framework arrangement with the Government of [*Supplier's Government*] through its global petroleum trading agency [*Supplier's Name*] in which [*Supplier's Name*] is granted exclusive right to supply Petroleum Products into Kenya following a competitive bidding process.
- D. In consideration for this exclusivity, [*Supplier's Name*] will provide 180-day credit supply of Petroleum Products into the Kenyan market with such credit supply secured by a 180-day Letter of Credit (LC) that is confirmed by a mutually agreed bank.

E. [Supplier's Name] shall, select and nominate OMC or OMC's with requisite experience and capability to undertake the role of Seller as provided for in the OTS Terms and Conditions that were effected on [dd_month_year] and in particular to administer the receipt of Petroleum Products into Kenya

F. GoK shall regulate the petroleum industry to ensure compliance with the relevant laws.

IT IS THEREFORE AGREED as follows:

1. Interpretation

1.1. The following definitions and rules of interpretation apply in this Master Framework Agreement.

Definitions:

Bill of Lading Date	means the date that a bill of lading is issued for a cargo at the port of loading
Business Day	means a day other than a Saturday, Sunday or public holiday in Kenya and [the Supplier's Government] when banks in Nairobi and the [Suppliers Government] are open for business
CIF	Means Cost, Insurance and Freight
Collection Account	has the meaning given in Clause 5.3;
Commencement Date	means [XXX] day of _____ 2023;
Control	means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract or otherwise (including, with correlative meanings, the terms controlling , controlled by and under common control with); and the expression change of control shall be construed accordingly. Control in this context excludes regulatory control.

Credit Period	means a period of one hundred and eighty (180) days after the Bill of Lading Date or any extended period as may be mutually agreed by both Parties.
“MINISTRY”	means the Government of the Republic of Kenya acting through the State Department for Petroleum, Ministry of Energy and Petroleum as the facilitator between SUPPLIER and Nominated Oil Marketing Company for the Sale and Purchase of Petroleum Products;
“MoU”	means the Memorandum of Understanding dated [<i>dd_month_year</i>] between the GoK through the MINISTRY and [<i>Supplier’s Government</i>] relating to Cooperation in the Sale and Purchase of Petroleum Products through Government to Government arrangement;
“Nominated Oil Marketing Company or Companies”	<p>means an Oil Marketing Company:</p> <ol style="list-style-type: none"> i. that is duly licensed to operate in Kenya; ii. that has met SUPPLIERS’s minimum qualifications for the sale of Petroleum Products; iii. that is nominated by SUPPLIER as the buyer of Petroleum Products and respective quantities under this Agreement and the OTS; and iv. that has entered into an SPA with SUPPLIER, for the purchase of Petroleum Products in a defined Term; <p>For sake of clarity, the term buyer in the Agreement means the nominated OMC(s) who shall purchase the nominated Petroleum Products under this Framework</p>
MT	Metric Ton
OMC	means Oil Marketing Company duly licensed by the Energy and Petroleum Regulatory Authority;

Open Tender System Terms and Conditions	means the Tender Terms and Conditions for Refined Petroleum Product Industry Imports, for Local and Transit Markets, dated [<i>dd_month_year</i>] or any successor agreement;
Petroleum Products	means Premium Motor Spirit (PMS), Automotive Gasoil (AGO) and Jet A-1 and in line with the Petroleum (Importation) Regulations, 2023 (Legal Notice No. 3 of 19 th January 2023)
Freight & Premium	means compensation paid for the transportation of Petroleum Products from Load Port to Discharge Port.
SUPPLIER	means a Government entity awarded the bid to supply Petroleum Products under this Master Framework Agreement
Supply Purchase Agreement (“SPA”)	means an agreement for the purchase and sale of Petroleum Products between the SUPPLIER and a nominated OMC(s).
Term	means the period from the Commencement Date and ending two hundred and seventy (270) days thereafter

1.2. Interpretation

- a) Clause, schedule and paragraph headings shall not affect the interpretation of this Framework Agreement.
- b) A **person** includes a natural person or entity.
- c) Unless the context otherwise requires, words in the singular shall include the plural and, in the plural, shall include the singular.
- d) Unless the context otherwise requires, a reference to one gender shall include a reference to the other genders.
- e) A reference to a law or to a provision of law are references to that law or to a provision of that law as amended and in force from time to time.

- f) A reference to **writing** or **written** includes fax and email.
- g) Any obligation on a party not to do something includes an obligation not to allow that thing to be done.
- h) A reference to **this Master Framework Agreement** is a reference to this Master Framework Agreement or such other agreement or document, in each case as varied from time to time.
- i) References to Clauses and Schedules are to the Clauses and Schedules of this Master Framework Agreement and references to paragraphs are to paragraphs of the relevant Schedule.
- j) Any words following the terms **including, include, in particular, for example** or any similar expression shall be construed as illustrative and shall not limit the sense of the words, description, definition, phrase or term preceding those terms.

2. Commencement and Term

2.1. This Master Framework Agreement shall commence on the Commencement Date and shall continue for the Term unless terminated earlier in accordance with clause 8 (Termination).

3. Nominated Oil Marketing Company(ies)

3.1. Prior to the Commencement Date, SUPPLIER shall nominate and communicate to GoK the Nominated OMC(s).

3.2. SUPPLIER and the Nominated OMC(s) shall enter into a Supply & Purchase Agreement (SPA) in the form set out in Schedule 1 in which the Nominated OMC(s) shall ensure delivery of Petroleum Products into Kenya as a Seller as defined under the OTS Terms and Conditions.

4. Petroleum Products Supply

For the Term of this Master Framework Agreement, SUPPLIER shall supply the Petroleum Products as provided hereunder.

4.1. Supplier

[SUPPLIER'S NAME]

4.2. Petroleum Products

Petroleum Products as defined.

4.3. Quality

Quality of the Petroleum Products delivered under this Master Framework Agreement shall comply with the prevailing specifications published by the Kenya Bureau of Standards, Open Tender System Agreement and operational requirements of the receiving Terminal(s) as may be advised from time to time. SUPPLIER and the Nominated OMC(s) shall carry out individual or joint or independent quality tests in ensuring compliance. The Nominated OMC(s) shall have the right to reject any Petroleum Product that does not comply with the specifications set out at the SUPPLIER's cost.

4.4. Quantity

For the sake of this Master Framework Agreement and to ensure security of supply, SUPPLIER undertakes to reserve the following monthly quantities of Petroleum Products for supply (as shall be further specified under an SPA):

- i. Premium Motor Spirit/Gasoline/Super Petrol: - 340,000 to 380,000 Metric Tons;
- ii. Automotive Gasoil/Diesel: - 430,000 to 470,000 Metric Tons; and
- iii. Jet A-1/Dual Purpose Kerosene: - 90,000 to 100,000 Metric Tons.

The quantities of Petroleum Products for sale and purchase under this Master Framework Agreement shall be as determined by GoK from time to time. GoK will issue to SUPPLIER a schedule of the monthly Petroleum Product quantity requirements, forty five (45) days prior to the first day delivery date range of the earliest cargo (es).

4.5. Terms of Delivery

Delivery terms will be CIF Mombasa.

4.6. Price:

- a) The price shall be the aggregate of the Free on Board (FOB) Price Component and Freight & Premium (Insurance, war risk and ocean loss) for each Cargo as set out hereunder.
- b) The Freight & Premium shall remain fixed or vary month on month during the Term of this Master Framework Agreement as specified in the Bid Award.

Petroleum Product	FOB Price Component	Freight & Premium (USD/MT)
PMS	100 percent of the arithmetic average of all the mean of low and high PLATT'S quotations for "PREM UNL 10 PPM" under the heading "FOB MED" as published by PLATT'S European Marketscan.	[●]/MT
Jet A-1	100 percent of the arithmetic average of all the mean of low and high PLATT'S quotations for Platts Asia Pacific/ Arab Gulf Marketscan under the heading "FOB Arab Gulf" for "Kero"	[●]/MT
Automotive Gasoil (Diesel / AGO)	100 percent of the arithmetic average of all the mean of low and high PLATT'S quotations for Platts Asia Pacific/ Arab Gulf Marketscan under the heading "FOB Arab Gulf" for "Gasoil 0.005% S' (50ppm) "	[●]/MT

- c) For cargoes whose first day of delivery date range is between the 1st day to the 14th day of the month, the applicable month of pricing shall be the immediate month prior to the month of delivery, i.e. the average of the published quotation during the month "M-1".

d) For cargoes whose first day of delivery date range is between the 15th to the last day of the month, the applicable month of pricing shall be the current month of delivery, i.e. the average of the published quotation during the month "M".

4.7. Inspection

An inspection shall be carried out at the load port by an independent inspector acceptable to GoK, SUPPLIER and the Nominated OMC(s). Determination of Quality shall be as prescribed in the SPA and the inspector's report shall be made available to all Parties.

5. Financing and Payment Mechanisms

5.1. Payment Terms

Nominated OMC(s) shall make payment to SUPPLIER in USD on the 180th calendar day following the Bill of Lading Date (Bill of Lading Date = day zero). However, if the 180th day is not a Business Day, then the payment will be made on the immediate Business Day following the 180th day.

5.2. Payment Security

On or before the Commencement Date, the Nominated OMC(s) shall obtain and maintain a Letter of Credit issued or confirmed by a financially sound and reputable investment grade international bank in a format acceptable to SUPPLIER.

5.3. Collection Account

The Nominated OMC(s) shall maintain an escrow account in Kenya for receipt of funds from Buyers under the OTS Tender Terms and Conditions.

5.4. SUPPLIER'S Warranties and obligations

SUPPLIER represents and warrants to the MINISTRY, that as of the Commencement Date:

- i. is a Government owned entity validly existing under the laws of [*Supplier's Government*];
- ii. has obtained all the requisite approvals from [*Supplier's Government*];

- iii. has power, authority, and title to the Petroleum Products to be delivered; and
- iv. has taken all necessary action to sign and deliver this Agreement and perform its obligations under this Agreement.
- v. Shall allow the GoK to conduct due diligence on its operations post award.

6. Delivery Default

If the SUPPLIER fails to deliver Petroleum Products pursuant to this Master Framework Agreement or delivers substandard Petroleum Products not meeting Kenya Standards, GoK shall have the right to purchase immediately any suitable alternative Petroleum Products without further notice to SUPPLIER. In such event, SUPPLIER shall pay to GoK (on behalf of participants of the cargo) any cost and liquidated consequential damages incurred thereof.

7. GOK Obligations

In consideration of the SUPPLIER's supplying the Petroleum Products for the agreed Credit Period, GoK will:

- 7.1. Ensure that SUPPLIER is the preferred supplier of the Petroleum Products during the term of this Master Framework Agreement.
- 7.2. Communicate the identity of the Nominated OMC(s) as a tender winning Seller pursuant to the provisions of Clause 6 of the OTS Tender Terms and Conditions with the obligations of supply under the OTS Tender Terms and Conditions.
- 7.3. Issue a Letter of Support to SUPPLIER as set out in Schedule 2.
- 7.4. Regulate the Petroleum Products market in such a manner to ensure that the Nominated OMC(s) discharges all the duties of a Seller under the OTS Tender Terms and Conditions.
- 7.5. Ensure timely receipt of Petroleum Products within the import timelines provided.

7.6. Ensure timely issuance of any applicable permit or consents required by SUPPLIER to perform its obligations under this Master Framework Agreement provided that any delays or refusal does not result from SUPPLIER'S inability or failure to comply with any condition relating to grant, maintenance or renewal of such applicable permit or consent;

8. Termination

8.1. Without affecting any other right or remedy available to it, either party may terminate this Master Framework Agreement with immediate effect by giving written notice to the other party if:

8.1.1. the other party commits a material breach of any term of this Master Framework Agreement and (if such breach is remediable) fails to remedy that breach within a period of fourteen (14) days after being notified by the other party in writing to do so; or

8.1.2. the other party repeatedly breaches any of the terms of this Master Framework Agreement in such a manner as to reasonably justify the opinion that its conduct is inconsistent with it having the intention or ability to give effect to the terms of this Master Framework Agreement.

8.2. For the purposes of clause 8.1, **material breach** means a breach (including an anticipatory breach) that is serious in the widest sense of having a serious effect on the benefit which the terminating Party would otherwise derive from a substantial portion of this Master Framework Agreement over the term of this agreement.

8.3. Without affecting any other right or remedy available to it, either party may terminate this Master Framework Agreement on giving not less than two (2) months' written notice to the other Party.

8.4. In the event this Master Framework Agreement is terminated for whatever reason, the Parties shall complete any obligations arising prior to such termination.

9. Warranties and representations

Each Party warrants that it has full power and authority to carry out its obligations under this Master Framework Agreement.

10. Taxes, Duties and Charges

The Nominated OMC(s) shall liaise with cargo(es) participants for the payment of all amounts in respect of taxes, duties, imposts, fees, charges and dues of every description imposed or levied by any governmental on the Petroleum Products delivered hereunder in accordance with the respective laws.

11. Confidentiality

11.1. This Master Framework Agreement is confidential. Neither its existence nor its terms shall be disclosed by either Party to any third party without the prior consent in writing of the other Party.

11.2. Notwithstanding Clause 11, a Party (the “disclosing Party”) may disclose details of this Master Framework Agreement without the other Party's prior written consent if:

11.2.1. such disclosure is required by law or by any securities exchange or regulatory or governmental body or fiscal authority having jurisdiction over it, wherever situated;

11.2.2. such disclosure is to an affiliate, legal advisor, agent, financing bank or insurance company for purposes of the transactions contemplated herein or in connection with any dispute, legal or arbitration proceedings arising from this Master Framework Agreement, and the disclosing Party shall cause all parties in receipt of such information to be bound by the same obligations of confidentiality as contained in this Master Framework Agreement.

12. Survival

12.1. In the event this Master Framework Agreement is terminated for any reason or lapses, the Supply Purchase Agreement in effect at the time of termination shall also be terminated, except that if any obligation remain unfulfilled under the Supply Purchase Agreement, then such Supply Purchase Agreement shall stay in effect until the obligations are fulfilled.

- 12.2. On termination of the Master Framework Agreement, the following clauses shall continue in force: clause 1 (Interpretation), Clause 11 (Confidentiality), clause 11.2.2 (Survival), Clause 24 (Governing law) and Clause 25 (Dispute Resolution).
- 12.3. Termination of this Master Framework Agreement shall not affect any rights, remedies, obligations or liabilities of the Parties that have accrued up to the date of termination, including the right to claim damages in respect of any breaches of the agreement which existed at or before the date of termination.

13. Variation

No variation of this Master Framework Agreement shall be effective unless it is in writing and signed by the Parties or their authorised representatives.

14. Waiver

- 14.1. A waiver of any right or remedy under this Master Framework Agreement or by law is only effective if given in writing and shall not be deemed a waiver of any subsequent right or remedy.
- 14.2. A failure or delay by a Party to exercise any right or remedy provided under this Master Framework Agreement or by law shall not constitute a waiver of that or any other right or remedy, nor shall it prevent or restrict any further exercise of that or any other right or remedy. No single or partial exercise of any right or remedy provided under this Master Framework Agreement or by law shall prevent or restrict the further exercise of that or any other right or remedy.

15. Rights and Remedies

Except as expressly provided in this Master Framework Agreement, the rights and remedies provided under this Master Framework Agreement are in addition to, and not exclusive of, any legal rights or remedies provided by law.

16. Severance

- 16.1. If any provision or part-provision of this Master Framework Agreement is or becomes invalid, illegal or unenforceable, it shall be deemed deleted, but that shall not affect the validity and enforceability of the rest of this Master Framework Agreement.
- 16.2. If any provision or part-provision of this Master Framework Agreement is deemed deleted under Clause 16, the Parties shall negotiate in good faith to agree a replacement provision that, to the greatest extent possible, achieves the intended commercial result of the original provision.

17. Entire Agreement

- 17.1. This Master Framework Agreement constitutes the entire agreement between the Parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter.
- 17.2. Each Party agrees that it shall have no remedies in respect of any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this Master Framework Agreement.

18. Assignment and Other Dealings

- 18.1. Save as otherwise provided in this Master Framework Agreement including entry into a Supply and Purchase Agreement, SUPPLIER shall not assign, transfer, mortgage, charge, subcontract, delegate, declare a trust over or deal in any other manner with any or all of its rights and obligations under this Master Framework Agreement without the prior written consent of GoK (such consent not to be unreasonably withheld or delayed).
- 18.2. This Clause shall not apply to assignments and other dealings required for purposes of any financing arrangements entered into by the Parties in connection with this Master Framework Agreement.

19. No Partnership or Agency

- 19.1. Nothing in this Master Framework Agreement is intended to, or shall be deemed to, establish any partnership or joint venture between any of the Parties, constitute any Party

the agent of another party, or authorise any Party to make or enter into any commitments for or on behalf of any other Party.

20. Stabilisation

If after the Execution Date the economic benefits or obligations of SUPPLIER is substantially affected by the promulgation of new laws and regulations, or of any amendments to the applicable laws and regulations of Kenya, the Parties shall agree to make the necessary adjustments to the relevant provisions of this Master Framework Agreement, observing the principle of the mutual economic benefits of the Parties.

21. Force Majeure

21.1. In this clause, “**Force Majeure**” shall include Acts of God, including but not limited to extraordinary events, natural disasters (for example lightning and earthquakes) unavoidable accidents, acts of war or conditions attributable to or arising out of war (declared or undeclared), strikes, lockouts, or other labour or political disturbances, acts of terrorism, insurrections, riots, and other civil disturbances, hostile acts of hostile forces constituting direct and serious threat to life and property, and all other matters or events beyond the reasonable control of the Party concerned.

21.2. Where GoK or the SUPPLIER (acting collectively and not individually) is prevented from complying with this Master Framework Agreement by Force Majeure (where such Person shall be the “**Affected Party**”), the Affected Party acting individually and/or jointly or collectively, shall promptly give written notice to the other Parties in accordance with the procedures set forth in Clause 21.1 specifying the Force Majeure event (and also providing the available evidence thereof) then the affected obligations of the Affected Party shall be suspended, provided that the Affected Party shall, where possible, use reasonable lawful efforts to remove or mitigate the effect of the Force Majeure event. No Party may claim that it has been prevented from complying with this Master Framework Agreement by Force Majeure caused as a direct result of strikes, lockouts or other labour disturbances involving such Party’s employees where the same have arisen due to such Party not being in compliance with the Affected Party’s Laws. Upon cessation of the Force Majeure Event, the Affected Party no longer affected shall notify the other Party.

21.3. Where the Party not affected disputes the existence of Force Majeure, that dispute shall be referred to arbitration in accordance with Clause 25.

21.4. Where an obligation is suspended by Force Majeure for more than twenty one (21) days, the non – Affected Party or the Affected Party may terminate this Agreement by notice in writing to the other Party without further obligations.

22. Notices

22.1. Each notice shall be in writing, in English and signed by the Party giving it (or its authorised representative).

22.2. Notices must be delivered by one of these methods:

- a) by hand;
- b) by courier; or
- c) by email as a document in ".pdf" format.

Notices must be addressed to the Party to be served at the address or email address set out below as up-dated or replaced:

[Supplier's Name]

Name:

Title:

Physical address:

Postal address:

Email:

Government of Kenya

Title: Principal Secretary

Physical address: 4th Floor, Kawi House, Off Popo Road, Nairobi

Postal address: 30582– 00100, Nairobi

Email: pssdp@petroleum.go.ke and copied to downstream@petroleum.go.ke

22.3. A Party may change its address or its email address for notices by notifying the other Party.

22.4. A notice becomes effective:

- a) if delivered by hand at 5 p.m. or earlier on a Business Day in the place of receipt, at delivery;
- b) if delivered by hand after 5 p.m. or on a day which is not a Business Day in the place of receipt, at 9.30 a.m. on the next Business Day;
- c) if sent by courier, on delivery; and
- d) if sent by email, when a delivery-receipt has been received by the sender in respect of the email address notified or an acknowledgement of the e-mail by the recipient sent to the sender whichever is later.

23. Counterparts

23.1. This Master Framework Agreement may be executed in any number of counterparts, each of which shall constitute a duplicate original, but all the counterparts shall together constitute the one agreement.

23.2. Transmission of the executed signature page of a counterpart of this Master Framework Agreement by email in “.pdf” format shall take effect as the transmission of an executed "wet-ink" counterpart of this Master Framework Agreement.

23.3. No counterpart shall be effective until each Party has provided to the other at least one executed counterpart.

24. Governing law

This Master Framework Agreement and any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with it or its subject matter or formation shall be governed by and construed in accordance with the Laws of Kenya.

25. Dispute Resolution

25.1. Should any dispute arise between the Parties with regard to the interpretation, rights, obligations and/or implementation of any one or more of the provisions of this Master Framework Agreement ("a Dispute"), the Parties shall in the first instance attempt to resolve such dispute by amicable negotiation.

25.2. Negotiation by Committee

- (a) Scope of Authority: The Dispute Resolution Committee (the "Committee") is authorized to resolve disputes that arise between the parties to this agreement, including disputes related to the interpretation or implementation of this agreement. The Committee's authority shall be limited to disputes that cannot be resolved by negotiation or other means provided for in this agreement.
- (b) Composition of the Committee: The Committee shall consist of three (3) members appointed by the parties to this agreement. Each party shall appoint one (1) member, and the third member shall be appointed by the two appointed members. The members shall have expertise in the subject matter of the dispute and shall act impartially in carrying out their duties.
- (c) Procedures for Dispute Resolution: The party initiating the dispute shall submit a written notice of dispute to the Committee, which shall include a description of the nature of the dispute and the relief sought. The Committee shall conduct a hearing or other proceedings as it deems necessary to resolve the dispute. The parties may be represented by counsel and may present evidence and call witnesses. The Committee shall render a decision in writing within thirty (30) days after the close of the proceedings.
- (d) Confidentiality: The proceedings of the Committee and any information disclosed during the proceedings shall be confidential and may not be disclosed to any third party without the consent of all parties.
- (e) Finality of Decisions: The decision of the Committee shall be final and binding on the parties to the dispute. The parties shall promptly comply with the decision and take any necessary steps to implement it.

- (f) **Governing Law:** This clause shall be governed by and construed in accordance with the Kenyan law.
- (g) **Termination or Amendment of the Agreement:** This clause may be terminated or amended by the parties in writing, provided that such termination or amendment is mutually agreed upon. Any termination or amendment shall not affect any rights or obligations that have accrued prior to the effective date of such termination or amendment.

25.3. Dispute resolution through Arbitration

- a. Should negotiations pursuant to Clause 25.2 fail to achieve a resolution within thirty (30) days, any dispute in relation to this Master Framework Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the London Centre for International Arbitration (LCIA) Rules, which Rules are deemed to be incorporated by reference into this Clause.
- b. The arbitral panel shall be comprised of three (3) arbitrators, two (2) of whom shall be designated by each Party and the third arbitrator, who shall act as the chairperson of the arbitral panel, shall be appointed by the two arbitrators. If the third arbitrator is not appointed within thirty (30) business days after the appointment of the two arbitrators, he shall be chosen by LCIA. No arbitrator shall be a national or an employee of either Party.
- c. The Seat, or legal place, of arbitration shall be London, United Kingdom.
- d. The language to be used in the arbitral proceedings shall be English.
- e. Nothing in this Clause shall prohibit a Party from approaching any court of competent jurisdiction for urgent interim relief.

25.4. If any Dispute arising out of or in connection with this Master Framework Agreement raises issues which are substantially the same as or in connection with the Supply and Purchase Agreement (a "Related Agreement Dispute") then notwithstanding that arbitrators may have been agreed or appointed under this Agreement, either Party may,

by written notice to the other Party and the arbitrators who have already been agreed or appointed hereunder, require the Dispute to be referred to and finally settled by the arbitral tribunal appointed under the Supply and Purchase Agreement provided that the arbitration in respect of the Related Agreement Dispute is an arbitration under the Rules and the provisions of this Clause shall apply and the arbitral tribunal appointed under the Supply and Purchase Agreement, has the necessary expertise and is otherwise qualified to arbitrate the Dispute arising out of or in connection with this Master Framework Agreement.

This Master Framework Agreement has been entered into on the date stated at the beginning of it.

[Execution Pages follows]

EXECUTION

This Master Framework Agreement is signed by duly authorised representatives of the Parties.

Signed Sealed and Delivered by the duly authorized representatives of the Government of the Republic of Kenya:

Cabinet Secretary
The National Treasury

Cabinet Secretary
Ministry of Energy and Petroleum

Witnessed by:

Principal Secretary
State Department For Petroleum
Ministry of Energy and Petroleum

Signed, Sealed and Delivered by the authorised representatives of
[Supplier's Name]

Signature _____

Name _____

In the presence of:

Signature _____

Schedule 1: SUPPLY & PURCHASE AGREEMENT

[*Supplier's Name*] and the Nominated OMC(s) to provide an executed copy to GoK

Schedule 2: Form of Letter of Support



REPUBLIC OF KENYA
THE NATIONAL TREASURY AND ECONOMIC PLANNING

Telegraphic Address: 22921
THE NATIONAL TREASURY Finance – Nairobi
P O BOX 30007 - 00100 FAX NO. 310833
NAIROBI
Telephone: 2252299
When Replying Please Quote
Ref: [●][●], 2023

Date: _____ 2023
[SUPPLIER's Name]

Dear Sirs

GOVERNMENT OF KENYA LETTER OF SUPPORT FOR SUPPLY OF PETROLEUM PRODUCTS

1. **Purpose:** This letter of Support ("Letter"):
 - (i) is issued by the Government of the Republic of Kenya ("GoK") pursuant to Clause 7.3 of the Master Framework Agreement dated (xxx) 2023 for the purchase and supply of Petroleum Products to [SUPPLIER's Name] a Company incorporated under the laws of [SUPPLIER'S Government] with registered office at [Physical Address] and of Post Office [Postal Address] which expression shall, where the context so requires, include the [SUPPLIER's Name] successors in title and assigns); and
 - (ii) shall also benefit (in accordance to the terms of the Deed of Adherence to be executed by the [SUPPLIER's Name] and [Name of Bank and address (physical and postal)] acting for and on behalf of any banks, financial institutions, lenders and any hedging counterparties providing financing, refinancing or hedging to the Supply and Purchase of Petroleum Products from time to time, together with any agent or

trustee thereof (collectively, the “Financing Parties”) and the expressions “Security Agent” and “Financing Parties” shall, where the context so requires, include such persons’ successors in title and assigns) the Financing Parties.

PROVIDED THAT no assignment of this Letter or rights thereunder by the [*SUPPLIER’s Name*] whether resulting from a change in the control of such [*SUPPLIER’s Name*] or howsoever arising, shall take effect unless the prior approval of the Cabinet Secretary of the National Treasury and Economic Planning has been sought and obtained in writing, such approval not to be unreasonably withheld or denied; and

PROVIDED FURTHER that where such assignment or transfer of this Letter is taking place in conjunction with a substitution of the [*SUPPLIER’s Name*] under the terms of the Master Framework Agreement and paragraph 8 of this Letter, notice to the GoK shall suffice.

It is understood and agreed that this Letter constitutes primary and binding obligations of the GoK but does not constitute a financial sovereign guarantee (under Section 58 of the Public Finance Management Act, 2012) of the payment obligations to the [*SUPPLIER’s Name*] and neither does it constitute a financing agreement between GoK and the Financing Parties.

2. Save where expressly defined otherwise in this Letter,
 - (i) any capitalized terms used in this Letter without definition shall have the same meaning as ascribed to them in the Master Framework Agreement (MFA); and
 - (ii) reference to the MFA shall include the MFA as amended, restated or supplemented from time to time,

PROVIDED THAT in the event of any inconsistency between this Letter and the MFA the defined terms set out in the MFA shall prevail.

3. Financing and Payment Mechanisms:

3.1 Payment Terms

The Nominated OMC shall make payment to [*SUPPLIER’s Name*] in United States Dollars (USD) on the 180th calendar day following the Bill of Lading Date (Bill of Lading Date is day

zero). However, if the 180th day is not a Business Day, then the payment will be made on the immediate Business Day following the 180th day.

3.2 Payment Security

On or before the Commencement Date, the Nominated OMC shall obtain and maintain a Letter of Credit issued or confirmed by a financially sound and reputable investment grade international bank in a format acceptable to [*SUPPLIER's Name*].

3.3 Collection Account

The Nominated OMC shall maintain an escrow account in Kenya for receipt of funds from Buyers under the OTS Tender Terms and Conditions.

3.4 SUPPLIER Warranties and obligations

[SUPPLIER's Name] represents and warrants to the MINISTRY, that as of the Commencement Date:

- i) is a Government owned entity validly existing under the laws of [*SUPPLIER's Government*];
- ii) has obtained all the requisite approvals from [*SUPPLIER'S Government*];
- iii) has power, authority, and title to the Petroleum Products to be delivered; and
- iv) has taken all necessary action to sign and deliver this Letter of Support and perform its obligations under this Letter of Support.

3.5 Delivery Default

If the [*SUPPLIER's Name*] fails to deliver Petroleum Products pursuant to the Master Framework Agreement or delivers substandard Petroleum Products not meeting Kenya Standards, GoK shall have the right to purchase immediately any suitable alternative Petroleum Products without further notice to [*SUPPLIER's Name*]. In such event, [*SUPPLIER's Name*] shall pay to GoK (on behalf of participants of the cargo) any cost and liquidated consequential damages incurred thereof.

4. Stabilisation

If after the Execution Date, the economic benefits or obligations of the [*SUPPLIER's Name*] are

substantially affected by the promulgation of new laws and regulations, or of any amendments to the applicable laws and regulations of Kenya, the Parties shall agree to make the necessary adjustments to the relevant provisions of this Letter of Support , observing the principle of the mutual economic benefits of the Parties.

5 Notice to Financing Parties and Transfer to Substitute Party

Subject to the terms of this Letter, any notice given to the [*SUPPLIER's Name*] under this Letter shall be given contemporaneously to the Financing Parties. To the extent that, in accordance with the MFA, GoK acting on behalf of Supply Coordination Committee is to be transferred to a third party (subject to satisfaction of all Legal Requirements), GoK agrees that it shall within sixty (60) days following receipt by GoK from the Financing Parties of a transfer notice, together with an application for the issuance of a replacement Letter, enter into a replacement letter of support on terms substantially similar to the terms of this Letter with the transferee and its financing parties.

6 Governing Law and Dispute Resolution

6.1 Governing law

This Letter of Support and any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with it or its subject matter or formation shall be governed by and construed in accordance with the Laws of Kenya.

6.2 Dispute Resolution

6.2.1 Should any dispute arise between the Parties with regard to the interpretation, rights, obligations and/or implementation of any one or more of the provisions of this Letter of Support (" a Dispute"), the Parties shall in the first instance attempt to resolve such dispute by amicable negotiation and in accordance with the MFA.

6.2.2 Negotiation by Committee

- a) Scope of Authority: The Dispute Resolution Committee (the "Committee") is authorized to resolve disputes that arise between the parties to this agreement, including disputes related to the interpretation or implementation of this agreement. The Committee's authority shall be limited to disputes that cannot be resolved by negotiation or other means provided for in this agreement.
- b) Composition of the Committee: The Committee shall consist of three (3) members appointed by the parties to this agreement. Each party shall appoint one (1) member, and the third

member shall be appointed by the two appointed members. The members shall have expertise in the subject matter of the dispute and shall act impartially in carrying out their duties.

- c) Procedures for Dispute Resolution: The party initiating the dispute shall submit a written notice of dispute to the Committee, which shall include a description of the nature of the dispute and the relief sought. The Committee shall conduct a hearing or other proceedings as it deems necessary to resolve the dispute. The parties may be represented by counsel and may present evidence and call witnesses. The Committee shall render a decision in writing within thirty (30) days after the close of the proceedings.
- d) Confidentiality: The proceedings of the Committee and any information disclosed during the proceedings shall be confidential and may not be disclosed to any third party without the consent of all parties.
- e) Finality of Decisions: The decision of the Committee shall be final and binding on the parties to the dispute. The parties shall promptly comply with the decision and take any necessary steps to implement it.
- f) Governing Law: This clause shall be governed by and construed in accordance with the Kenyan law.
- g) Termination or Amendment of the Agreement: This clause may be terminated or amended by the parties in writing, provided that such termination or amendment is mutually agreed upon. Any termination or amendment shall not affect any rights or obligations that have accrued prior to the effective date of such termination or amendment.

6.2.3 Dispute resolution through Arbitration

- (i) Should negotiations pursuant to Clause 6.2.2 fail to achieve a resolution within thirty (30) days, any dispute in relation to this Letter of Support, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the London Centre for International Arbitration (LCIA) Rules, which Rules are deemed to be incorporated by reference into this Clause.
- (ii) The arbitral panel shall be comprised of three (3) arbitrators, two (2) of whom shall be designated by each Party and the third arbitrator, who shall act as the chairperson of the arbitral panel, shall be appointed by the two arbitrators. If the third arbitrator is not appointed within thirty (30) business days after the appointment of the two arbitrators, he shall be chosen by LCIA. No arbitrator shall be a national or an employee of either Party.

(iii) The Seat, or legal place, of arbitration shall be London, United Kingdom.

(iv) The language to be used in the arbitral proceedings shall be English.

(v) Nothing in this Clause shall prohibit a Party from approaching any court of competent jurisdiction for urgent interim relief.

(vi) Nothing in this Clause shall prohibit a Party from approaching any court of competent jurisdiction for urgent interim relief.

6.2.4 If any Dispute arising out of or in connection with this Letter of Support raises issues which are substantially the same as or in connection with the Master Framework Agreement (a "Related Agreement Dispute") then notwithstanding that arbitrators may have been agreed or appointed under this Agreement, either Party may, by written notice to the other Party and the arbitrators who have already been agreed or appointed hereunder, require the Dispute to be referred to and finally settled by the arbitral tribunal appointed under the Master Framework Agreement provided that the arbitration in respect of the Related Agreement Dispute is an arbitration under the Rules and the provisions of this Clause shall apply and the arbitral tribunal appointed under the Master Framework Agreement, has the necessary expertise and is otherwise qualified to arbitrate the Dispute arising out of or in connection with this Letter of Support.

7 Term

7.1 The obligations of GoK under this Letter shall come into effect on the commencement date of the Master Framework Agreement and shall remain in force until the expiry of the Master Framework Agreement unless the Master Framework Agreement is terminated earlier by the Parties thereto; PROVIDED THAT GoK acknowledges and agrees, subject to paragraph 7.2, that termination of the Master Framework Agreement (for whatever reason) shall be without prejudice to :-

- (i) the [*SUPPLIER's Name*] and the Financing Parties' rights and GoK's obligations under this Letter; and
- (ii) any accrued rights prior to such termination.

7.2 If the Master Framework Agreement terminates before the expiry of its full term for any reason, then this Letter shall terminate on the later of:

- (i) thirty (30) days after the Master Framework Agreement has terminated, if the [SUPPLIER's Name] has not notified GoK of a claim under this Letter by such date; or
- (ii) the date on which such claim(s) is finally resolved and/or settled and any amount payable under or in connection with such claim(s) is unconditionally and irrevocably paid in full in accordance with the terms of this Letter.

8 Assignment and Deed of Adherence:

8.1 Subject to the Master Framework Agreement, the [SUPPLIER's Name] may for so long as any Debt Due remains outstanding:

- (i) with notice to and prior written approval of the National Treasury and Economic Planning, assign any of its rights under this Letter to the Agent acting and on behalf of the Financing Parties for purposes of providing security under the Financing Agreements (the "Security Assignment");
- (ii) with prior written notice to the National Treasury and Economic Planning, assign or transfer any of its rights under this Letter in connection with a substitution of the [SUPPLIER's Name] under the terms of the MFA;
- (iii) with prior written notice to the National Treasury and Economic Planning, assign or transfer any of its rights under this Letter in connection with the enforcement of any rights under the Security Assignment provided that the person acquiring such rights is a Competent Person (as defined under the MFA); or
- (iv) with prior written notice to the National Treasury and Economic Planning, appoint an Agent (or any replacement or successor thereto) as the [SUPPLIER's Name] agent or attorney (whether by way of a power of attorney or other legal instrument) to implement its rights under this Letter.

8.2 Except as set out above, the rights under this Letter shall not be assigned or transferred to a third party without consent and written approval of the National Treasury and Economic Planning,

and should any rights be assigned or transferred without the approval of GoK under the terms of this Letter,

- a. the obligations of GoK under this Letter shall immediately be suspended and no claim may be brought by the [SUPPLIER's Name] during the period of suspension;
- b. this Letter shall automatically lapse within a period of thirty (30) days following such assignment unless the Financing Parties:
 - (i) obtain the necessary approval; or
 - (ii) procure the reversal of the assignment or transfer complained of; or
 - (iii) demonstrate to GoK's reasonable justification that the assignment or transfer was not legally effective, or that such assignment or transfer was fraudulent and that it has taken steps to rectify the anomaly.

8.3 The [SUPPLIER's Name] shall notify GoK of the identity of the Agent as soon as this is known to the [SUPPLIER's Name]. Immediately thereafter, GoK, the [SUPPLIER's Name] and the Financing Parties shall execute a deed of Adherence, to accrue to such Agent (for and on behalf of the Financing Parties) the benefit of this Letter.

9 Binding Undertaking:

This Letter is intended to:

- (i) create legally binding undertakings on the GoK and the [SUPPLIER's Name] and to inure to the benefit of GoK, the [SUPPLIER's Name] and the Agent that signs a deed of Adherence to this Letter and;
- (ii) be enforceable among the aforesaid and their respective successors, assigns and transferees.

10 Waivers of Sovereign Immunity:

10.1 Pursuant to the provisions of the Government Proceedings Act, Chapter 40 of the Laws of Kenya (the "Government Proceedings Act") the commitments of the Government expressed under this Letter constitute commercial activities (rather than governmental or public activities) of GoK and GoK is subject to private commercial law with respect thereto.

10.2 Furthermore, to the extent that GoK may in any jurisdiction claim for itself or its assets or revenues immunity from suit, execution or attachment (whether in aid of execution, before judgment or otherwise) or other legal process and to the extent that in any such jurisdiction there may be attributed to itself or its assets or revenues such immunity (whether or not claimed), GoK agrees not to claim and irrevocably waives such immunity to the extent permitted by the laws of Kenya.

11 Privileges, Immunities of the Financing Parties

The Parties to this Letter hereby acknowledge and agree that nothing contained in this Letter shall be construed as a waiver, renunciation or other modification of any privileges, immunities and exemptions accorded to the Financing Parties under any articles of agreement establishing any such Financing Party, international law or any other applicable law.

12 Risk Management Committee:

For better management of risks covered under this Letter, GoK through the Ministry of Energy and Petroleum will establish a **Risk Management Committee** comprising of the SUPPLIER, the National Treasury and Economic Planning, the Ministry of Energy and Petroleum, the Office of the Attorney General and the Department of Justice, the Energy and Petroleum Regulatory Authority and any other relevant Government Instrumentality. For purposes of better management, the Committee can co-opt any other member or entity in the public or private sector.

The mandate of the Risk Management Committee shall be to consult on any matter(s) that may have an impact on any of the rights or obligations of the GoK, the Financing Parties or the [SUPPLIER's Name] under this Letter and the MFA.

13 Legal Opinion

Following the delivery of this Letter to the [SUPPLIER's Name], GoK shall deliver to the [SUPPLIER's Name] (for its own benefit and the benefit of Financing Parties) a legal opinion from the Attorney General as legal counsel to the GoK confirming, inter alia,

- (i) the validity of the obligations contained in this Letter (so far as they relate to GoK); and
- (ii) that the transactions contemplated herein on the part of the GoK are in accordance with all applicable laws of Kenya.

13 Amendment:

This Letter of Support may be varied from time to time by written agreement of the Parties, such variation to take effect on the date of the last signature on the Deed of Variation or Amendment, PROVIDED THAT no variation that alters the overall liability of GoK under this Letter of Support may take effect unless Cabinet approval has been sought and obtained, and the legal clearance of the Attorney General sought and obtained prior to execution of such Deed of Variation or Amendment

Yours faithfully,

Government of the Republic of Kenya acting through the following duly authorised representatives:

Cabinet Secretary, National Treasury and Economic Planning

Cabinet Secretary, Energy and Petroleum

Witnessed-by:

**Director General
Energy and Petroleum Regulatory
Authority**

Acknowledged and agreed by:

SIGNED)
by)
.....)
and)
.....) _____
being the duly authorised signatories of) Director
[SUPPLIER's Name])
in the presence)
of:)
) _____
) Director
)
)
)
)
)

Advocate

ANNEX 2: TENDER TERMS AND CONDITIONS FOR REFINED PETROLEUM PRODUCT INDUSTRY IMPORTS, FOR LOCAL AND TRANSIT MARKETS

This Agreement made on the **1st of March 2023** between **BUYERS** and **SELLERS** of Refined Petroleum Products within the Kenya Petroleum Oil Industry, for the importation and delivery of Refined Petroleum Products to the Local Kenyan Market as well as the neighboring Transit Markets.

WHEREAS:

- a. Oil Marketing Companies in Kenya are required by the Petroleum (Importation) Regulations, 2023 (Legal Notice No. 3 of 2023) to import refined petroleum products through the Open Tender System (OTS) centrally coordinated by the Ministry of Energy and Petroleum (MOEP);
- b. Kenya Pipeline Company Limited (KPC), Kenya Petroleum Refineries Ltd (KPRL), Vitol Tank Terminals International (VTTI) and/or other third-party depots in Mombasa receives the imported refined petroleum products as required and obligated by Law under Legal Notice No. 3 of 2023 and therefore plays a fundamental role in the operations of this Agreement;
- c. Parties or Participants to this Agreement are Oil Marketing Companies (OMCs) which:
 - i. are registered and licensed by Energy & Petroleum Regulatory Authority (EPRA) through the Ministry of Energy and Petroleum (MOEP);
 - ii. are participating in the Open Tender System (OTS);
 - iii. have not defaulted on any payment of their share of refined petroleum products tender quantity within the last two consecutive months;
 - iv. have signed a Transport and Storage Agreement (TSA) with Kenya Pipeline Company Limited;
 - v. have fully contributed their linefill obligation with Kenya Pipeline Company;
 - vi. Are fully paid-up members of Oil Spill Mutual Aid Group (OSMAG);
- d. The Transport and Storage Agreement (TSA) as hereinafter defined is an integral part and is considered as an attachment to this Agreement;
- e. This Agreement supersedes the Tender Terms and Conditions for Refined Petroleum Product Industry Imports, for Local and Transit Markets' Agreement dated 1st April 2022.

NOW THEREFORE IT IS AGREED AS FOLLOWS:

A. SELLER shall mean a Party:

- a. having been granted the license for Import, Export and Wholesale of petroleum products by Energy & Petroleum Regulatory Authority (EPRA);
- b. having been marketing petroleum products in the Local Market for the last twelve (12) months and has not defaulted as **BUYER** in the Open Tender System (OTS) within the period or in case of a Government to Government arrangement, the Nominated Oil Marketing Company;
- c. having been awarded the tender for the supply of a specified cargo by the Ministry of Energy and Petroleum (MOEP) under the terms of this Agreement or in the case Government to Government arrangement the Term Contract.
- d. shall be required on an annual basis to submit a reference letter from a reputable bank (at least Tier 1 & 2 banks) to the Ministry of Energy and Petroleum (MOEP) showing proof of financial support.
- e. shall have no outstanding linefill obligations to Kenya Pipeline Company Limited (KPC); or

B. BUYER shall mean a Party that has nominated to participate in a specific refined product industry import, either on their own behalf or as bona-fide nominated agents of Oil Marketing Companies (OMCs) registered and operating in Transit markets supplied through the Port of Mombasa, or their nominated agents, suppliers or financiers.

BUYERS for the Transit Market shall be the notifying party upon delivery of product and shall nominate to **SELLER** the consignee(s) on whose names the product shall be manifested for warehousing under transit and shall take full responsibility for performance of any party that the **BUYER** represents under this agreement. In addition, these **BUYERS** shall:

- a. nominate product volumes into the tender;
- b. issue discharge instructions, specifying cargo splits and consignee details, no later than three (3) working days before the expected time of arrival of the vessel;
- c. advice the invoicing party to the **SELLER**. In the absence of such advice to the **SELLER** before issuance of invoice and shipping documents as per clause 11.1, the **SELLER** shall regard the **BUYER** as the default invoicing party;
- d. ensure payment is made and transmitted to the **SELLER** within the stipulated time.

e. shall have no outstanding linefill obligations to Kenya Pipeline Company Limited (KPC).

1. EFFECTIVE DATE

- 1.1. This Agreement shall take effect on **1st March 2023** and shall continue until reviewed or terminated as provided hereinafter.
- 1.2. No party shall tender or participate in Industry imports pursuant hereto, prior to signing this Agreement. Any new OMCs (not present at the time of signing the revised OTS Agreement) shall sign a Deed of Adherence, and the same shall be circulated to all OMCs.

2. ABBREVIATIONS AND DEFINITIONS

- 2.1. The following abbreviations shall have the meanings provided:

AFQRJOS	Aviation Fuel Quality Requirements for Jointly Operated Systems
AGO	Automotive Gasoil
ASE	Adjustment of Stock Entitlement
B/L	Bill of Lading
°C	Degrees Centigrade
C & F	Cost and Freight
DISPORT	Discharge Port
EPRA	Energy & Petroleum Regulatory Authority.
ETA	Expected Time of Arrival
FOB	Free on Board
GOK	Government of Kenya
G to G	Government to Government
INCOTERMS	International Commercial Terms (latest set of International Chamber of Commerce)
JET-A1	Jet Aviation Fuel, also known as "JET"
KBRR	Kenya Banks Reference Rate
KEBS	Kenya Bureau of Standards
KES	Kenyan Shilling
Kg	Kilogram
KOSF	Kipevu Oil Storage Facility
KOT	Kipevu Oil Terminal
KPA	Kenya Ports Authority

KPC	Kenya Pipeline Company
KPRL	Kenya Petroleum Refineries Limited
KRA	Kenya Revenue Authority
L/C	Letter of Credit
LIBOR	London Inter-Bank Borrowing Official Rates
MOEP	Ministry of Energy and Petroleum or the Ministry responsible for petroleum
MT	Metric Tons
M ³	Cubic Meter
NOR	Notice of Readiness
OMC	Oil Marketing Company
OSMAG	Oil Spill Mutual Aid Group
OTS	Open Tender System
PDPR	Per Day Pro-Rata
Pipecor	Pipeline Co-ordinator
PMS	Premium Motor Spirit
RTGS	Real Time Gross Settlement
SCM	Supply Co-ordination Meeting
SHINC	Saturdays, Sundays, Holidays included
SOT	Shimanzi Oil Terminal
SUPPLYCOR	Industry Supply Coordinator and /or its Successor's
TSA	Transport and Storage Agreement
TT	Telegraphic Transfer
US BBL	United States Barrel
USD	United States Dollar
VSC	Vessel Scheduling Committee
VSM	Vessel Scheduling Meeting
VTTI	Vitol Tank Terminals International

2.2. The following terms shall have the meanings provided:

2.2.1 **“Cargo”** shall mean a specific shipment of refined product of Industry Import.

2.2.2 **“Charter Party Terms”** shall mean the terms of the agreement as shall be agreed between the **SELLER** and the ship owner for a specific Cargo.

2.2.3 **“Cleared Funds”** shall mean payments confirmed by **SELLER’s** Bank as received either through Electronic Funds Transfers (EFT) or Letter of Credit.

- 2.2.4 **“Common User Facility”** means petroleum infrastructure owned and maintained by any person, which may be used by third parties”
- 2.2.5 **“Full Cargo”** shall mean the total tendered parcel size, with an operational tolerance of +/- 5% advised in the tender award from MOEP.
- 2.2.6 **“Invitation to Tender”** shall mean the process defined in Clause 3 of this Agreement or a Government to Government arrangement.”
- 2.2.7 **“Nominated Oil Marketing Company”** shall mean the counterparty selected by the Supplier to deliver cargoes in a Government to Government arrangement.
- 2.2.8 **“Safe berth”** shall mean a berth, which vessels so conforming, and having any beam, can at all times safely reach and leave and at which such vessels can lie at all times safely afloat.
- 2.2.9 **“Supplier”** shall mean the entity that has signed an agreement with GoK for supply of Petroleum Products (PMS, AGO and Jet A-1) under the Government to Government arrangement.
- 2.2.10 **“Tender Offer”** shall mean an offer by **SELLER** to supply refined product to **BUYERs** or in the case of Government to Government arrangement, an offer by Supplier.
- 2.2.11 **“Tender Closing Day”** shall mean the last day for submission of bids
- 2.2.12 **“Tender Opening Day”** shall mean the day Ministry of Energy and Petroleum opens the bids for Industry Import under this agreement.
- 2.2.13 **“Delivery Date Range”** shall mean the dates of delivery as specified in the Tender Invitation or as amended at the Vessel Scheduling Meeting.
- 2.2.14 **“Forex Date”** shall mean the reference date for the exchange rate to be used in billing.
- 2.2.15 **“Demurrage Committee”** shall mean the demurrage validation and verification committee chaired by MOEP (or its nominee) and constituted by Supplycor, Importers, receiving terminals (KPC, KPRL, private terminal owners).
- 2.2.16 **“Government to Government”** shall mean an arrangement defined in Legal Notice No. 3 of 2023.
- 2.2.17 **“Vessel Scheduling Meeting”** shall mean the meeting chaired by MOEP attended by representatives from OMCs, KPC, KRA, VTTI and Supplycor whose main agenda is to schedule vessels for all the firm imports.
- 2.2.18 **“Term” shall mean the period to supply under the Government to Government arrangement.**

- 2.2.19 "TSA" shall mean Transport and Storage Agreement between KPC and each individual OMC.
- 2.2.20 "Transit Product" Shall mean product destined to other countries like Uganda, Rwanda, Democratic Republic of Congo (DRC), South Sudan etc.
- 2.2.21 "Transshipment Product" To mean product destined to other countries delivered by Sea.

3. INVITATION TO TENDER

- 3.1. Invitation to tender on final participations shall be issued by Supplycor on behalf of MOEP at least seven (7) working days before Tender opening date (annexure I), unless the tender in question is for an emergency cargo, in which case the tender call lead time shall be waived. Any changes on nominations for the tender shall be communicated by Supplycor at least two (2) working days prior to tender opening date.
- 3.2. Supplycor, on behalf of MOEP, shall notify parties to this agreement of the total cargo to be tendered accompanied with the breakdown of the individual BUYER's participation, clearly indicating the allocation split between local and transit volumes, specifying the critical operational requirements of the receiving Terminal(s).
- 3.3. For a Government to Government arrangement, the invitation to tender shall be as per the bid document.

The offers should be submitted in a signed company letterhead and in a sealed plain envelope to:

**THE PRINCIPAL SECRETARY,
STATE DEPARTMENT FOR PETROLEUM
MINISTRY OF ENERGY & PETROLEUM,
4th Floor Kawi House, Off Popo Road
NAIROBI;**

Or any other physical address as advised by the Ministry in charge of Petroleum.

4. TENDER CLOSING AND OPENING TIME

- 4.1. Tenders shall be delivered to the enclosed tender box at MOEP offices by 14:15 hours Nairobi Time on the Tender closing day and shall be opened at 14:30 hours Nairobi time on the same

day or in the case of a Government to Government arrangement as specified in the bid.

- 4.2. Witnessing of Tender opening shall be limited to representatives of the signatories to this Agreement or Suppliers with representatives from MOEP and Supplycor. Only one bid per company will be permitted for submission and should be denominated in USD and rounded to two (2) decimal places.
- 4.3. Tenders shall neither close nor be opened on Fridays and workdays falling immediately before public holidays, unless the tender is for an emergency import declared by MOEP or in the case of a Government to Government arrangement as specified in the bid.

5. TENDER OFFER, VALIDITY & DISQUALIFICATION OF OFFERS

- 5.1. Submissions of Tender offer by a SELLER shall constitute a binding offer to the BUYERs or for Government to Government arrangement the schedule sent to the Supplier that shall include the participation of BUYERs shall be binding on the BUYER.
- 5.2. Tender Offer by a SELLER to BUYERs shall comprise Freight & Premium component (Clause 10.2) only to be used in determination of the tender winner (Winning Bid) or in case of Government to Government arrangement as specified in bid document.
- 5.3. SELLER shall be awarded the tender based on the lowest bidding number on Freight and Premium in USD/MT for the respective tender cargo or in case of Government to Government arrangement the quoted Freight & Premium in USD per metric ton. Where the bid is on a month on month basis, the average number over the Term shall apply.
- 5.4. In the event of a 'tie', i.e. two or more SELLERs/SUPPLIERs quoting similar Freight & Premium and are the most competitive, then such bidders shall be allowed an extra thirty (30) minutes at the tender opening meeting to review their bids. MOEP shall open the revised bids before announcement of the winning bid. The revised bid shall not be higher than the Freight & Premium previously submitted.
- 5.5. **OFFER VALIDITY:** The winning bid shall remain valid until 12:00 hours Nairobi Time on the day following the Tender opening date, within which time BUYER may withdraw their participation, except where BUYER and SELLER is the same entity. For purpose of this Clause, validity shall mean that no SELLER will be entitled to withdraw any offer within this period or at any other time except as provided in clause 5.6 hereunder.
- 5.6. In the event that the tendered volume is reduced by more than fifteen (15) percent of the tender cargo size, SELLER will be at liberty to withdraw its offer no later than 15:00 hours

Nairobi time on the day following the Tender opening date.

- 5.7. For Government to Government arrangement, BUYERS shall be obligated to offtake the Petroleum Products as assigned.
- 5.8. **DISQUALIFICATION OF OFFER:** Any offer submitted by a SELLER/SUPPLIER that is not in conformity with clauses 3 and 4 of this Agreement shall be automatically disqualified.

6. AWARD LETTER

- 6.1. MOEP shall provide the award letter(s) to the most competitive bidder(s) within five (5) working days following the Tender opening day. Parties to this agreement will be provided with copies of signed winning bids and award letters.
- 6.2. For the G to G arrangement, MOEP shall award to the SUPPLIER and subsequently communicate to the BUYERS in this Agreement the Nominated OMC and the respective assigned participation.

7. DELIVERY AND QUANTITY

- 7.1. The designated point of delivery shall be in-tank either at KPC-KOSF and/or KPRL and/or SOT Terminals and/or Mbaraki Terminals and/or VTTI Terminals. Should operational constraints dictate otherwise, additional handling charges, if any, will be negotiated between BUYER(s) and SELLER.
- 7.2. It is mandatory that full cargo quantity tendered by any performing vessel to either of the discharge Terminals but within the operational tolerance provided for in this document, is prorated to BUYERS as advised in the tender award letter from MOEP as follows:-
 - 7.2.1. The operational tolerance shall be +/- 10% of the tender quantity.
 - 7.2.2. For a cargo quantity between 100% and 110% of the tender quantity, 100% of the tender quantity must be delivered to buyers.
 - 7.2.3. Any SELLER intending to deliver cargo that is more than provided in this Agreement i.e. more than 10% of tender quantity, shall first seek clearance from the VSC prior to loading the vessel, and approval of the same shall be documented in the minutes. Parties flouting this requirement will be reported to MOEP and EPRA for further action and shall be barred from participating as SELLER in the next tender cycle subsequent to their delivery.
 - 7.2.4. For the Government to Government arrangement, MOEP shall review the reported default

cases and bar the SUPPLIER(s) from participating in subsequent tender(s).

8. QUALITY

- 8.1. Quality of the products delivered here-under shall be as per the prevailing specifications published by KEBS, OTS Agreement and operational requirements of the receiving Terminal(s). If the quality of the product delivered does not meet the operational specifications of the receiving terminals in line with prevailing contract, the MOEP, Vessel Scheduling Committee, the facility operator and the SELLER shall consider the allowable reproducibility and repeatability levels for the quality parameter(s) in question as per KEBS standard method, as well as the prevailing security of supply situation and advise if the product should be discharged. If acceptable, the SELLER shall give an undertaking to clear the slops generated following receipt of this cargo as per TSA.
- 8.2. In the event of a dispute on quality results between the receiving Terminal and the SELLER, KEBS will be requested by both parties to arbitrate by testing the quality of the product and KEBS findings shall be final and binding.
- 8.3. JET A-1 specification shall conform to the Aviation Fuel Quality Requirements for Jointly Operated System (AFQRJOS) checklist, latest issue.
- 8.4. The density for PMS shall be maximum 0.7508 kg/litre at 20 degrees centigrade. Any SELLER delivering cargo with higher density but still within KEBS limits will have the price adjusted basis the Cost and Freight (C&F) determined on the price build-up. The C&F price will be multiplied by the reference density of 0.7508 kg/liter and divided by the actual density at discharge port at 20 degrees centigrade basis the pre-discharge certificate provided by the independent inspector nominated for delivery of the said cargo.
- 8.5. A **SELLER/SUPPLIER** who delivers product that does not meet product specifications set out in clause 8.1, 8.3 and 8.4 shall be disqualified from participating as a **SELLER/SUPPLIER** in the subsequent two tender cycles. In addition, the said **SELLER/SUPPLIER** shall be liable for prudent costs not compensated by EPRA for local volumes as shall be determined by the VSC.
- 8.6. In the event product does not meet KEBS specification, cargo will be rejected. **SELLER/SUPPLIER** shall be in Delivery Default and subject to penalties as per clause 19.

9. SHIPMENT

- 9.1. Shipment shall be in one or two parcels, at the SELLER's/SUPPLIER's option, subject to clause

19 and 20. However, SELLER/SUPPLIER can only claim demurrage for any one vessel.

- 9.2. Where the SELLER/SUPPLIER opts to deliver cargo in two shipments, the SELLER/SUPPLIER shall not deliver quantity above allowed limit, as per clause 7.2.1. Any additional quantity shall be delivered subject to clause 7.2.4.
- 9.3. The SELLER shall allocate product to all BUYERs in both vessels, and subsequently all BUYERs shall be liable to pay demurrage as billed, as per clause 9.1.
- 9.4. All vessels delivering product must be double hull, meet the maximum age limit of 20 years and meet any other requirements issued by the Kenya Maritime Authority from time to time.

10. PRICE

The price of the product in Mombasa shore tanks shall be the aggregate of the following:

10.1. FOB COMPONENT

- 10.1.1. The FOB component shall be as per tender call and confirmed by MOEP award letter. It shall be the arithmetic average of the mean of Platt's high and low quotations for the month of pricing specified as follows:
 - 10.1.1.1. For cargoes whose first day of delivery date range is between the 1st day to the 14th day of the month, the applicable month of pricing shall be the immediate month prior to the month of delivery, i.e. the average of the published quotation during the month "M-1";
 - 10.1.1.2. For cargoes whose first day of delivery date range is between the 15th to the last day of the month, the applicable month of pricing shall be the current month of delivery, i.e. the average of the published quotation during the month "M".
- 10.1.2. Any revision of delivery date range shall not affect the month of pricing as defined above.
- 10.1.3. For PMS, Platt's European Marketscan Mediterranean product cargo assessment under the heading 'FOB Med (Italy) Prem Unl 10ppm' shall apply.
- 10.1.4. For JET A-1, Platt's Asia Pacific/Arab Gulf Marketscan under the heading 'FOB Arab Gulf' for 'Kero' shall apply. Actual United States Barrel to Metric Ton conversion as per bill of lading shall apply.
- 10.1.5. For AGO, Platt's Asia Pacific/Arab Gulf Marketscan under the heading 'FOB Arab Gulf' for 'Gasoil 0.005% S' (50 ppm) shall apply. Actual United States Barrel to Metric Ton conversion as per bill of lading shall apply.

- 10.1.6. Any published correction to any relevant assessment shall be notified to BUYERs within three (3) working days of the Platt's correction.
- 10.1.7. In the event that the applicable Mean of Platt's quotations for the delivery month (M) are not available by the invoice date, the quotations for the month to-date average shall be applied on a provisional basis. Immediately the applicable quotations for the delivery month (M) specified on the Tender Invitation are known, SELLER shall raise supplementary invoices or credit notes in favor of BUYERs. These supplementary invoices or credit notes shall be issued to BUYERs not later than five (5) working days following the publication of the final price and shall be paid not later than five (5) working days from the date of receipt, failure to which SELLER/BUYER shall notify MOEP and EPRA of the defaulting party, who shall not be allowed to participate in the refined product tender either as BUYER or SELLER.
- 10.1.8. A copy of the final price build-up showing the final outturn figures (Metric Tons and Cubic Meters at 20 °C) shall be sent to Supplycor for forwarding to EPRA and BUYERs. Supplycor will validate the final price build up prior to sending it to EPRA and BUYERs.

10.2. FREIGHT AND PREMIUM COMPONENT

A fixed amount in United States Dollar per Metric ton (USD/MT) as awarded as per Clause 5.3 or as per the bid document in a Government to Government arrangement.

10.3. THE HANDLING AND ADMINISTRATIVE COMPONENT FOR LOCAL PARCELS ONLY

- 10.3.1. The Handling and Administrative Component (HAC) is formed of a variable Kenya Shillings component, calculated as per Annex II. Statutory charges shall apply as gazetted from time to time.
- 10.3.2. In the event that there are prudent costs incurred by Oil Industry and sanctioned by MOEP and communicated by official letter latest within three (3) working days prior to issuance of the final price buildup, there will be a provision for a HAC to cater for recovery of the additional cost.
- 10.3.3. The SELLER shall invoice BUYERs for the line item as part of the HAC basis the Bill of Lading quantity and payment by the BUYERs shall be as per the terms provided under the Tender Terms and Conditions.

- 10.3.3.1. The SELLER shall submit to the VSC, a list of BUYERs who have defaulted in making payment of the line item as part of the HAC by not later than the tenth (10th) working day after outturn date. For this purpose, the outturn date shall be deemed to be the date of completion of vessel discharge.
- 10.3.3.2. The Oil Marketing Companies shall, through the VSC, administer prudent cost recovery process for the specific item identified under 10.3.2. The VSC shall administer the line-item process, including:
- a. reconciling the line item account balances advised by the **SELLER** as having been collected vis-a-vis the projected collections of the line item through the Open Tender System;
 - b. facilitating the line-item disbursements as provided hereunder;
 - c. reconciling the line-item disbursements vis-a-vis the total amounts due to Oil Marketing Companies in respect of the prudently incurred cost the line item is meant to recover as detailed in MOEP guidance letter
- 10.3.4. The SELLER shall update the VSC within 14 days from collection of the funds on the total amount received on the line item.
- 10.3.5. The total line item collected and remitted to the SELLER's account shall be shared and disbursed amongst the eligible Oil Marketing Companies on a pro rata basis of each individual Oil Marketing Company's share of the global prudently incurred cost as detailed in the MOEP guidance letter
- 10.3.6. The line item disbursements to Oil Marketing Companies shall be done on a monthly basis by SELLER as agreed upon during the VSC.
- 10.3.7. Failure by **SELLER** to remit the line item collected through the Open Tender System as part of the HAC by the default date as required in clause 10.3.3.2 shall attract an interest penalty basis the prevailing KBRR applicable on the default date plus a premium of 7% and will be applied on the amount not remitted to eligible Oil marketers. The interest penalty shall be invoiced by affected OMCs immediately after the default date who will then notify MOEP of the default with a request to be barred from participating as SELLER in the next tender cycle.
- 10.3.8. Notwithstanding clause 10.3.7 above, **SELLER** who fails to remit the line item collected through the Open Tender System as part of the HAC on the default date shall also be suspended from participation in the next Open Tender System as a **SELLER** until the line item is paid and the interest penalty under clause 10.3.7 is remitted to eligible oil marketers

in full.

10.3.9. All numbers shall be calculated to 4 (four) decimal places.

10.4. TRANSIT DISCHARGE COSTS COMPONENT FOR TRANSIT PARCELS ONLY

10.4.1. The discharge costs component for transit parcels is comprised of a variable cost component in USD to cover discharge costs e.g. Northern Corridor Levy, Delivery order charges and any other statutory charges calculated as per Annex III.

10.4.2. All numbers shall be calculated to 4 (four) decimal places.

11. PAYMENT, PENALTY FOR LATE PAYMENT & TRANSFER OF ENTITLEMENT

11.1. **SELLER** shall forward invoices to **BUYERS**, together with all supporting documentation within 5 (five) working days prior to the first day of delivery date range. Where **BUYERS** require original invoices, **SELLER** shall provide as requested.

11.2. The supporting documents shall be sent vide email:

- a. Copy of bill of lading
- b. Forex schedule
- c. Copy of price build up
- d. Load port Certificate of Quality

11.3. Payment shall be made to **SELLER** within two (2) working days after completion of vessel discharge subject to clause 11.4, failure to which late payments shall attract a penalty, as spelt out in clause 11.6. For this purpose, the outturn date shall be deemed to be the date of completion of vessel discharge.

Where delivery of the product is through SOT and/or Mbaraki Mombasa to **BUYER's** nominated discharge location, all payments including duties/taxes shall be remitted latest two (2) working days before the firm berthing date from KPA. Where **BUYER** defaults to pay for their SOT allocation, such **BUYER** shall be barred from participating in two (2) consecutive OTS Tender(s). Subject to changes in customs processes, **BUYERS** may pay duties/taxes directly to KRA.

All supplementary payments or refunds shall be settled within five (5) working days from the date of the receipt of relevant documents.

11.4. In the event that invoices and the requisite supporting documents are not received by **BUYER** within five (5) working days prior to the first day of delivery laycan, **BUYER** shall pay **SELLER** within five (5) working days from receipt of said invoices and requisite supporting documents.

11.5. Payment shall be made as follows:

11.5.1. For the Cost & Freight (C&F) component (as stipulated in Clause 10.1 and 10.2 above), in US Dollars in cleared funds, into a US Dollar account as indicated by the **SELLER**. This payment shall be made by bank transfer and/or by Letter of Credit (LC). Payments by LC shall be subject to mutual arrangements between **BUYER** and **SELLER**.

11.5.2. For the Government to Government arrangement, the C&F for local quantities shall be paid in Kenya Shillings converted at the prevailing US Dollar TT Selling rate as advised by **SELLER's** bank on the outturn date or in the case of the Forex date falling on a weekend or a gazetted public holiday, the first following Kenyan banking day. The payment shall be made to an escrow account domiciled in Kenya as advised by **SELLER**. The payment by **BUYERS** shall be made by bank transfer and/or by Letter of Credit (LC). Payments by LC shall be subject to mutual arrangements between **BUYER** and **SELLER**.

11.5.3. For the Government to Government arrangement the C&F for transit products shall be paid in USD in cleared funds, into a USD escrow account domiciled in Kenya as indicated by the **SELLER**. This payment shall be made by bank transfer and/or by Letter of Credit (LC). Payments by LC shall be subject to mutual arrangements between **BUYER** and **SELLER**.

11.5.4. For the discharge costs applicable to Transit parcels (as stipulated in clause 10.4 above), in US Dollars in cleared funds, into a US Dollar escrow account as indicated by the **SELLER**. This payment shall be made by bank transfer and/or by LC. Payments by LC shall be subject to mutual arrangements between **BUYER** and **SELLER**

The applicable Forex Date shall:

11.5.4.1. For KOT the outturn date.

11.5.4.2. For SOT and Mbaraki the B/L date which shall not be earlier than:

- i. Fourteen (14) days prior to first day of tender stipulated delivery date range for cargoes loading out of the Arabian Gulf, Red Sea, South Africa, East Coast of Africa, West coast of India. In the event the B/L date is earlier than 14 days, then the applicable Forex Date shall be the 14th day prior to the 1st day of the tender delivery date

range.

- ii. Twenty (20) days for cargoes out of the Mediterranean region, Far East and elsewhere. In the event the B/L date is earlier than 20 days, then the applicable Forex Date shall be the 20th day prior to the 1st day of the tender delivery date range.

11.5.5. For the discharge costs applicable to Transit parcels (as stipulated in clause 10.4 above), in US Dollars in cleared funds, into a US Dollar account as indicated by the **SELLER**. This payment shall be made by bank transfer and/or by LC. Payments by LC shall be subject to mutual arrangements between **BUYER** and **SELLER**.

11.6. Penalty for late payments shall be computed as follows:

11.6.1. Where **SELLER** issues complete billing documents to **BUYER** in accordance with clause 11.1:

11.6.1.1. For transit product and transit product HAC: At the one-month LIBOR rate or any other prescribed international benchmark, ruling on the payment due date plus 5.5% (five decimal five zero percent) for the period between the 3rd and 5th working day from date of completion of discharge.

11.6.1.2. For Local Product and Local Product HAC (in KES): At the Base rate ruling on the payment due date from **SELLER**'s bank plus 5.5% (five decimal five zero percent) for the period between the 3rd and 5th working day from date of completion of discharge.

11.6.2. Where the required invoices and supporting documents are not received by the **BUYER** within five (5) working days prior to the first day of the delivery date range, the due date shall be as per clause 11.4 and penalties for late payment shall be computed as outlined in clause 11.6.1 depending on the number of days late.

11.7. Default Penalties shall apply as follows:

11.7.1. In the event that **BUYER** does not effect payment by the fifth (5th) working day after the date of outturn report, **BUYER** shall be deemed to be in default and shall be referred to MOEP and EPRA, subject to clause to 11.7.2.

11.7.2. Should **BUYER** provide a bank swift advice with value date that is within payment deadline i.e. within five (5) working days after the date of outturn report, but **SELLER** has not yet sighted the funds, an additional four (4) working days shall be granted before the

BUYER is declared a defaulter.

- 11.7.2.1. If the funds are sighted within 14 calendar days after the date of the outturn report, late payment interest shall be charged as per clause 11.6.1.
- 11.7.2.2. If the funds are not sighted after 14 calendar days after the date of the outturn report, then default penalty of USD 20 per MT shall apply for transit products. A penalty of the equivalent KES converted at the prevailing US Dollar TT Selling rate as advised by **SELLER's** bank on the applicable Forex date shall apply for the local products. The **SELLER** shall be at liberty to dispose off the product, in which case MOEP and EPRA shall be involved in determination of the default.
- 11.7.3. BUYER who expresses interest to pay for their full OTS allocation by the fifth (5th) working day from the date of the outturn report and pays within fourteen (14) calendar days from the date of outturn report, the default penalty applicable to BUYER shall be USD 10 per MT or equivalent KES converted at the prevailing US Dollar TT Selling rate as advised by **SELLER's** bank on the applicable Forex date.
- 11.7.4. BUYER who does not pay for their OTS allocation either in part or in full within fourteen (14) calendar days from the date of outturn report, the default penalty applicable shall be USD 40 per MT or equivalent KES converted at the prevailing US Dollar TT Selling rate as advised by **SELLER's** bank on the applicable Forex date on the quantity not paid for.
- 11.7.5. The defaulting BUYER(s) shall be reported to MOEP and EPRA with a copy to KPC, shall be excluded in the KPC's capacity allocations and the BUYER(s) shall be suspended from participating in the subsequent two (2) consecutive OTS tenders, during which time they shall pay for default charges of USD 40 per MT or equivalent KES converted at the prevailing US Dollar TT Selling rate as advised by **SELLER's** bank on the applicable Forex date as well as any other valid claims, which shall be confirmed by SELLER in writing to MOEP.
- 11.7.6. BUYER who does not pay the SELLER for SOT and/or Mbaraki OTS cargoes latest within two (2) working days before the berthing date from KPA or Shipping Agent, shall be deemed to be in default and the BUYER shall also be referred to MOEP and EPRA subject to clause 11.4.
- 11.7.7. SELLER shall reserve the right to dispose off defaulted product after five (5) working days from the date of outturn report upon notification to the buyer (in writing). If the SELLER opts to exercise their right to dispose off the product, the default penalty applicable to BUYER in such case shall be USD 10 per MT or equivalent KES converted at the prevailing

US Dollar TT Selling rate as advised by **SELLER's** bank on the applicable Forex date. For avoidance of doubt, the **SELLER** shall not dispose off product for which **BUYER** has provided a swift within the payment timelines.

11.7.8. In the event of either party defaulting, **MOEP** shall notify all the Parties to this agreement.

11.8. Penalty for Late payment shall be payable within fifteen (15) calendar days after presentation of the invoice. Where payment is not effected within fifteen (15) calendar days after presentation of the invoice, the defaulting party shall not participate in subsequent tender cycle either as **BUYER** or **SELLER** until such time that **SELLER** confirms in writing to **MOEP** on receipt of payment.

In any event, **SELLER** reserves the right to withhold the refined product equivalent to the late payment interest charges and other outstanding amounts.

11.9. All third-party charges associated with late payment and default including among other **KRA/URA** Tax Penalties including customs warehouse rent, financing costs on Taxes (at prevailing bank lending rates), and prevailing **KPC** charges including product aging costs provided in the **KPC** Transport and Storage Agreement, shall be on account of the defaulting party and shall be recovered at the actual billed amounts. In any event where product in question is discharged to third party terminals, the applicable hospitality charges will be passed to the defaulting party.

11.10. Transfer of Entitlement:

11.10.1. Except where there are disputes related to **OTS**, **SELLER** shall transfer to **BUYER** the full or partial entitlement as invoiced and paid for without deduction or set off within two (2) working days following cleared funds from **BUYER** and subject to issuance of outturn report. For the purposes of this clause, Transfer of Entitlement shall be deemed to be the issuance of Title Transfer documents by **SELLER** to **BUYER**. Any unexplained delays by the **SELLER** shall be reported to **MOEP**. Such title transfer documents shall be:

- a. Stock Adjustment document to **KPC/KPRL/VTTI** known as **ASE**
- b. Customs Form for Local Parcels
- c. Passed Customs warehousing entry
- d. Relevant outturn amendments for Transit Parcels
- e. Any other documents as shall be stipulated by **TSA** agreement as well as the prevailing Customs regulations.
- f. Release from Financier in the case where the Import is through Collateral

Financing.

For local parcels, **SELLER** is required to warehouse a minimum of 60% (or as may be advised by the MOEP) of the OTS cargo meant for local consumption by the date of completion of discharge to facilitate entitlement transfer and tax payments immediately the outturn report is issued

- 11.10.2. Upon receipt of instructions by way of Stock Adjustment document (ASE), KPC/KPRL shall endorse such instructions and shall document the date of receipt and confirm availability of product to the Parties. For local parcels, in addition to endorsing the Stock Adjustment document (ASE), KRA shall further endorse the Customs Form.
- 11.10.3. For Local Parcels, KPC/KPRL shall effect stock adjustments within 24 hours of receipt of the Stock Adjustment document (ASE) and Customs Form duly endorsed by KRA. In the case of Transit Parcels, KPC/KPRL shall effect the stock adjustments and amended outturn report within 24 hours of receipt of the Stock Adjustment document (ASE) and advice by the nominated surveyor.
- 11.10.4. KPC/KPRL shall circulate by electronic means to the Parties on a daily basis, the updated daily Stock entitlements and shall inform the Parties in the event that a **SELLER** has negative Stock entitlement.
- 11.10.5. Where penalty for late payment is due from **BUYER**, **SELLER** reserves the right to withhold product quantities equivalent to the penalty at the time of entitlement transfer within the fifteen (15) days when the penalty for late payment will be outstanding.
- 11.10.6. In the event that a **SELLER** does not transfer stocks to **BUYER** within the period stipulated here-above, or where the **SELLER** has insufficient stocks in KPC, **BUYER** shall be entitled to charge a penalty of USD 1 per MT per day or equivalent KES converted at the prevailing US Dollar TT Selling rate as advised by **SELLER**'s bank on the applicable Forex date which shall apply until the date of the title transfer. For avoidance of doubt, the penalty shall not apply where a **BUYER** delays confirming the **SELLER**'s ASEs.
- 11.10.7. Penalty for late entitlement transfer charges shall be payable by **SELLER** within fifteen (15) Calendar days after presentation of the invoice. If payment is not effected fifteen (15) Calendar days from presentation of the invoice, the defaulting party shall not participate in subsequent tenders either as **BUYER** or **SELLER** until such time that **BUYER** confirms in writing the receipt of payment to MOEP.
- 11.10.8. Where product is delivered from the vessel directly into SOT and/or Mbaraki, entitlement of the product shall pass from **SELLER** to **BUYER** upon receipt of funds into **SELLER**'s

nominated account. **SELLER** is required to facilitate amendment of the outturn to the name of **BUYER's** and provide copies of relevant Customs documentation to facilitate access to the product by **BUYER**, within one day following completion of Vessel discharge.

11.11. Debit Notes and/or Invoices for default charges/penalties due to either **BUYER** or **SELLER** shall be issued and presented to the other party latest within forty five (45) calendar days from the default date failure to which such claims shall remain barred. Payment shall be paid within fifteen (15) calendar days from the date of receipt of the invoice.

12. INSPECTION

Quantity and quality of Industry Import, as determined by discharge installation, and confirmed by an Independent Inspector/Surveyor at Mombasa, is final and binding on all parties, except in the case of fraud or manifest error. For the invoice, disport inspection charges shall be included in the price build-up as per annexure II and III hereto. The **SELLER** shall provide **BUYER** with disport inspection data.

13. LAYTIME

Laytime shall be 48 hours SHINC commencing 6 hours from tendering Notice of Readiness (NOR) or upon vessel 'All fast', whichever is earlier.

Charter party terms and conditions to apply and a copy to be provided by the **SELLER** during the monthly Demurrage Committee.

Time lost due to non-berthing of tankers during night time and/or awaiting daylight high tide, shall not count as used lay time and shall be deemed to be night-time allowance. For the purpose of clarity, the expiry of the night-time allowance period shall be set at 0600 HRS Kenyan time of the morning immediately following the night time tendering of NOR.

In any event, both the NOR + 6 hours allowance and the night-time allowance shall be counted simultaneously, and lay time calculation shall commence at the end of the longer one of either of the two periods of lay time allowance.

14. DEMURRAGE

14.1. There will be no Demurrage claims for OTS Vessels arriving after the delivery date range and/or where lack of physical ullage for the Industry Cargo is attributable to **SELLER** who

again claims compensation for demurrage.

14.2. SELLER is mandated to nominate the performing Vessel to **BUYER's** and indicate the demurrage rate prior to Vessel arrival in Mombasa. The demurrage rate shall be actual as stipulated in the charter party terms and conditions but subject to a maximum of the following rates pegged on vessel classification basis summer deadweight, which will form part of the support documents.

- a. Medium Range (MR) with max summer deadweight of 44,999 long tons– max USD 25,000 PDPR
- b. Long Range 1 (LR1) with summer deadweight between 45,000 to 79,999 long tons– max USD 31,000.00 PDPR
- c. Long Range 2 (LR2) with summer deadweight between 80,000 to 159,999 long tons – max USD 45,000 PDPR.
- d. The OTS committee shall review demurrage caps bi-annually based on an objective benchmark market assessment with MOEP confirmation of the same.

14.3. If the nominated vessel arrives within delivery date range, demurrage may arise in the following instances:

- a. Where the vessel cannot berth and / or discharge the industry cargo due to lack of physical ullage in the receiving terminals;
- b. Where berthing of the subject vessel is delayed by another vessel occupying the berth and discharging Industry cargo. For vessel(s) arriving within date range but cannot berth to discharge due to operational reasons within shore side, any extra and verifiable financing charges accruing from B/L date will apply subject to maximum of LIBOR (or any other prescribed international benchmark) + 2%.

14.4. There are instances however that the nominated vessel may arrive earlier than date range in which case laytime will be considered as follows:

14.4.1. Where vessel arrives earlier than date range but cannot berth either due to lack of physical ullage and/or the jetty is occupied by another vessel, laytime shall be deemed to commence either at 06:00 Hrs on the first day of date range or upon All fast, whichever comes earlier, except in the case of vessels discharging to more than one Jetty.

14.4.2. In the case of vessel(s) that must shift from one jetty to another e.g. SOT to Mbaraki, it is understood that earlier berthing of the vessel in one jetty does not guarantee

berthing in the subsequent jetty upon completion of discharge at the first jetty. In this case, 14.4.1 shall apply where the vessel will offload from one jetty and will be shifted to the second jetty immediately upon completion of discharge. Otherwise, laytime count will be suspended for the period that vessel will be required to wait shifting from one jetty to the next, i.e. from hoses disconnection at the first jetty until All fast at the subsequent jetty (ies).

14.5. Demurrage claims for OTS imports will be handled as follows:

14.5.1. For purposes of verification and validation, Supplier will avail the demurrage computation, any shifting charges applicable and the relevant support documents for the claim to Supplycor representative within five (5) working days after vessel discharge completion. Supplycor representative will then forward the support documents to the Industry nominated Demurrage Committee (Annex IV) for verification and/or validation during the monthly meeting for review of OTS related demurrage claims.

14.5.2. Upon validation of the Demurrage claim, Supplycor representative shall notify EPRA of the correct demurrage cost to be included in the pricing formulae. Supplycor will also give notice of the demurrage claim to **BUYERS**.

14.5.3. After the adoption of the demurrage amount by EPRA, **SELLER** will claim reimbursement of the demurrage costs from **BUYERS** of the cargo. Such claims shall be payable within five (5) working days from the date of presentation of invoice, failure to which defaulting parties shall be forwarded to MOEP and EPRA for further action.

14.5.4. Demurrage for Transit parcels should be billed based on approval from Demurrage Committee.

15. TITLE AND RISK

15.1. Risk of loss and damage to the products sold/purchased hereunder shall pass from **SELLER** to **BUYER** - in case of deliveries to Mombasa shore tanks, either at KPC-KOSF and/or VTTI and/or KPRL, or in case of deliveries through Shimanzi Oil Terminal (SOT) and/or Mbaraki, as the product passes the vessel's flange at the discharge berth.

15.2. Title to the product shall pass to **BUYER** from **SELLER** within two (2) working day upon payment of the purchase price for KOT cargoes provided there are no disputes on past items. For SOT cargoes, title to the product shall pass to **BUYER** within two (2) working days from

the outturn report date. Any deviation from this requirement shall be reported to MOEP by the **BUYER**.

15.3. As a separate and independent condition, **BUYER** agrees that unless and until the full purchase price is tendered, the product shall be **SELLER's** property. Until delivery of the product, **SELLER** shall insure them against all usual risks to full replacement value, and the **SELLER** shall not re-sell, use or part with possession of them. This obligation shall survive termination of this Agreement.

15.4. KPC and other Common User Facilities shall handle the refined product on behalf of the Parties as bailee.

16. TERMINATION AND WITHDRAWAL OF PARTY

16.1. This Agreement shall be terminated as against a party upon the occurrence of any of the following:

16.1.1. Immediately upon dissolution, bankruptcy, insolvency, or appointment of a receiver, liquidator, or trustee in bankruptcy for that party.

16.1.2. Written notice to a party that a law has been introduced or amended by an Act of Parliament so that it is unlawful for that party to operate or perform its duties and obligations under this Agreement or realize the benefits of this Agreement.

16.1.3. If such party ceases to carry on business.

16.1.4. If proven guilty of criminal activities

Notice of termination or withdrawal under this Agreement shall not discharge or relieve the withdrawing party of any rights, duties, obligations or liabilities arising prior to such termination, nor prejudice any rights or remedy accruing before, at or in consequence of such termination, or any proceeding with respect to any such right or remedy including any proceedings by way of arbitration provided for hereunder.

17. ARBITRATION

17.1. If at any time during the continuance of this Agreement any dispute, difference or question relating to the construction, meaning or effect of this Agreement or of any of the Clauses herein shall arise between the parties, then the aggrieved or affected party shall give written notice of not less than twenty-one (21) days to the other party of such dispute, difference or

questions.

- 17.2. Any dispute with regard to any matter in connection with this Agreement shall be referred to a sole arbitrator to be appointed by the parties hereto and failing agreement on the appointment of such arbitrator then a single arbitrator will be appointed by the Chairman for the time being of the Kenya Branch of Chartered Institute of Arbitrators within twenty-one (21) days.
- 17.3. The arbitration shall be conducted in accordance with the provisions of the Arbitration Act No. 4 of 1995 (Laws of Kenya or any statutory modifications or re-enactment thereof for the time being in force). The Place of Arbitration shall be **NAIROBI** and the language of proceedings shall be English.
- 17.4. The parties will apportion equally such costs of the arbitration including the fees to the arbitrator, excluding any charges for legal or other representation by or on behalf of the parties.
- 17.5. The appointed arbitrator's decision must be given in writing and will be final and binding on both Parties. It must be adhered to and put into effect. Judgment upon any award rendered may at the instance of any Party be entered as a decree of the Court in any Court having jurisdiction or application may be made to such Courts for judicial acceptance of the award and an order of enforcement as the case may be.
- 17.6. This Clause, (clause 17), constitutes an irrevocable consent by the Parties to any proceedings in terms hereof, and they may not withdraw from such proceedings or claim at any such proceedings that they are not bound by this Clause, and it is severable from the rest of this Agreement, and remains effective even if this Agreement is terminated for any reason.

18. GENERAL

To the extent that they are not in conflict with the terms of this agreement, the Members hereby agree to be bound by the terms of INCOTERMS 2020 and amendments thereof.

19. WITHDRAWAL PENALTY

A **SELLER** who wins and is awarded the tender but withdraws from delivery of the product(s) shall pay **BUYERs** a penalty of USD 10.00 per Metric Ton of Tender quantity or part quantity thereof not delivered and shall be suspended from participating as **SELLER** for a period of two (2) consecutive tenders.

A **BUYER** who either withdraws a quantity tendered after expiry of the stipulated offer validity period or does not pay the **SELLER** shall be deemed to have defaulted and shall be liable to a withdrawal penalty detailed in clause 11.7, in this case, withdrawal penalty will be payable to **SELLER** within 30 calendar days from the date of invoice and the provisions of clause 11.7 above shall apply.

20. LATE DELIVERY PENALTY

- 20.1.** In the event that **SELLER's** vessel does not arrive in Mombasa within three (3) days after the allocated delivery date-range, **SELLER** shall pay **BUYERs** a late delivery penalty of USD 1.00 per Metric Ton of Tender Quantity per day.
- 20.2.** For this purpose, the late delivery penalty shall accrue from the first day after the allocated delivery date range until the vessel arrives. Further, these amounts shall be payable within thirty (30) calendar days after the date of the last day of delivery date range.
- 20.3.** Until such payment is effected in full and receipt of monies confirmed by **BUYER's**, **SELLER** shall not participate in any other refined product tender and shall be referred to MOEP for appropriate action.
- 20.4.** In addition, **SELLER** shall be responsible for all direct costs associated with product delivery outside the allocated delivery date range. For purposes of clarification, direct costs shall mean the extra Freight & Premium for an emergency cargo.

21. DELIVERY DEFAULT

- 21.1.** Delivery default shall be deemed to have occurred if the cargo is not supplied within ten (10) days after the last day of the delivery date range, in which case **BUYER's** will be relieved of their obligation to buy the cargo.
- 21.2.** This will also apply where **SELLER** cannot demonstrate that there is an expected shipment by providing copies of Bill (s) of Lading and Certificate of Quality to MOEP by the first day of delivery date range. In the event that the Supplier cannot provide the required documents, MOEP shall proceed to call an emergency tender to substitute the defaulted cargo and the defaulting **SELLER** shall be barred from participating as **SELLER** in the two (2) consecutive tenders in addition to the provisions of clause 21.3.
- 21.3.** **SELLER** who is in default shall be liable for the penalties detailed in Clause 19.
- 21.4.** For the Government to Government arrangement, MOEP shall review the reported default

cases and bar the SUPPLIER(s) from participating in subsequent tender(s).

22. FORCE MAJEURE

- 22.1.** Neither **SELLER** nor **BUYER** shall be liable for damages or penalties for any failure or delay in performance of any obligation hereunder other than obligation to make payment, where such failure or delay is caused by force majeure, being any event, occurrence or circumstance reasonably beyond any control of that party, including without prejudice to the generality of the foregoing but not limited to failure or delay caused by or resulting from acts of God, piracy attacks, fires, floods, wars (whether declared or undeclared), riots, delays of carriers due to breakdown or adverse weather, perils of the sea, embargoes, accidents, restrictions imposed by any governmental authority (including allocations, priorities, requisitions, quotas and price controls).
- 22.2.** The party whose performance is so affected shall immediately notify the other party hereto indicating the nature of such a cause and, to the extent possible, inform the other party of the expected duration of the force majeure event. The time of **SELLER** to make, or **BUYER** to receive, delivery hereunder shall be extended during any period in which delivery shall be delayed or prevented by reason of any of the foregoing causes up to a total of ten (10) days.
- 22.3.** As soon as the affected Party anticipates that it will be able to resume performance of its obligations under this Agreement, that Party shall promptly give the other Party written notice to that effect and shall promptly resume performance of its obligations. If any delivery hereunder shall be so delayed or prevented for more than ten (10) days, either party may terminate this contract with respect to such delivery upon written notice to the other party.
- 22.4.** Nothing in this Clause shall relieve either party of its obligations accrued at the date of the event.

23. WAIVER

- 23.1.** Any waiver or concession that may be granted by a party(ies) hereto in regard to any of terms and conditions of this agreement shall not in any way affect or prejudice that party's strict rights hereunder.
- 23.2.** Parties involved in reviewing requests for waiver for quality, delivery date range and demurrage are MOEP, VSC, receiving facility/terminal and the **SELLER**.
- 23.3.** Waiver criteria shall be for the following scenarios:
- 23.3.1.** Quality deviations whereby product specifications comply with Kenya Standards (KEBS) but

do not meet operational requirements of the receiving terminal; refer to clause 8.

- 23.3.2. Request by **SELLERS** to change the delivery date range after tender award: the **SELLER** shall propose a new date range to the Vessel Scheduling Committee for deliberation and approval. The proposed date range shall not extend beyond ten (10) calendar days from the original date range. The pricing of the cargo shall remain as per tender award.
- 23.4. All such waivers or concessions may be withdrawn at any time without prior notice. No waiver by either party of any breach of this Agreement shall be considered as a waiver of any subsequent breach of the same or any provision.

24. ETHICAL CONDUCT

Each party warrants and undertakes that it shall ensure that its officers and employees and any other party whom it engages to assist in performing its obligations in this contract, shall operate in an ethical manner at all times and in compliance with all applicable laws and regulations.

The Parties will provide all possible assistance to each other in order to investigate any possible instances of unethical behaviour or business conduct violations by an employee and/or authorized representative of the other. Each party will forthwith disclose any breach of these provisions that comes to its knowledge to allow for timely action for prevention and detection of unethical behaviour. Each Party will adopt appropriate processes to prevent offering any illegal gratification in the form of bribes or kickbacks either in cash or kind in the course of all dealings with each other. Any instances of such violations will be viewed in a serious manner and each Party reserves the right to take appropriate actions or remedies as may be required under the circumstances.

25. ASSIGNMENT

No party shall assign this agreement in whole or in part without the written notice to the other parties except to an associate as defined in Section 153 of Companies Act, 2015, provided that transfer of more than 50% of the shares of either party shall be deemed to be an assignment within the context of this clause.

26. TOTAL AGREEMENT

This agreement is the entire agreement between the parties concerning the subject matter and supersedes all prior agreements and understandings whether written or verbal. This agreement

may not be varied or amended in any way except in writing signed by representatives of all the parties.

27. REBUTTAL OF PARTNERSHIP AND AGENCY

This Agreement shall not constitute or be deemed to constitute a partnership or agency relationship between the parties.

28. GOVERNING LAW

This Agreement shall be construed in accordance with and governed by the Laws of the Republic of Kenya.

We, the undersigned, duly authorized by our respective companies, hereby agree to all the above terms and conditions.

ANNEX 3: BID FORM

[BIDDER'S LETTER HEAD]

[DATE]

The Principal Secretary

State Department for Petroleum

Ministry of Energy and Petroleum,

P.O. Box 30582-00100

4th Floor, Kawi House, Off Popo Road

NAIROBI, KENYA

Dear Sir,

**REF: TENDER FOR SUPPLY OF AUTOMOTIVE GASOIL THROUGH A GOVERNMENT
TO GOVERNMENT ARRANGEMENT DELIVERED TO KIPEVU OIL TERMINAL,
MOMBASA**

We refer to your tender invitation dated [day_month_year] requesting for bids for supply of Automotive Gasoil for a term of two hundred and seventy (270) days. In reference to Clauses 3 and 14 of the bid document and Clause 4.6 of the model Master Framework Agreement, we are pleased to offer as below:

Month	Freight & Premium (USD/MT)
April 2023	
May 2023	
June 2023	
July 2023	
August 2023	
September 2023	
October 2023	
November 2023	
December 2023	

Our contract will be financed by [name of investment grade international bank]

Yours Sincerely

[Bidder's authorized representative]

ANNEX 4: FORM OF BID SECURITY - DEMAND BANK GUARANTEE

Beneficiary: _____

ITT No: _____

Date: _____

BID GUARANTEE No: _____

Guarantor: _____

1. We have been informed that _____ (hereinafter called "the Applicant") has submitted or will submit to the Beneficiary its Bid (hereinafter called "the Bid") for the execution of _____ under Request for Tenders No. _____ ("the ITT").
2. Furthermore, we understand that, according to the Beneficiary's conditions, Bids must be supported by a Bid guarantee.
3. At the request of the Applicant, we, as Guarantor, hereby irrevocably undertake to pay the Beneficiary any sum or sums not exceeding in total an amount of _____ (_____) upon receipt by us of the Beneficiary's complying demand, supported by the Beneficiary's statement, whether in the demand itself or a separate signed document accompanying or identifying the demand, stating that either the Applicant:
 - a) has withdrawn its Bid during the period of Bid validity set forth in the Applicant's Bid document ("the Bid Validity"), or any extension thereto provided by the Applicant; or
 - b) having been notified of the acceptance of its Bid by the Beneficiary during the Bid Validity or any extension thereto provided by the Applicant has failed to execute the Master Framework Agreement.
4. This guarantee will expire: (a) if the Applicant is the successful Bidder, upon our receipt of copies of the Master Framework Agreement signed by the Applicant and, or (b) if the Applicant is not the successful Bidder, upon the earlier of (i) our receipt of a copy of the Beneficiary's notification to the Applicant of the results of the Bidding process; or (ii) forty five (45) days after the end of the Bid Validity.
5. Consequently, any demand for payment under this guarantee must be received by

us at the office indicated above on or before that date.

[Signature]