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LEGAL NOTICE No. 36

THE PUBLIC FINANCE MANAGEMENT ACT

(No. 18 of 2012)

IN EXERCISE of the powers conferred by section 24 (4) of the Public Finance Management Act, 2012, the Cabinet Secretary for finance makes the following Regulations:—

THE PUBLIC FINANCE MANAGEMENT (ROADS ANNUITY FUND) REGULATIONS, 2015

1. These Regulations may be cited as the Public Finance Management (Roads Annuity Fund) Regulations, 2015.

Citation.

2. (1) In these Regulations, unless the context otherwise requires—

Interpretation.

“annuity payment obligations” means the funding requirements included in approved estimates of expenditure for the purposes of the Fund during a given financial year;

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

“Committee” means the Oversight Committee established under regulation 12;

“contracting authority” means either the Kenya National Highways Authority (KeNHA), the Kenya Rural Roads Authority (KeRRA) or the Kenya Urban Highways Authority (KURA) as defined in the project agreements under the Annuity Programme;

“Independent Engineer” means a suitably qualified and experienced professional engineer or engineering firm hired by the contracting authority, with the approval of the contractor, to certify that the contractor has met all obligations for which payment is claimed under the project agreement;

“Fund” means the Road Annuity Fund established under regulation 3;

“Officer Administering the Fund” means the Principal Secretary for the time being responsible for matters relating to roads;

“operational expenditure” means moneys included in the approved annual budget of the Fund dedicated to meeting the routine administrative costs of the Secretariat;

“penalties” mean amounts payable by or recoverable from contractors or the contracting authority on account of non-performance of contractual obligations as stipulated in project agreements; and

“project” has the meaning assigned to it under section 2 of the Public Private Partnership Act, 2013;

No. 15 of 2013.

“project agreement” means the agreement executed between a contracting authority and a private entity for the development and maintenance of a road project under the Annuity Programme.

(2) For the purposes of these Regulations, “Annuity Programme” means the Road Annuity Programme approved by Cabinet on the 10th March, 2015, under which the national government shall—

- (a) identify a maximum of ten thousand kilometre priority roads distributed across the country;
- (b) procure long term contracts for design, finance, construction and maintenance of identified roads under a public private partnership arrangement within the meaning of the Public Private Partnership Act, 2013, with payments linked to the completion of roads and performance based maintenance; and
- (c) pay for the services delivered by the private contractors through the normal budget process.

No. 15 of 2013.

3. There is established a fund to be known as the Roads Annuity Fund which shall be operated under the budgeting, accounting, reporting and auditing framework of the Act.

Establishment of the Fund.

4. The initial capital of the Fund shall be five hundred million shillings appropriated by Parliament in the 2014/15 financial year.

Capital of the Fund.

5. The object and purpose of the Fund shall be to provide funds to meet the national government’s annuity payment obligations for the development and maintenance of roads under the Annuity Programme.

Object and purpose.

6. The Fund shall consist of—

Sources of the funds.

- (a) money appropriated by Parliament for the purpose of the Fund;
- (b) money allocated from fuel taxes as assigned by an Act of Parliament;
- (c) income from investments of any balances in the Fund;
- (d) grants, donations or other bequests made to the Fund;
- (e) money paid to the Fund from any other source as may from time to time be approved by the Cabinet Secretary.

7. (1) For the purposes of the Annuity Programme, Parliament shall, in each financial year, appropriate an amount equal to the approved expenditure requirements for that financial year which shall be paid into the Fund.

Payments into the Fund.

(2) Transfers of the funds referred to in paragraph (1) of this regulation into the Fund’s account shall be effected on a monthly basis.

(3) The Officer Administering the Fund shall ensure that sufficient funds are available in the bank account, in accordance with the funding obligations set out in the project agreements.

(4) For the purposes of paragraph (3) of this regulation, the Officer Administering the Fund shall ensure that a minimum of five per centum of the annual annuity obligations or two billion shillings, whichever is lower, is maintained in the annuity payment obligations bank account.

(5) The earnings of, or accruals to the Fund shall be retained in the Fund, and shall be spent only for the purposes for which the Fund is established.

8. (1) Money shall only be paid out of the Fund where—

- (a) an invoice has been issued to the contracting authority with respect to the requested payment;
- (b) the invoice is in respect of an existing project agreement under the Annuity Programme; and
- (c) a certificate of the accounting officer confirming that the annuity payments are due and issued in accordance with the terms of the project agreement has been provided by a contractor under that project agreement.

(2) Moneys may additionally be paid out of the Fund where such payments—

- (a) relate to expenditures under the Annuity Programme that did not form part of the approved budget for the financial year; or
- (b) have been recommended by the Officer Administering the Fund and approved by the Committee.

(3) For purposes of paragraph (2) of this regulation, a supplementary budget shall be prepared by the Officer Administering the Fund and approved in accordance with regulation 7, provided that disbursement under the supplementary budget shall comply with the requirements of paragraph (1), of this regulation.

9. A contracting authority shall only request for payments from the Fund where—

- (a) the project to be financed under the Annuity Programme has been procured in accordance with the Public Private Partnership Act, 2013;
- (b) the project to be financed was included in the estimates of revenue and expenditure approved by the Cabinet Secretary;
- (c) the contracting authority ascertains that the Independent Engineer has in accordance with the terms of the respective project agreement certified that the contractor has met all obligations for which payment is claimed under the project agreement; and

Conditions for payment out of the Fund.

Responsibilities of contracting authorities with respect to applications for payments out of the Fund.

No. 15 of 2013.

(d) the requirements of regulation 8 are met.

10. The Officer Administering the Fund may withhold payments due and owing to an applicant where—

Withholding of payments.

- (a) a contracting authority provides information justifying the proposed withholding; and
- (b) an Independent Engineer supports that the proposed withholding is justifiable.

11. (1) Applications for payment out of the Fund shall be made by a contracting authority in a format prescribed by the Officer Administering the Fund at least twenty one days before the due date.

Applications for payments out of the Fund.

(2) Any applications for payment made under paragraph (1) of this regulation shall be supported by documents required under these Regulations which shall include—

- (a) the name and address of the payee;
- (b) the bank account details of the payee;
- (c) an invoice from the contractor;
- (d) any certificates required from the contracting authority and the Independent Engineer under the terms of the project agreement;
- (e) a certified payment voucher with all the certificates filled and signed for; and
- (f) any other information as may be prescribed by the Officer Administering the Fund.

(3) Any application under these Regulations shall be signed by the chief executive officer of a contracting authority.

12. (1) There is established a committee to be known as Oversight Committee for the Fund which shall consist of—

Establishment and composition of Oversight Committee.

- (a) the Principal Secretary responsible for matters relating to finance, who shall be the chairperson of the Committee;
- (b) the Principal Secretary responsible for matters relating to roads, who shall be the Secretary to the Committee;
- (c) the Principal Secretary responsible for matters relating to planning;
- (d) the Attorney-General or his representative;
- (e) a representative of the Kenya Bankers Association; and
- (f) two other persons being eminent professionals appointed by the Cabinet Secretary drawn from the engineering, accounting or legal professions.

13. The functions of the Committee shall be to—

Functions of the Committee.

- (a) inform the Cabinet Secretary on the funding requirements of the Fund;

- (b) adopt the estimates of annual revenue and expenditure of the Fund and recommend them to the Cabinet Secretary for approval;
- (c) ensure that the annual estimates of revenue and expenditure for the Fund include cumulative Annuity Programme commitments for the financial year under review;
- (d) ensure that only the projects included in the Annuity Programme are promoted for funding under these Regulations;
- (e) inform the Cabinet Secretary on the amounts and timing for the fund transfers into the Fund;
- (f) approve and review the investment of surplus funds into the Fund;
- (g) advise the Cabinet Secretary on the sources of funds for the Fund;
- (h) adopt the financial statements prepared by the Officer Administering the Fund before submission to the Auditor-General; and
- (i) adopt the non-financial reports of the Fund and submit them to the Cabinet Secretary.

14. (1) The Principal Secretary responsible for matters relating to roads shall be the Officer Administering the Fund.

Officer
Administering the
Fund.

(2) The functions of the Officer Administering the Fund shall be to—

- (a) supervise and control the administering of the Fund;
- (b) prepare estimates of annual revenue and expenditure of the Fund relating to Annuity Programme obligations and operational expenses and submit it to the Committee for adoption;
- (c) cause to be established proper systems of control and oversight under the provisions of the Act;
- (d) advise and consult the Committee on matters relating to the administering of the Fund;
- (e) keep and maintain complete financial records of all projects comprised in the Annuity Programme;
- (f) advise the Committee on trends and projections relating to the financing requirements of the Annuity Programme;
- (g) advise and consult with the Cabinet Secretary on matters relating to the administration of the Fund as may, from time to time, be necessary;
- (h) prepare the non-financial performance report of the Fund and submit it to the Committee for adoption;
- (i) cause to be kept proper books of accounts and other books and records relating to the Fund and the activities financed under the Fund;

- (j) prepare, sign and transmit to the Auditor-General in respect of each financial year and within three months after the end thereof, a statement of account relating to the Fund in such form 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; and
- (k) furnish any additional information which is proper and sufficient for the proper discharge of the mandate of the Auditor-General.

(2) The Officer Administering the Fund shall comply with the ordinary budget cycle in the preparation of estimates for the Fund.

(3) The Officer Administering the Fund shall submit estimates of revenue and expenditure to the Cabinet Secretary by the 15th September of the preceding financial year for approval.

15. The Officer Administering the Fund shall have power to —

- (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 relating to the Annuity Programme.

Powers of Officer Administering the Fund.

16. (1) The Officer Administering the Fund shall designate a secretariat to support the operations of the Fund.

Secretariat support for Officer Administering the Fund.

(2) The Secretariat shall consist of such staff as the Cabinet Secretary may, in consultation with the Officer Administering the Fund, consider necessary for the proper performance of the functions of the Officer Administering the Fund under these Regulations.

17. (1) The Officer Administering the Fund shall cause an account in the name of the Fund to be maintained for the Fund in a bank within the Republic of Kenya in line with section 28 of the Act and any Regulations made thereunder.

Accounts of the Fund.

(2) All monies payable into the Fund shall be received into the bank account of the Fund.

(3) The Fund's accounts shall be operated by the Officer Administering the Fund and two other persons nominated from the state department responsible for roads and the Fund's secretariat.

(4) The Officer Administering the Fund may open and maintain other accounts for the following purposes —

- (a) the payment of Annuity Programme obligations;
- (b) the payment of operational expenditure; and

- (c) receiving penalties paid by contractors for contractual non-performance.

(5) Subject to regulation 10, the Officer Administering the Fund shall ensure that the operational expenditure does not, within any given financial year, exceed zero point one per centum of the annual Annuity Programme obligations, or one hundred million shillings, whichever is lesser.

(6) The cap under paragraph (5) of this regulation shall be subject to periodic review by the Cabinet Secretary.

18. The Officer Administering the Fund shall ensure that the accounts of the Fund are not overdrawn.

Overdrawn accounts.

19. (1) Withdrawals from the Fund shall only be for purposes of payment of approved annuity payment obligations and operational expenditure of the Fund.

Withdrawals from the Fund.

(2) The records of expenditure relating to the Fund shall be kept and maintained in accordance with the provisions of the Act and Regulations made thereunder.

20. The Fund shall be governed by all relevant financial and procurement laws and Regulations as applicable.

Financial and procurement Regulations.

21. (1) Where a contractor submits an invoice to the contracting authority with a request for payment, the contracting authority shall process and submit the same to the officer administering the Fund within ten days from the date of receipt thereof.

Invoices.

(2) Applications for payments out of the Fund that meet all the requirement of these Regulations shall be settled within twenty one days from the date of receipt of the application by the Officer Administering the Fund.

22. The Officer Administering the Fund shall—

Miscellaneous disclosures.

- (a) an annual basis, publish on the website of the ministry responsible for matters relating to roads the estimates prepared of Annuity Programme funding and payment obligations for the forthcoming financial year; and
- (b) on a quarterly basis, publish on the website of the ministry responsible for matters relating to roads the balance of funds held in the account designated for annuity payment obligations.

23. The provisions of the Act relating to offences by public officers, including financial misconduct, shall apply to these Regulations.

Offences.

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 on the performance of the Fund in accordance with the requirements of the Act and Regulations made thereunder.

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 wind up the Fund with the approval of the National Assembly where the Cabinet Secretary considers that the Fund has successfully completed the specific objectives for which it was created.

Winding up of the Fund.

(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 contractors or their agents for financial statements to confirm any valid outstanding obligations and commitments for payment;
- (b) 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.

(3) The Cabinet Secretary shall submit a final statement of accounts to Parliament and to the Auditor-General for audit within nine months from the date of the decision to wind up the Fund.

Made on the 24th March, 2015.

HENRY K ROTICH,
Cabinet Secretary for the National Treasury.