

[April 2020]

LEGAL NOTICE No. [...]

PUBLIC FINANCE MANAGEMENT ACT

(NO.18 OF 2012)

IN EXERCISE of the powers conferred by Section 24 of the Public Finance Management Act, No 18 of 2012, the Cabinet Secretary for the National Treasury makes the following Regulations:—

THE PUBLIC FINANCE MANAGEMENT (NATIONAL TOLL FUND) REGULATIONS, 2020

Citation

1. These Regulations may be cited as the Public Finance *Citation* Management (National Toll Fund) Regulations, 2020.

Interpretation

2. In these Regulations, unless the context otherwise requires— *Interpretation*
“Act” means the Public Finance Management Act, 2012;

“Authorized Toll Collector” means:

- a. a relevant Contracting Authority; or
- b. a private party authorized by a Contracting Authority to collect tolls from Road Users and, where applicable, includes a Service Provider where such Service Provider has been authorized to act as a toll collector under contract;

“Cabinet Secretary” means the Cabinet Secretary responsible for matters relating to Finance;

“Committee” means the Oversight Committee established under Regulation 8 of these Regulations;

“Contracting Authority” has the meaning given to this term under the Public Private Partnerships Act, 2013;

“Fund Secretariat” means the secretariat established under Regulation 14; “Gazette” means the Kenya Gazette;

“Independent Expert” means a person or organisation with substantial experience in the development of traffic forecasts, toll revenue projections and road project Project Agreements appointed to support the Office Administering the Fund in the preparation of quarterly and annual Inflow and Outflow projections;

“Inflows” means all payments into the Fund;

“Officer Administering the Fund” means the officer designated as such under Regulation 11 of these Regulations;

“Outflows” means payments out of the Fund to meet eligible expenditure under the Fund;

“Political Event” has the meaning given to that term under a Project Agreement;

“PPP Unit” has the meaning assigned to that term under the Public Private Partnerships Act, 2013;

“Private Party” includes a Service Provider or a Toll Operator appointed as an Authorised Toll Collector under a Project Agreement to perform services related to a toll road in Kenya;

“Project Agreement” has the meaning assigned to that term under the Public Private Partnerships Act, 2013;

“Project Roads” means all the roads declared as toll roads by the Cabinet Secretary at the time being responsible for matters relating to roads and which will be or are provided by a Service Provider, and whose tolls are or will be collected by a Toll Operator;

“Projected Fund Ratio” as at a particular future date means the sum of the projected future Inflows plus any moneys currently held within the accounts of the Fund divided by the projected future Outflows of the Fund up to that future date;

“Projected Shortfall” means where the Projected Fund Ratio falls below 1.05 in any projection period;

“Projected Surplus” means where the Project Fund Ratio exceeds 1.10 in any projection period;

“Road Tolls” or “Tolls” means the user charges to be levied on Road Users in accordance with the Public Roads Toll Act, Cap 407 of the Laws of Kenya;

“Road Users” means the categories of vehicular traffic subject to pay a prescribed toll;

“Service Payments” means payments due and invoiced by a Service Provider pursuant to a Project Agreement and in accordance with these Regulations, and has the meaning ascribed to that term in the Project Agreement;

“Service Provider” means a Private Party that enters into a Project Agreement with a Contracting Authority to provide a Project Road, as detailed under a Project Agreement;

“Short-term Liquid Instruments” means any marketable financial security having short-term maturity, readily convertible into cash, including fixed income instruments such as treasury bills, commercial paper and certificates of deposit as may from time to time be approved in accordance with these Regulations;

“Termination Payment” has the meaning given to that term under a Project Agreement;

“Toll Operator” means a Private Party appointed as an Authorised Toll Collector under a Project Agreement by a Contracting Authority to establish, administer and operate a Toll System;

“Toll System” means all those processes and operations relating to the set-up of toll charging and/ or collection points, payment platforms, accounting frameworks, cash handling and remittance protocols, enforcement rules and institutions, and all matters connected with and incidental thereto as may be detailed under applicable regulations;

Objects and Purpose of Regulations

3. The objects and purposes of these regulations are to -
 - (a) Establish a centralized fund into which all revenues collected pursuant to these regulations shall be paid and administered;
 - (b) Provide for the oversight and administration of the Fund;
 - (c) Prescribe the processes by which money is paid into and out of the Fund;
 - (d) Provide investors in and financiers of Project Roads visibility and structure in participation processes under the Fund; and
 - (e) Make provision for purposes connected with and

incidental to the foregoing objects and purposes.

Establishment of the Fund

4. (1) There is established a Fund to be known as the National Toll Fund, which shall be operated under the budgeting, accounting, reporting and auditing framework of the Act. *Establishment of Toll Fund*
- (2) The objective and purpose of the Fund shall be to provide a dedicated public fund from which Government's payment obligations arising from Project Agreements for Project Roads shall be met. *Objects and Purpose of Fund*

Road Tolls

5. Road Tolls shall be set in accordance with the Public Roads Toll Act, Cap 407 of the Laws of Kenya. *Imposition of Tolls*

Payments In and Out

6. The Fund shall consist of the following inflows — *Payments into the Fund*
- (a) Road Tolls levied on Road Users for access to and use of Project Roads;
 - (b) fees or charges imposed on Road Users accessing Project Roads with overloaded axles;
 - (c) monies appropriated by Parliament or otherwise paid into the Fund by the Government for the purposes of the Fund;
 - (d) grants and donations made to the Fund;
 - (e) any earnings, accruals or income generated from moneys held within the Fund;
 - (f) insurance proceeds payable to a Contracting Authority under a Project Agreement applied as clawback intended to make good a loss occasioned to and suffered by a Contracting Authority for an action of a Service Provider only where the losses suffered by the Contracting Authority have been met from the Fund;
 - (g) money from any other source approved by the Cabinet Secretary.
7. Payments out of the Fund shall comprise the following — *Payments Out of the Fund*
- (a) Payments certified by a Contracting Authority as being due to a Service Provider or a Toll Operator under a Project Agreement and in accordance with these Regulations, excluding:
 - a. Compensation for Political Events
 - b. Termination Payments;

- (b) the approved annual operating budget of the Fund;
- (c) any other eligible expenditure incurred in pursuance of the object and purpose for which the Fund is established.

Oversight and Administration of the Fund

8. (1) There is established a committee to be known as the Oversight Committee which shall consist of – *Oversight Committee*
- (a) principal secretary for the time being responsible for matters relating to finance, who shall be its chairperson;
 - (b) principal secretary for the time being responsible for matters relating to roads, who shall be its secretary;
 - (c) principal secretary for the time being responsible for matters relating to transport
 - (d) principal secretary for the time being responsible for matters relating to planning and statistics; and
 - (e) a representative of the Attorney General.
- (2) The Oversight Committee may from time to time admit a representative of each contracting authority for the time being having a Project Road [and a representative of the PPP Unit] into its sittings, to participate *ex officio*.
- (3) The Functions and powers of the Oversight Committee shall be *Functions* to –
- (a) review and approve the annual work programme of the Fund;
 - (b) approve the annual estimates of Inflows and Outflows of the Fund;
 - (c) approve the annual operating costs budget of the Fund;
 - (d) approve annual and supplemental requests for budgetary appropriations to meet Projected Shortfalls in the Fund;
 - (e) submit budget estimates and requests for budgetary appropriations to the Cabinet Secretary;
 - (f) authorise allocations on accordance with approved budgets
 - (g) submit annual reports of the Fund to the Cabinet Secretary and inform the Cabinet Secretary of the annual funding requirements of the Fund;
 - (h) consult with the Cabinet Secretary on the opening of bank accounts of the Fund by the Officer Administering the Fund;

- (i) make recommendations to the Cabinet Secretary on the use of Projected Surpluses;
- (j) authorise withdrawals from the Fund of Projected Surpluses upon recommendation by the Officer Administering the Fund in accordance with approvals from the Cabinet Secretary;
- (k) approve the systems for the control and oversight of the operation of the Fund;
- (l) approve the operating plan of the Fund prepared by the Officer Administering the Fund;
- (m) approve the recruitment and remuneration of staff of the Fund;
- (n) approve the Fund's investment policies with respect to surplus cash;
- (o) receive and approve all reports on the Fund from the Officer Administering the Fund;
- (p) approve annual financial statement of accounts prepared by the Officer Administering the Fund;
- (q) oversee the performance of the Officer Administering the Fund;
- (r) oversee the performance of the Fund;
- (s) perform any other function necessary to promote the objects and purpose of the Fund and consistent with these Regulations.

9. The Cabinet Secretary will appoint an officer to administer the Fund. *Officer Administering the Fund*
10. (1) The functions of the Officer Administering the Fund shall be to – *Functions of Officer Administering the Fund*
- (a) supervise and control the administration of the Fund, for which purpose it shall cause to be established proper systems for the operation of the Fund;
 - (b) prepare the annual operating costs budget of the Fund for approval by the Committee;
 - (c) prepare the annual estimates of Inflows and Outflows of the Fund and of the Projected Fund Ratio and for any Projected Shortfalls or Projected Surpluses make recommendations to the Committee for their approval;
 - (d) prepare quarterly reports, on a rolling 12-month basis, of the projected Inflows and Outflows of the Fund and of the Projected Fund Ratio, and for any Projected Shortfalls or Projected Surpluses make recommendations

to the Committee for their approval;

- (e) prepare and submit to the Contracting Authorities and Service Providers, within 45 business days of the end of each quarter, quarterly reports, on a rolling 12 month basis, on the projected Inflows and Outflows of the Fund and of the Projected Fund Ratio, as well as statements on how any Projected Shortfalls are intended to be addressed;
- (f) appoint, as necessary, a suitably qualified independent expert, to prepare or advise on the preparation of the traffic and toll revenue projections supporting the estimates of Inflows, and the estimates of payments to be made under Project Agreements supporting the estimates of Outflows, and consult with the Contracting Authorities on the same;
- (g) open a bank account and any sub-accounts of the Fund in a financial institution approved by the Cabinet Secretary;
- (h) make payments out of the Fund in accordance with these Regulations;
- (i) ensure that there are held within the Fund sufficient funds to meet the quarterly and annual obligations of the Fund;
- (j) cause to be kept proper books of account and all records of the Fund;
- (k) prepare annual financial accounts and reports of the Fund in accordance with the Act;
- (l) prepare and submit to the Oversight Committee quarterly and annual non-financial reports on the performance of the Fund in accordance with Act;
- (m) prepare, sign and transmit to the Auditor-General in respect of each financial year a statement of account relating to the Fund in such form and within such timelines as the Public Sector Accounting Standards Board established under Section 192 of the Act may from time to time prescribe in accordance with the Act, a copy of which statement of account shall be filed with the National Treasury;
- (n) furnish any additional information which is proper and sufficient for the proper discharge of the mandate of the Auditor-General;
- (o) invest, in accordance with these regulations and subject to Committee approval, any surplus cash in Short-term Liquid Instruments to manage the Fund's liquidity;
- (p) prepare, from time to time, an operating plan for the

Fund;

- (q) recommend the appointment of Fund secretariat staff to the Committee;
 - (r) perform any other function that the Committee may, consistent with these Regulations, delegate and require to be undertaken.
- (2) Subject to the approval of the Committee, the Officer Administering the Fund may delegate some of these functions to a designated entity, which delegation shall be in writing, and time-bound.
- (3) The act of delegating the performance of a function of the Officer Administering the Fund to a third designated entity shall not divest the Officer Administering the Fund of the responsibility for ensuring that its function is effectively and efficiently performed in the public interest or on behalf of public service as set out in these Regulations.
11. (1) For the better implementation of the obligations under Regulations 10(1)(c) to (e), the Officer Administering the Fund shall – *Addressing Shortfalls in Fund*
- (a) on a quarterly basis, determine the Projected Fund Ratio at each future quarter end during the subsequent 12 month period with the view to ensuring that at each quarter end the Projected Fund Ratio is equal to or exceeds [one point zero five (1.05)];
 - (b) for every Projected Shortfall, initiate an annual or supplementary budget process to secure budgetary appropriations to cover the Projected Shortfall in accordance with the budgeting provisions in the Act;
 - (c) upon the establishment of the Fund and for as long as toll revenues have not risen to a level sufficient for the Projected Fund Ratio to equal or exceed [1.05] cause to be appropriated such budgetary allocations as shall be adequate to cover all of the Fund's obligations.
- (2) Projected Shortfalls in the Fund shall be evidenced by – *Determining Shortfalls in Fund*
- (a) contracted obligations under Project Agreements;
 - (b) quarterly estimates of Inflows and Outflows of the Fund prepared by the Officer Administering the Fund;
 - (c) bank statements, financial statements and statements

of amounts held within the designated Fund accounts.

12. The Officer Administering the Fund shall be supported by such staff as may, in consultation with the Committee, be deemed necessary for the purposes of the Fund administration. *Secretariat/Staff*

Procedures of the Fund

13. (1) Disbursements out of the Fund shall be bound by the following broad principles – *Eligibility of disbursements out of Fund*
- (a) disbursements to Service Providers shall be on the basis of contracted obligations of a Contracting Authority under a Project Agreement;
 - (b) the contracted obligations shall be included in the approved annual estimates of Inflows and Outflows of the Fund;
 - (c) disbursements shall be against proper documentation as detailed in these Regulations;
 - (d) utilisation of Projected Surpluses shall be subject to formal approval of the Committee and the Cabinet Secretary as detailed in these Regulations.

14. The Officer Administering the Fund shall satisfy itself, with respect to every payment instruction received from a Contracting Authority, of the following – *Payment Procedure by the Officer Administering the Fund*
- (a) that each payment instruction is made in writing and authenticated by the certificate of the Contracting Authority as to the payment amount, the nature of services rendered against which the payment instruction is submitted and the eligibility of the payment recipient;
 - (b) that the payee's account is the same one indicated in the Project Agreement unless an alternative payee has been communicated in writing to the Officer Administering the Fund by a Contracting Authority in accordance with a Project Agreement, payments to which alternative payee shall amount to complete and final discharge of the Fund and the Contracting Authority to the Service Provider and all its financiers for that particular invoice;
 - (c) the payment processes of the Officer Administering the Fund, including the execution of the powers reserved for it under Regulation 21 shall be completed and payments made no later than the time stipulated for such payments under a Project Agreement;

15. The Officer Administering the Fund shall, where it establishes that the requirements in Regulation 14 have not been met in any material particular, have the right to request for clarification and rectification from the Contracting Authority, and the power to suspend disbursements against invoices until such matters are resolved.

*Right to
Question and
Reject
Payment
Instruction*

Financial and Final Provisions

16. The Officer Administering the Fund shall cause to be opened in the name of the Fund such bank accounts for the Fund in a bank or banks approved in accordance with Section 28 of the Act, as may be necessary for the purposes for which the Fund is established.
17. The Officer Administering the Fund shall ensure that no bank accounts of the Fund are overdrawn.
18. (1) Where, pursuant to Regulation 10(1)(d) there is a Projected Surplus, the Committee, on the advice of the Officer Administering the Fund, may declare the existence of a surplus in the Fund.
- (2) Subject to sub-regulation (3), Projected Surpluses may be paid out of the Fund into the National Exchequer Account, subject to the recommendation of the Committee and authorization of the Cabinet Secretary on the use of surpluses, and provided such withdrawal does not lead to a Projected Shortfall.
- (3) Where surpluses are taken out of the Fund, they shall be applied toward restoration of any appropriations by Government by way of budgetary allocations into the Fund and may include application of the same to settlement, in full or in part, of any sovereign debt contracted toward development of road projects in Kenya, management of contingent liabilities arising from Project Agreements, or the reduction of Government's annual road sector financing deficits or for any other eligible road sector project as may from time to time be determined by the Cabinet Secretary.
19. All receipts, savings and accruals of the Fund and the balance of the Fund at the close of each financial year, shall be retained for the purpose for which the Fund is established.
20. The Officer Administering the Fund shall establish systems, protocols and procedures necessary to ensure that –
- (a) the Fund's expenditure is controlled and is monitored, on an annual basis, against the Fund's approved revenue and

*Opening of
Accounts*

*Fund not to be
overdrawn*

*Declaration
and Use of
Surplus Funds*

*Moneys to be
retained in
Fund*

*Superintenden
ce of Fund
Expenditure*

- expenditure plan;
- (b) withdrawals from the Fund are only for the purposes of payment of approved expenditure in accordance with these Regulations;
 - (c) the records of expenditure relating to the Fund are kept and maintained in accordance with the provisions of the Act and Regulations made thereunder.
21. In furtherance of its mandate under these Regulations, the Officer Administering the Fund shall have power to – *Access to Information*
- (a) access any project related data that he or she may need from Contracting Authorities in furtherance of his or her functions,;
 - (b) call for any additional information with respect to requests for payments out of the Fund; and
 - (c) issue financial management guidelines upon approval of the Committee relating to the purposes and objects of these Regulations.
22. The existing government financial and procurement regulations shall apply in the administration of the Fund. *Government Financial Regulations*
23. The provisions of the Act relating to offences by public officers, including financial misconduct, shall apply to these Regulations. *Misconduct of Public Officers*
24. (1) The Cabinet Secretary shall at the elapse of ten years from the date of commencement of these Regulations cause a review to be conducted of the performance of the Fund in accordance with the requirements of the Act. *Review of Performance of the Fund*
- (2) The review shall determine whether the Fund has met the objectives for which it was established.
 - (3) The report on the review shall be submitted to the Cabinet for approval.
25. (1) The Cabinet Secretary may, subject to the approval of the National Assembly, wind up the Fund where the Cabinet Secretary considers that the Fund has successfully completed the specific objectives for which it was created. *Winding Up*
- (2) On the winding up of the Fund –
 - (a) the Officer Administering the Fund shall call on the contracting authorities to request from the respective service providers or their agents financial statements to

- confirm any valid outstanding obligations to Service Providers and commitments for payment;
- (b) subject to sub-regulation (a), the Officer Administering the Fund shall pay any amount remaining in the Fund into the National Exchequer Account for the credit of the national government;
 - (c) the Cabinet Secretary shall pay any deficit in the Fund from the funds of the national government in the National Exchequer Account with the approval of the National Assembly;
 - (d) assets other than cash of the Fund shall be transferred to the Ministry for the time being responsible for matters relating to roads;
 - (e) the Fund Secretariat shall be disbanded upon winding up of the Fund.
- (3) The Officer Administering the Fund shall prepare, and the Cabinet Secretary shall submit to Parliament and to the Auditor-General a final statement of accounts for audit within nine months from the date of the decision to wind up the Fund.

Made on the [xxx, 2020].

HON. UKUR YATANI,
Cabinet Secretary for the National Treasury & Planning