

Kenya Transparency & Communications Infrastructure Project

Capacity Purchase for BPO

Vision

Kenya becomes
a top ten global
ICT hub.

Mission

To rapidly
and innovatively
transform Kenya
through promotion
of ICT for
socio-economic
enrichment
of our society

"Piloting initiative for the purchase of
international telecommunications capacity -
Business Process Outsourcing Industry-
Documentation in line with the fulfillment of the
related disbursement condition"

Ref: "Disbursement: Additional Instructions"
letter issued in November 28, 2007

April, 2008

DATED THIS

DAY OF

2008

KENYA ICT BOARD

- and -

[BPO]

**PILOT BUSINESS PROCESS OUTSOURCING SUPPORT
FOR
CAPACITY PURCHASE SCHEME
AGREEMENT**

Drawn By:

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Advocates,
Landmark Plaza,
13th Floor,
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P. O. Box 26333
00100 - NAIROBI

BPO BANDWIDTH CAPACITY SUPPORT AGREEMENT

THIS AGREEMENT is made on the _____ day of _____ 2008
BETWEEN KENYA ICT BOARD, a state corporation established in Kenya pursuant to *the State Corporation Act, Chapter 446 of the Laws of Kenya* and of Post Office Box Number 27150 – 00100, Nairobi (hereinafter referred to as “***KICTB***”, which expression shall where the context so admits include successors and assigns of the **ONE PART AND [BPO]**, [a limited liability company duly incorporated in Kenya Pursuant to the Companies Act, Chapter 486 of the Laws of Kenya and of Post Office Box Number [000000 – 00000], [Town] (hereinafter called “***the BPO***” which expression shall where the context so admits include its successors and permitted assigns) of the **SECOND PART**.

WHEREAS

Recitals:

- (A) ***KICTB*** is a state Corporation established in Kenya to rapidly and innovatively transform Kenya through promotion of ICT for socio-economic enrichment of our society and having the following broad objectives: -
- (i) To develop and position Kenya as the preferred ICT destination in Africa;
 - (ii) To develop and promote competitive ICT industries in Kenya;
 - (iii) To develop world class Kenyan ICT institutions; and
 - (iv) To increase ICT access, utilization for all Kenyans (become a principle driver in bridging the digital divide)
- (B) ***The BPO*** is an independent Company duly incorporated in Kenya carrying on the business of a Business Process Outsourcing Operator in Kenya and is duly registered with ***the Communication Commission of Kenya***, as such;
- (C) The ***Government of Kenya*** has identified Business Process Outsourcing as having the highest potential to create employment for economic and social

empowerment for the unemployed and especially the youth, therefore making it a flagship project in the **Republic's Vision 2030**;

- (D) It has been noted that the Business Process Outsourcing operators in Kenya are disadvantaged by the high cost of bandwidth in Kenya and are therefore not able to compete on fair terms with other Business Process Outsourcing destinations globally;
- (E) **The Government of Kenya** has successfully negotiated for a Business Process Outsourcing "Bandwidth Support Capacity Purchase Scheme" support line (hereinafter referred to as "**the Support**") in the Financing Agreement signed with the **International Development Association** (hereinafter referred to as "**the IDA**") for the **Kenya transparency and Communication Infrastructure Project (TCIP)**. This support is conceived as a transitional and non-discriminatory support with a sunset close so as:
- i. to be compatible with Kenya's existing commitments under the WTO
 - ii. to be designed to best achieve its purpose as in C above.
- (F) **KICTB** has been tasked with disbursing the said Bandwidth Support Capacity Purchase Scheme
- (G) **KICTB** has offered and **the BPO** has accepted the Bandwidth Support Capacity Purchase Scheme on the terms set out in this agreement as more specifically hereinafter described.

Operative provisions:

1 Commencement & Period of Agreement

- 1.1 This Agreement shall be deemed to have commenced on the **1st day of July 2007** ("**the Commencement Date**").
- 1.2 The Agreement shall cover the dates **1st July 2007** until **30th June 2008** or until this Agreement is terminated in accordance with **Clause 8** below.

- 1.3 The agreement may only be extended or renewed by mutual agreement of the parties in writing

2 Bandwidth Support Capacity Purchase Scheme

In consideration of *the BPO* providing services as a Business Process Outsourcing Operator from Kenya in an expert and diligent manner and to the best of its ability, promptly and faithfully comply with and observe all lawful and best business practices, **KICTB** shall, unless prevented by *force majeure* and subject to the express provisions of this Agreement, subsidize the cost of *the BPO's* bandwidth capacity purchase cost as follows;

For every incremental bandwidth above the level at 31st December 2006, KICTB will pay the difference between the actual cost and US\$ 500 per 1Mbps. This is as for the formulae attached in Schedule I.

PROVIDED THAT:

- 2.1 *The BPO* shall register itself with **KICTB** as a Business Process Outsourcing operator and shall duly advise **KICTB**, in writing, of any changes of its particulars of registration as and when they occur as well as their effective date;
- 2.2 The Support shall be processed and paid out on a monthly and reimbursement basis as per the attached schedule of payments table in Schedule II.
- 2.3 *The BPO* shall presented its Claim by way of a Corporate Officer's Certificate which will cover the information as per the standard format contained in Schedule III hereto accompanied by a proof of bandwidth capacity purchase from its satellite capacity purchaser as well as usage graphs or statistics to support the same;
- 2.4 **KICTB** shall cause *the BPO's* Corporate Officer's Certificate to be audited by an auditor of its (**KICTB**) choice; The Scope of the audit is as per the attached Schedule IV

- 2.5 **The BPO** shall avail to the auditor all material documents (and copies thereof) relating to the Corporate Officer's Certificate including but not limited to its Contract with the bandwidth capacity supplier.
- 2.6 **KICTB** shall monitor the impact of **the Support** to **the BPO** on its operations including but not limited to job creation (corresponding FTEs) and growth and the BPO shall avail all required data and information to evidence the same;
- 2.7 **KICTB** shall thereafter pursue **the BPO's** Claim with **the IDA** and shall remit the same as soon as it is paid out by **the IDA** in accordance with the payment schedule presented in 2.2 ;
- 2.8 **The BPO** may Claim the Support for any bandwidth capacity purchased from **1st July 2007** or from commencement of its operations, whichever is later, subject to the above terms;
- 2.9 **The BPO** undertakes to refund any sums in respect of any fraudulent Claims including the cost of recovery thereof and **KICTB** reserves its right to file a criminal complaint in respect thereof and in addition thereto pursue the same in any civil proceedings

3 Obligations

- 3.1 **The BPO** shall offer its services and carry out its duties under the terms of the said service in an expert and diligent manner and to the best of its ability, promptly and faithfully comply with and observe all lawful and best business practices; and
- 3.1.1 throughout the term of this agreement, **the BPO** will, when required, give to **KICTB** such written information regarding any of the Services as [the Board or its nominee] may reasonably require; and
- 3.1.2 in case of any incident preventing the performance and/or expansion or growth of the Services **the BPO** shall promptly notify **KICTB** of such incident.

4 **Confidential information**

- 4.1 **KICTB** will not disclose or use or cause to be disclosed or used, at any time during or subsequent to this agreement, any secret or confidential information of **the BPO** or any of its employees or clients or customers or any other non-public information relating to the business, financial or other affairs of **the BPO** acquired by it except as required in connection with its performance of the Agreement or as required by law.
- 4.2 Each Party agrees not to reveal such information to third parties; to use such information only to perform its respective obligations under this Agreement and to reveal to its employees only such information as is necessary for the performance of their duties. The provisions of this clause shall survive the termination of this Agreement.

5 **Exclusive Agreement**

This Agreement is exclusive between **KICTB** and **the BPO**, and **the BPO** may neither sell, assign nor transfer any duties, rights or interests created under this Agreement except with the prior written consent of **KICTB**.

6 **Force Majeure**

'Force Majeure' shall mean any event or circumstances which affects either party and is not within the reasonable control (directly or indirectly) of the party affected, to the extent that such event or circumstances or its effects cannot be prevented, avoided or removed by such party acting in accordance with Prudent Operating Practice. **'Force Majeure'** shall include each of the following Project and requirements.

- 6.1 Any act of war (whether declared or undeclared), invasion armed conflict, act of foreign enemy, blockade, embargo, revolution, riot, insurrection, civil commotion, act of terrorism, or sabotage provided that any such event occurs within or directly involved in the Republic of Kenya;
- 6.2 An Act of God includes but not limited to lightning, fire, earthquakes, volcanic activity, floods, storms, cyclones, typhoons, or tornadoes;

- 6.3 Epidemics or plagues;
- 6.4 Explosions or chemical contamination;
- 6.5 Labour disputes including strikes, a go-slow or lock-outs;
- 6.6 A change in Law that would render the performance of this Agreement impossible.

7 Waiver

The Parties agree that no act, omission, acquiescence, or waiver by either party shall be construed as a release of the other from their obligations under the Agreement unless done so by written consent of both Parties to this Agreement.

8 Termination

- 8.1 This Agreement may be terminated forthwith by written notice by either Party if a Party:
 - 8.1.1 Goes into liquidation (compulsory or voluntary) save for the purpose of a solvent amalgamation or reconstruction or if such party enters into a voluntary arrangement with its creditors or if a receiver is appointed in respect of the whole or a substantial part of the assets of such part or if such party enters into any arrangement for the benefit of its creditors if threatens to do so any such things or if an administration order is made in respect of such Party;
 - 8.1.2 Ceases to carry on its present business of BPO;
 - 8.1.3 Reasonably apprehends that any of the events mentioned above is about to occur in relation to the other and notifies that other party accordingly;
 - 8.1.4 Is in breach of this Agreement and has not remedied the breach within **THIRTY (30) DAYS** of notification by the party to do so.

8.1.5 If there exists a situation/occurrence of an event beyond its control (***Force Majeure***) for a continuous period of **THIRTY (30) DAYS** and which makes it impossible or impractical to carry out its obligations under the agreement.

8.2 Either party may terminate this agreement by giving the other not less than **THIRTY (30) DAYS** notice to that effect.

8.3 In the event that fraud is detected on the part of ***the BPO*** in connection with any of the Claims forwarded under this Agreement, ***KICTB***, may at its own discretion, suspend the receipt, processing or payment of any claims, past, present or future, until such reasonable measures as are stated by ***KICTB*** have been effected by ***the BPO***.

9 Notices

9.1 All notices under this Agreement shall be in written form and may be sent by email, hand delivery, by registered post or by fax to the addresses set out herein (or such other addresses as either party may from time to time notify the other).

9.2 Any notice sent by registered post shall be deemed received when it should in the ordinary course of post have reached its destination and in proving such service it shall be sufficient to prove that the letter containing the notice was properly stamped and posted to the address given herein (or to such substitute address as a party may from time to time by written notice notify to the other).

9.3 Notices sent by email or fax shall be deemed received at the expiration of one (1) hour after dispatch. In proving such service, it shall be sufficient to produce any answer back or confirmation slip generated by the system used to transmit the message.

9.4 All notices issued or given pursuant to this Agreement shall be addressed to the following persons and at the following addresses:

For the **KICTB**: The Chief Executive Officer,

Fax no.: + 254 (20) 315147

[email](mailto:ceo@ict.go.ke) ceo@ict.go.ke

P. O. Box 27150

00100 – NAIROBI.

[Particulars for hand delivery]

Kenya ICT board,

12th floor Telposta Towers, Koinange Lane

NAIROBI

For the **BPO**

The Chief Executive Officer

Fax no.: + 254 (20) [00000000]

[email](#)

P. O. Box [BOX NUMBER]

[POSTAL CODE] – [TOWN].

[Particulars for hand delivery]

[Building]

[Floor]

[Road/Street]

[TOWN]

10 Void or Unenforceable Provisions

If any provision of this Agreement is held to be void or unenforceable by or as a result of the determination of any court or other authority which decision is binding upon the parties, the parties agree that such determination shall not result in the nullity or unenforceability of the remaining provisions of this Agreement. The parties further agree to use their efforts to replace such void or unenforceable provision in a manner which will achieve, to the extent possible, the economic, business and other purposes of the said void or unenforceable provision.

11 Amendment/Modification of Terms

- 11.1 No change in, modification of, or addition to the terms and conditions contained in the Agreement shall be valid unless set forth in a written document signed by both parties which specifically states that it constitutes an amendment hereto.
- 11.2 If at any time during the term of this Agreement the conditions prevailing shall so substantially change so as to justify in the opinion of either party a revision of any term such party shall be at liberty to call upon the other to negotiate such revision and if the parties shall fail to reach Agreement on such revision the difference shall constitute a dispute within the meaning of **Clause 14** hereinafter

12 Fairness and Good Faith

- 12.1 **Good Faith:** - The parties undertake to act in good faith with respect to each other's rights under this Agreement and to adopt all reasonable measures to ensure the realization of the objectives of this Agreement.
- 12.2 **Operation of the Agreement:** - The parties recognize that it is impractical in this Agreement to provide for every contingency which may arise during the life of the Agreement and the parties hereby agree that it is their intention that this Agreement shall operate fairly as between them and without detriment to the interest of either of them, and that, if during the time of this Agreement, either party believes that this Agreement is operating unfairly, the parties will use their best efforts to agree on such action as may be necessary to remove the cause of such unfairness.

13 Final Expression of Agreement

This Agreement is intended by the parties to be the final expression of their agreement and understanding as to the subject matter herein, and constitutes the entire understanding between them with respect thereto. It is a complete and exclusive statement of the correspondence, conversation, negotiation, understandings or agreements relating to the same subject matter.

14 Governing Laws

14.1 The applicable Law to this Agreement is the Kenyan law.

14.2 This Agreement and all its terms and conditions are intended to be fully effective and binding, to the extent permitted by the Laws of Kenya, upon the successors and permitted assigns of the parties.

15 Interpretation

15.1 The headings of the clauses are for guidance only and shall not affect the interpretation.

15.2 Words denoting the singular may be taken as denoting the plural and vice versa where the context so requires.

SCHEDULE I

Support Amount Computation Formula

Bandwidth Capacity Support Purchase Scheme support is based on the incremental capacity used above the consumption on 31st December 2006. This will also be tied to the growth of the BPO business as reflected by the increase in FTEs growth over a period of time.

The component calculation formula is based on the following parameters;

- i. Baseline for the start, being capacity purchased on 31st December 2006 = b
- ii. Bandwidth consumption for the due Month = x kbps
- iii. Cost of Bandwidth for the due Month = yUS\$ per kbps
- iv. Competitive level of support pegged on projected cost = US\$ 500 per kbps

Computations are as follows:

- a) Total paid for the incremental above the baseline at market rates;

$$\text{Total}_1 = (x-b)*y$$

- b) Competitive cost for the same incremental bandwidth should be;

$$\text{Total}_2 = (x-b)*500$$

- c) Support Amount = Total1 -Total2

Sample Computations:

Example:

A Qualified BPO Operator (QBPO) was buying 4Mbps in July 2007 at the rate of US\$ 3,200 per Kbps. In Dec 2006, the Operator was buying 1Mbps of bandwidth capacity.

The Support component is computed as follows;

Capacity Support Computations	kbps	Rate \$ (y)	Amount
Audited Capacity Purchase in July 2007 = x	4096	\$3,200	
Baseline Capacity as at 31/12/2006 = b	1024		
Total_1			\$9,600
Total_2			\$1,500
KICTB Support Component			\$8,100

SCHEDULE III

Period Covered


Capacity Purchase for BPO "Piloting initiatives for the purchase of international telecommunications capacity - Business Process Outsourcing Pilot - Documentation in line with the fulfillment of the related disbursement condition" Ref: "Disbursement: Additional Instructions" letter issued in November. The period covered is as presented in the table below.

Item	Period
1	July 2007
2	August 2007
3	September 2007
4	October 2007
5	November 2007
6	December 2007
7	January 2008
8	February 2008
9	March 2008

Item	Period
10	April 2008
11	May 2008
12	June 2008
13	July 2008
14	August 2008
15	September 2008
16	October 2008
17	November 2008
18	December 2008

SCHEDULE III

Standard Invoice Format / Corporate Officer's Certificate

BPO Support Bandwidth Capacity Support Purchase Scheme Kenya ICT Board TCIP program		Qualified BPO Invoice		
Invoice Date: _____		Invoice Period From: _____ To: _____		
From: (BPO/CC Name and Address) Name _____ Contact _____ P.O.Box. _____ Physical Address: _____ _____ _____		To:  The Chief Executive Officer, Fax no.: + 254 (20) 315147 P. O. Box 27150 00100 – NAIROBI. email ceo@ict.go.ke		
Ite m	Description	Qty	Price	Total
			Sub-Total	
			Tax	
			Total	

I, _____, do hereby confirm that I am the BPO's Corporate officer charged with ensuring that the particulars of our Claim contained herein are true and reflect the correct position and I thus, by my signature below, hereby affirm the truthfulness and correctness thereof.

Signature & Stamp: _____ **Date:** _____

SCHEDULE IV

Scope of Audit

TERMS OF REFERENCE FOR THE KENYA ICT BOARD BPO AUDIT

1.0 Background

The Government of Kenya has identified the Business Process Outsourcing industry (BPO industry) as a key engine for job creation for the country. The Government is keen to provide the best possible environment for this industry to grow fast. The cost of international broadband capacity has been identified as a key constraint which limits the growth potential of the BPO industry. The Government is looking at supporting the local Business Process Outsourcing industry to buy bandwidth at nearly the same price level as what the industry competitors elsewhere are paying or at the expected post submarine cable availability costs (whichever is higher to guarantee sustainability). The project will provide targeted cost subsidies to the industry to level down the cost of the communications input.

This subsidy is conceived as a transitional and non-discriminatory subsidy with a sunset close so as:

- i. to be compatible with Kenya's existing commitments under the WTO, and
- ii. to be designed to best achieve its purpose.

In order to access subsidized bandwidth BPO companies will be obligated to purchase their bandwidth directly from Approved Vendors*. Disbursement of funds will be from the Ministry of Information and Communications through the Kenya ICT Board and as per the agreed terms and conditions. The disbursement of funds will be made against verifiable bandwidth consumption and invoices which will include written confirmation from vendors. The same information will be audited by the Kenya ICT Board on a monthly basis.

2.0 Objective of the Audit

The Objective of this assignment is

- i. review and confirm the authenticity of the Qualified Business Process Outsourcing Companies (QBPO) bandwidth purchases and usage patterns monthly/periodic
- ii. review the BPOs FTEs and their growth in relation to the accorded support.
- iii. ensure that the subsidy is not subject to any abuse, such as reselling of bandwidth, diversion for other uses, etc.

3.0 Scope of the Audit

The scope of the audit is limited to BPO's verifications of the monthly/periodic bandwidth purchase and usage patterns to establish actual bandwidth application in the BPO organization. The monthly utilization bandwidth statement of the BPO should contain the following:

- i. Actual monthly bandwidth purchase and consumption
- ii. Copy of invoice from bandwidth supplier
- iii. Evidence of compliance with taxation including payroll taxes (the latter to also confirm employees existence)
- iv. FTEs relate indicators such as workstations existence and numbers, etc
- v. Audit clearance note indicating satisfaction with application of bandwidth to actual use.

4.0 Qualification of the Auditor

- i. The Auditor will be an experienced accountant/financial controller, with qualifications in Management Accountancy, Certified Public Accountancy, Business Administration, Financial Management or any other directly relevant qualification. Knowledge of international accounting standards is essential.
- ii. A minimum of 3 years experience in the following field of financial systems and controls, preparation and verification of payment vouchers, financial accounting and auditing and computer literate.

5.0 The Role of the Auditor

- i. To audit bandwidth monthly statements every month so as to verify the actual compliance.
- ii. Perform periodic audits to establish the actual bandwidth application in the BPO organization.
- iii. To give a monthly opinion to the ICT Board on whether the BPO's statement reflect the true bandwidth purchase and usage patterns.
- iv. To ensure compliance with the agreed terms and conditions, laws and regulations.
- v. To ascertain the integrity and reliability of the BPO's bandwidth purchase and usage.
- vi. Responsible for the implementing measures to monitor the BPO's bandwidth purchase and usage patterns.

6.0 Deliverables

- i. The Auditor will present monthly verified utilization statements report one week before the end of each month to Kenya ICT Board.
- ii. The Auditor should be able to provide the true utilization statement on request.
- iii. The Auditor shall report on a regular basis to the Kenya ICT Board.

7.0 Reporting

The Auditor will report through the Deputy CEO/TCIP Programme Manager to the Kenya ICT Board Chief Executive Officer.

IN WITNESS WHEREOF the parties hereto have duly executed this Agreement the day and year first hereinbefore written.

SEALED with the Common Seal]
Of **KENYA ICT BOARD**]
in the presence of:-]
]
]
Director]
]
]
Director/Secretary]

SEALED with the Common Seal]
Of **[BPO]**]
in the presence of:-]
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Director]
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Director/Secretary]