REPUBLIC OF KENYA

MINISTRY OF ROADS

SESSIONAL PAPER NO 4 OF 2009

ON

THE NAIROBI URBAN TOLL ROAD CONCESSION PROJECT

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CHAPTER 1: OVERVIEW

This Sessional Paper seeks:

(i) To brief Parliament on the proposed development of a section of the Mombasa – Malaba (A104) highway (the "Northern Corridor") into a toll road known as the Nairobi Urban Toll Road Concession.

(ii) The approval of Parliament pursuant to Section 4A of the Public Roads Toll Act (Cap 407) for the concession agreement and the tolling regime for the Nairobi Urban Toll Road Concession.

CHAPTER 2: INTRODUCTION

2.1. POLICY BACKGROUND

The Kenya Vision 2030 development blueprint aims to transform Kenya into a newly industrialised middle income country by the target year of 2030. The Vision is based on three pillars namely the economic pillar, the social pillar and the political pillar. The three pillars are in turn anchored on ten foundations one of which is infrastructure. The Vision 2030 strategy recognises that investment in infrastructure, including road transport, will underpin the projected economic growth required under the economic pillar.

Sessional Paper No 5 of 2006 on the Development and Management of the Roads Sector for Sustainable Economic Growth (the "Sessional Paper of 2006") provides the guiding principles for the roads sector as it presses forward to fulfil its designated role in Vision 2030. Through the Sessional Paper of 2006, Parliament approved the complete restructuring of the entire road management framework in Kenya.

One key provision of the Sessional Paper of 2006 was the proposed formation of three new road authorities to take over the day-to-day management of roads from the various former agencies, which was subsequently implemented in the Kenya Roads Act, 2007. Another objective of the Sessional Paper of 2006 was the increased involvement of stakeholders and the private sector in road management.

The increased stakeholder involvement has already been partially achieved through the structuring of the membership of the Boards of Directors for the Road Authorities and the Kenya Roads Board, all of which have majority private sector representation. The increased private sector participation in road construction and maintenance is being progressively achieved through the ongoing reduction in force-account operations and the outsourcing of these activities to the private sector.

However despite the progress made to date, there is still abundant scope for further participation of the private sector in roads, including in the mobilizing of resources and in the taking-up of long term full responsibility for road maintenance and management activities.

2.2. TRANSPORT SECTOR

The transportation sector in Kenya includes the following modes: road, rail, maritime & inland waterways, pipeline and air.

An efficient transport system is a necessary ingredient in the promotion of trade, economic growth and integration on a national and regional scale. Kenya's economy is heavily reliant on road infrastructure for its transport needs and the condition of the road network greatly influences the rate of growth of the economy.

The national road network is estimated to be 177,800 km in length, of which 12,600 km are paved, 27,000km are gravel and the rest are earth.

2.3. DEVELOPMENTS IN THE ROADS SECTOR

The roads sector has, in past years, faced constraints of a financial, institutional and managerial nature. This resulted in rapid deterioration in the value and serviceability of national road assets. In order to address the situation, the Government in 1993 instituted the Road Maintenance Levy Fund to provide sustainable funding for roads. In 1999 the Kenya Roads Board was set up to manage the fund.

In the recent past the Government, with the approval and authorization of Parliament, has restructured the roads sector to bring it in line with international best practices. A comprehensive policy paper for roads, the Sessional Paper of 2006 was adopted and the Kenya Roads Act 2007 was enacted. This Act provided for establishment of three autonomous road authorities to be responsible for various sections of the National Road Network. The three authorities are:

- Kenya National Highways Authority (KENHA) to manage national highways.
- Kenya Rural Roads Authority (KERRA) to manage rural and small town roads.
- Kenya Urban Roads Authority (KURA) to manage roads in cities and municipalities

The Kenya Wildlife Service (KWS) will continue to manage roads in national parks. The three road authorities are now fully operational.

As seen above the Government, in the ongoing endeavour to improve the state of the national road system, has made substantial progress in restructuring the management of the roads sector. In addition, Government increased the roads budgetary provision under the Ministry of Roads from Kshs 13.4 billion in the 2002-2003 financial year to Kshs 71.9 billion in 2009-2010, resulting in a rapid and continuing increase in the length of good roads.

However in spite of this sustained and successful effort to rehabilitate existing roads and enhance service delivery, worsening traffic congestion still remains a serious challenge.

2.4. TRAFFIC CONGESTION AND TOLL ROADS

Traffic congestion arises when the volume exceeds the design capacity of a road to convey traffic. On intercity highways in Kenya, fast-moving vehicles are increasingly unable to find opportunities to overtake and must travel at the speed of the slowest vehicle. In urban areas, stop-go traffic and severe delays are notable during peak commuting hours and even during non-peak periods. Minor traffic incidents escalate into major obstructions to the flow of vehicles. In the absence of appropriate interventions, traffic congestion will worsen as economic growth translates into further increases in the vehicle population.

Underinvestment in the railway system and poorly structured public transit systems have exacerbated congestion on rural and urban roads.

The current state of affairs regarding traffic congestion is untenable in the context of Vision 2030.

From a technical viewpoint, the solution to the problems of congestion on roads is two-fold. Firstly, there needs to be additional financial investment in roads to expand the number of lanes, construct missing links/bypasses, install facilities for non-motorised traffic and provide grade separation (flyovers) at busy intersections. Secondly, functional high capacity public transport systems have to be provided within the cities.

The overall investment required to rehabilitate and maintain roads to the required standard while simultaneously providing extra lanes and intersection structures to assure freedom from congestion is considerable. Economies of every size and stage of development have faced this problem of finding sufficient resources to invest in roads, including advanced economies in Europe and North America, middle income economies and newly industrialising "tiger" economies.

The most successful solutions adopted to address the road investment shortfall are those based on the toll road concept. The toll road concept works as follows:

(a) A given road section may generate unwanted extra costs for the road user for several reasons, including the following:

- The road section may be poorly maintained thereby resulting in high vehicle maintenance and operating costs.
- The existing road between two destinations may be such that a shorter or better alternative can be proposed. Alternatively, a potential road link between two points may be missing altogether, forcing road users to find other means to reach the destination.
- The road may be congested, thus imposing delays and additional costs.

(b) In the toll road concept, it is recognised that savings in cost and time can be realised by road users if certain investments are made. It is further recognised that if those investments are made, the road users will be willing to pay to use the improved facilities.

(c) The necessary road investment is frequently raised from the private sector, thus relieving the Government of the burden of raising the funds. In return, the investor is allowed to levy a toll upon the road users. The levy paid by the road user is typically less than the benefits gained in time and vehicle operating costs. The quantum of the levy is controlled.

(d) The toll road system is implemented as a concession typically over a period of 20 - 35 years.

CHAPTER 3: NAIROBI URBAN TOLL ROAD CONCESSION PROJECT

3.1. BACKGROUND TO INTRODUCTION OF TOLL ROADS

The provision of a Vision 2030-compliant road network requires a magnitude of investment that is beyond the ability of the Government to finance from taxes and borrowing.

In recognition of this financial constraint, the Government in 2001 approached the World Bank for assistance in evaluating the available options for road sector financing. The World Bank granted assistance under its Public-Private Infrastructure Advisory Facility (PPIAF) and a detailed technical study ("Concession Study") was commissioned to do the following:

- Evaluate the economic, financial and technical viability of introducing road concessions in Kenya.
- Determine specific concessionable road networks and formulate a transparent concessioning framework and mechanisms.

The findings of the Concession Study were as follows:

a) Road concessioning is viable from an economic perspective and the potential for concessioning using conventional road tolling is greatest on the Northern Corridor.

b) The Northern Corridor should be improved in three phases as follows.
   - Concession 1: from Mombasa to Machakos Turnoff (466km)
   - Concession 2: from Machakos Turnoff to Rironi and the Nairobi Southern Bypass (106km)
   - Concession 3: from Rironi to Mau Summit, Mau Summit to Malaba and Mau Summit to Busia (693km)

c) The first stage in the improvement of the Northern Corridor should be Concession 2. This first phase would test the willingness by road users to pay for improved infrastructure and would also build local expertise in the operation and management of concessions.

Concession No 2 entails the following roads.

Table 1

SECTION	ROAD	FROM	TO	LENGTH (KM)
1	A109	Machakos Turnoff	Athi River	21.5
2	A104	Athi River	JKIA Interchange	11.5
3	A104	JKIA Interchange	Langata Road roundabout	10.5
4	A104	Langata Road roundabout	Westlands Roundabout	5.3
5	A104	Westlands Roundabout	Kikuyu Interchange	16.2

SECTION	ROAD	FROM	TO	LENGTH (KM)
6	A104	Kikuyu Interchange	Rironi	11.5
7(1)	Southern Bypass	St. James Hospital on Mombasa Road	Ngong Road junction (near Karen)	14.5
(7(2)	Southern Bypass	Ngong Road junction (near Karen)	Kikuyu	14.5
TOTAL				105.5

The findings of the Concession Study were discussed at a Stakeholder Workshop in July 2003 and presented at an Investor's Conference held in November 2004. The Concession Study noted that the legal statutes required amendments to enable road concessioning. Most of the required amendments were later enacted as part of the Kenya Roads Act, 2007 (Fifth Schedule). However a few additional amendments have been found to be necessary and will be brought before Parliament in due course.

In 2006 a Cabinet Memorandum on Concessioning of Roads in Kenya was prepared. Through this Memorandum the Cabinet approved road concessioning as a policy initiative and approved amendment of existing legislation to accommodate concessioning.

Following this approval, the Government constituted an Interministerial Committee on Road Concessioning. This Committee comprised the State Law Office, the Ministry of Finance, the Department of Government Investment & Public Enterprise (DGIPE), the Ministry of Transport, the Cabinet Office, the Ministry of Roads, the Ministry of Nairobi Metropolitan Development, the Ministry of Planning and National Development, the Ministry of Provincial Administration & Internal Security and the Ministry of Regional Development Authorities.

The purpose of the Committee was to provide oversight and management at each stage in the introduction of road concessioning in Kenya.

Section 4(1) of the Public Procurement and Disposal (Public Private Partnerships) Regulations 2009 ("PPP Regulations") which came into effect on 10th March 2009 established a new oversight institution for public private partnerships known as the Public Private Steering Committee ("PPSC"). For the Nairobi Urban Toll Road Concession, whose preparation commenced in 2006 before the advent of the PPP Regulations, the Interministerial Committee fulfilled the oversight role comparable to that of the PPSC.

In 2006 the Government invited international bidders to tender for the Nairobi road concession. Three parties expressed interest but only one bidder, from Austria, Messrs A-Way/Strabag/HCH Joint Venture (Nairobi Motorway Group) eventually submitted a bid. The Government evaluated the bid with technical assistance provided by the World Bank through an international consultant with experience in Toll Road Project Development. The evaluation concluded that the sole bid received was suitable as a basis for negotiation of a viable Concession Contract.

The Inter-Ministerial Committee on Road Concessioning has been involved throughout the concessioning process and has supervised and overseen each stage in the process of identification, procurement services, evaluation of bids and negotiation of the Concession Contract.

The International Development Association (IDA) has rendered the necessary advice to the Government on the Concession. The International Finance Corporation (IFC) and the African Development Bank (AfDB) have participated in the negotiations and have further agreed to participate in the concession initiative by providing development lending to the eventual Concessionaire.

After the clarification and negotiation phase, an acceptable Concession Contract was drafted in 2009 and is the subject of this Sessional Paper.

3.2. TERMS OF THE CONCESSION CONTRACT

The salient terms of the proposed Concession Contract include the following:-

- The Concession will comprise the highway (A109/A104) between Machakos Turnoff - Athi River – JKIA – Westlands – Rironi. The Concession also includes the Southern Bypass linking the St. James Hospital on Mombasa Road and Kikuyu.
- The Concessionaire will construct an elevated roadway on A104 between Nyayo Stadium and Museum Hill and also over the Westlands Roundabout. The Government, with World Bank support, will improve the Machakos Turnoff – Athi River section of A109 to dual carriageway standard and will construct the Southern Bypass. Both Government-built sections will be handed over to the Concessionaire for maintenance. The Concessionaire will, in future, further improve the various roads and road intersections as it becomes necessary.
- The Concessionaire will erect four main toll-collecting plazas on A104 at Athi River junction, Enterprise Road junction, James Gichuru Road junction and Rironi. The Concessionaire will also construct smaller ramp plazas at other locations.
- The Concessionaire will have a concession period of 30 years and in that time he will be fully responsible for the maintenance of the road to stipulated high standards. Penalties are specified in the Concession Contract in the event of failure to adhere to agreed standards.
- In the event that traffic exceeds certain limits on specified sections, the Concessionaire is obliged under the Contract to construct additional lanes at his cost, so as to maintain a certain level of service. Penalties are provided in the Contract to enforce this requirement.
- The level of tolls to be levied is predetermined and the method of increase in tolls to account for inflation is also specified. The tolling strategy is based on four categories of vehicles namely:

- Class 1 - Light Vehicles comprising passenger cars, light delivery vehicles (tare not exceeding 1.5 tonne) and motor cycles.
- Class 2 - Medium Heavy Vehicles comprising PSVs 8-14 seater.
- Class 3 - Large Heavy Vehicles comprising lorries with 3 or 4 axles and PSVs of over 15 passengers.
- Class 4 - Extra Large Heavy Vehicles comprising trucks and lorries with 5 or more axles.

- The toll charges for Class 2, Class 3 and Class 4 vehicles will be two times, six times and eight times the toll charges levied on Class 1 vehicles respectively. The tolls tariffs at various plazas will be directly proportional to the distance of road covered by a vehicle.
- The following indicative table gives the toll charges that would be payable under the Concession Contract by a vehicle 36 months after opening as it travelled from Mombasa towards Malaba using Mombasa Road, Uhuru Highway and Waiyaki Way.

Table 2

REF	TOLL POINT	TOLL PAYABLE FOR VEHICLE (KSHS) *			
		CLASS 1 (Toll =X)	CLASS 2 (Toll =2X)	CLASS 3 (Toll =6X)	CLASS 4 (Toll =8X)
1	Athi River Mainline Plaza	178	357	1070	1,426
2	Uhuru Mainline Plaza (in the vicinity of Enterprise road junction)	120	241	723	964
3	Westlands Mainline Plaza	134	268	804	1072
4	Rironi Mainline Plaza	140	281	843	1124
TOTAL TOLL DUE		572	1147	3440	4,586

* 2009 prices

- The concession contract stipulates in detail the obligations and responsibilities of the parties to the contract and the remedies available for breaches thereof.

Parliamentary approval must be sought and obtained before the concession can be implemented.

3.3. APPROVALS FOR THE NAIROBI URBAN TOLL ROAD CONCESSION

The draft Concession Contract was submitted to the Office of the Hon. Attorney General for evaluation. The Hon. Attorney General's legal opinion clearing the contract was granted in April 2009.

The Nairobi Urban Toll Road Concession was submitted to Cabinet in 2009 and approval granted for subsequent forwarding to Parliament.

3.4. NEXT STEPS IN THE NAIROBI URBAN TOLL ROAD CONCESSION

Subject to approval by the National Assembly of the Concession Contract, the Concession Contract will be signed. The concessionaire will have a period of several months to reach agreement with various financiers (the "financial close") and for various other conditions precedent, such as selection of contractors, to be fulfilled (the "commercial close").

The negotiations between signing and financial/commercial close will produce or refine various appendices which will become part of the concession contract agreement. Following financial/commercial close and fulfilment of all other conditions, works will commence within a specified period. Within 48 months from the commencement of works, the elevated roadway sections and grade separated interchanges will be ready. Within 72 months the Government with support from the World Bank will have constructed the Machakos Turnoff – Athi River dual carriageway and the Southern Bypass. The Concessionaire will maintain the road and expand it whenever necessary, in accordance with the Contract, over the next 30 years.

Among the obligations of the Government in a concession is the provision of all land and the relocation of services and utilities. Since the Concession requires extensive use of fly-overs at junctions and wide areas for toll plazas, private land must be acquired by the Government to supplement what is already available within the road reserve.

CHAPTER 4: APPROVAL BY PARLIAMENT

Section 4A of the Public Roads Toll Act (Cap 407) stipulates as follows:

(1) The Minister, or a roads Authority, may enter into an agreement with a suitably qualified person to plan, design, construct and manage a public road or any portion thereof which has been declared to be a toll road for the purposes of this Act.

(2) A person authorized under subsection (1) shall carry out the activity for which he is authorized subject to such terms and conditions as may be specified in the agreement.

(3) A proposed agreement for the purpose of this section shall be laid before the National Assembly for approval prior to signature.

(4) The tolling regime provided for in an agreement to be entered into by the Minister or a roads agency designated by the Minister, shall be laid before the National Assembly for approval prior to the Minister or roads Authority designated by the Minister signing such agreement.

(5) Any agreement entered into by the Minister or a roads agency pursuant to subsection (1) without the approval of the National Assembly shall be null and void

In accordance with the above, the agreement for the Nairobi Urban Toll Road, which contains the tolling regime, has been duly forwarded to Parliament for consideration.

Encl – Nairobi Urban Toll Road Draft Concession Contract