



SPECIAL ISSUE

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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.

Conditions for payment out of the Fund.

(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

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.

ROAD ANNUITY FUND REGULATIONS 2015

IN THE MATTER OF THE STATUTORY INSTRUMENTS ACT NO.23 OF 2013

AND IN THE MATTER OF THE PUBLIC FINANCE MANAGEMENT ACT, 2012

LEGAL NOTICE NO. 2015

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

PART 1

Name of the Statutory Instrument	:	Public Finance Management (Roads Annuity Fund) Regulations, 2015
Name of the Parent Act	:	Public Finance Management Act, 2012
Enacted Pursuant to	:	Section 24(4), Public Finance Management Act 2012
Name of Ministry	:	The National Treasury
Gazetted on	:	2 April, 2015
Tabled on	:	9 April 2015
Submitted under	:	Section 11, Statutory Instruments Act No.23, 2013

PART II

1. Purpose of the Statutory Instrument

1.1 The Roads Annuity Fund Regulations 2015 establish a special purpose Fund in support of the national government's policy to upgrade to bitumen standards some 10,000 km of priority roads spread throughout Kenya, aimed at supporting the improvement of accessibility across the country, addressing rural poverty, and providing opportunities for growth in rural areas. The programme is dubbed the Roads 10,000 km Programme, a strategy that fits well under Kenya's Vision 2030 strategy where infrastructure is one of the enablers for economic growth.

1.2 The Roads Annuity Fund will provide funds to meet National Government's liability to contractors engaged to build the 10,000 km of road under the programme, termed annuity payment obligations, which will fall due under conditions to be agreed in specific project agreements entered into with developers to be procured competitively. The Fund will also provide comfort to road developers (including contractors and financiers) that National Government's annuity payment obligations will be met when they fall due to rule out fears that pending bills will accumulate with respect to payment demands under the new mode of financing roads development. In addition, the Fund gives greater transparency to developers with respect to the funding arrangements for the annuity payment obligations; and ultimately,

the new system aims to move the country gradually to a “user-pay” model for funding infrastructure projects outside the Exchequer budget.

- 1.3 The Roads 10,000 km Programme has been designed under the Public Private Partnerships framework and law, which aims at facilitating broad-based private sector participation in the development and financing of public infrastructure in Kenya. It aims to rapidly add 10,000 km of new bitumen standard roads to Kenya’s economy, opening up new opportunities.
- 1.4 The Roads Annuity Fund Regulations 2015 consequently articulate the sources of funds for the Programme, the conditions and procedures under which annuity obligations are to be financed, and circumstances when payment requests may be rejected. They also establish a governance framework that creates clear audit trails for all money movements under the Fund, and how the National Assembly shall oversight, annually, the operations of the Fund.

2. Legislative Context of the Statutory Instrument

2.1 In line with section 24(4) of the PFM Act 2012, these Regulations are made to ensure that the Roads Annuity Fund is subjected to a proper governance arrangement that promotes the objectives of public financial management, and has been established in full conformance to and compliance with those standards and requirements.

2.2 The PFM Act furthermore requires that public funds be subjected to periodic reviews to determine the extent to which such funds continue to meet the objectives for which they are established. The Roads Annuity Fund Regulations provide for periodic reviews of the Fund’s performance by both the Cabinet Secretary and the National Assembly.

3. Policy Background

3.1 The Roads 10,000 km Programme is designed to be financed under the PPP availability payments model, where the private sector partners raise own financing to design, engineer and construct the road assets, after which Government pays them on a semi-annual basis against continued availability of the road asset in the conditions and quality contracted under the Programme. The programme allocates key project risks away from the public sector, retaining largely regulatory risks within the public sector, thereby better aligning the capabilities and efficiencies of the parties to better manage their respective mandates in the design and delivery of higher quality and quantity of public infrastructure.

3.2 This policy approach has been motivated by the country’s experience with the development of road infrastructure since independence. Kenya has a total of 160,886 km of roads, out of which only 12,200 km is paved – most of which was done between 2003 and 2009. The rest is un-tarmacked – meaning connectivity and mobility remains greatly hampered in Kenya today. Furthermore, owing to inadequate maintenance, the paved roads deteriorate overtime and funds are ploughed back for rehabilitation resulting into huge capital outlays for rehabilitation while expansion of the paved road network grows at a very slow pace. As at the beginning of the financial year 2014/2015, the Ministry of Transport and Infrastructure had an outstanding on-going roads contract portfolio of Ksh.140 billion made up of a GOK component of Ksh.88 billion and a development partner component of Ksh.52 billion. Overtime, the Ministry, owing to a huge portfolio of projects, budgetary and Exchequer constraints, has not been able to finance road works as they fall due. The foregoing has led to accumulation of pending bills, expensive

contracts, and, under extreme circumstances, compensation payments as a result of interest claims (nugatory payments).

- 3.3 On the other hand, road maintenance in Kenya is currently funded exclusively through a dedicated Road Maintenance Levy Fund (RMLF), which is a statutory instrument. The total collection under RMLF from 2003/4 to 2012/13 amounts to some Ksh.172 billion (equivalent to an annual average of Ksh.25 billion). The road network condition has improved significantly due to better maintenance supported by RMLF. At the beginning of 2003/2004, the proportion of roads in good condition averaged only 10%. In 2012/13 the proportion of the road network in good condition had improved to an average of 25%, representing an increase of 15%. The proportions of roads in poor and unmaintainable condition decreased significantly from 56% to 40% signifying overall improvement of road asset value over the period.
- 3.4 As at the end of year 2013, the funds required to clear the maintenance backlog was Ksh.230 billion. It is estimated that the annual maintenance need is Ksh.40 billion per year while the RMLF collects approximately Ksh.25 billion annually. This means that the maintenance backlog continues to accumulate. Owing to inadequate maintenance funds, the investment incurred in construction of the roads is lost due to maintenance neglect. The need to ensure maintenance of the roads under construction to prevent the investment from wasting away is therefore important. This is one of the advantages under the Roads Annuity Programme.
- 3.5 In order to improve accessibility, address rural poverty, and provide opportunities for growth in rural areas, therefore, the Government has adopted a policy to upgrade to bitumen standards some 10,000 km of priority roads spread throughout the country. The strategy fits well under Kenya's Vision 2030 strategy where infrastructure is one of the enablers. Consequently, the Ministry of Transport and Infrastructure has proposed the design, finance, construct and maintain model under the program to address some of the above challenges. The Ministry, in consultation with the National Treasury has identified the Annuity PPP Model as a suitable implementation framework, and ultimately full PPP model and tolling for other high traffic volume roads.
- 3.6 An important reason for these Regulations additionally lies in the overall policy objective of leveraging private finance and private sector efficiencies and innovation in the delivery of public services. Since the private sector is generally risk-averse, the quality of projects promoted through the PPP framework should be high. This can only be achieved through careful project selection and preparation. In many ways, the quality of projects assume the colour of the implementing institution, hence house-keeping practices become crucial determinants of private sector comfort and confidence that projects are well selected and well prepared. The PPP policy framework recognizes that the public sector has a number of legacy constraints that can very well be compensated through private sector efficiencies. Through creating a new business paradigm for public infrastructure development, supported by well-defined and properly mandated institutions, the Government through these Regulations will be communicating a firm message to the investing private sector that Kenya is committed to making the PPP transaction structure work, and that all participating entities will draw value from engaging under that framework.
- 3.7 Like all matters PPP, the Roads 10,000 km Programme is premised on the triad platform of affordability, value for money and optimal risk allocation. In this context, the Regulations

provide a mechanism through which PPP policy objectives and aspirations are applied under this Programme.

4. Consultation Outcome

- 4.1 The National Treasury consulted a wide range of stakeholders while preparing these Regulations. These included the Association of Consulting Engineers of Kenya, the Institution of Engineers of Kenya, Kenya Bankers Association, East African Venture Capital Association, Development Finance Institutions in Kenya, Commercial Banks in Kenya, the Attorney General, the Ministry of Transport and Infrastructure, Kenya National Highways Authority, Kenya Rural Roads Authority, Kenya Urban Roads Authority, Kenya Roads Board, Central Bank of Kenya, and individual consulting firms.
- 4.2 The consultations were conducted through meetings convened by the National Treasury and which were held both at the National Treasury board rooms as well as in a public fora held at the Hilton Hotel, Nairobi in February 2015. All consultations were very well attended by all stakeholder groups.
- 4.3 Stakeholders were first consulted before the regulations were developed, and this phase of consultations aimed at soliciting their views on how to best structure the regulatory and financing framework for the Annuity Programme. They were also consulted after the regulations were developed, to obtain their validation that the regulations reflected the agreed framework.
- 4.4 At the validation workshop held on 2 February 2015, which was attended by about 100 stakeholders from all the stakeholder groups identified above, stakeholders endorsed the structure and design of the regulatory framework, reflected in the Roads Annuity Fund Regulations. They specifically validated the payment mechanism within the Fund, the financing mechanism within the Fund, the documentary requirements for payment requests, the governance framework for the Fund, as well as the financial accountability framework for the Fund. Several specific oral comments were received from the stakeholders at the validation workshop, which were logged by rapporteurs at the meeting, together with a range of written submissions on the draft regulations which were sent in subsequently - all of which aimed to improve some aspect of the draft regulations.
- 4.5 In general, over 50% of the comments related to drafting and or language issues in the draft Regulations, which have been properly addressed by the Attorney General in the gazetted version of the Regulations. The remaining 50% related to structural concerns with respect to the funding and payment process – all adequately addressed. Stakeholders sought stronger language with respect to Government's commitment to resource the Fund, and to guarantee that financiers and contractors will be compensated once the physical asset in the roads contemplated is built and delivered. They also sought stronger wording on the roles and responsibilities of the officer administering the fund, particularly that there should be as few decision layers as possible between invoicing and disbursements against invoices. Overall, the comments affirmed the Regulations. Stakeholders were reminded that in then end, the PFMA 2012 requirements on audit trails needed to be complied with under all circumstances. All of these interventions were incorporated in an improved draft of the regulations, which is the now gazetted version.

5. Guidance

- 5.1 Contracting authorities, investors, and professional service providers will all require guidance to enable them effectively apply the proposed regulatory framework and to comply with it.
- 5.2 An important obligation reposed in the PPP Unit under the PPP Act 2013 is the duty to conduct civic education to promote awareness and understanding of the PPP process amongst stakeholders. In addition, the Unit is obligated to provide capacity building to and advise contracting authorities on PPPs with respect to the planning, coordinating, undertaking or monitoring of PPP projects. Furthermore, the Unit is designated a resource centre on matters relating to PPPs and for that purpose, is required to conduct research and gap analysis to ensure continuous performance improvement in the implementation of PPPs. Part of this mandate extends to collating, analysing and disseminating information including data on contingent liabilities of Government in relation to PPP projects.
- 5.3 A specific and detailed Briefing Note to contracting authorities and to the participating contractors on the Regulations has been prepared to enable all implementing agencies and developers to intimately assimilate the Regulations. In addition, a standard document on the roles and functions of the Road Annuity Fund Regulations has been prepared for inclusion in tender documents to allow developers properly price their bids. These two specific tools are the most useful in creating both clarity and confidence that the Government has the wherewithal and resolve to see to the Programme's successful implementation.
- 5.4 This engagement strategy is thus practical, timely and fit-for-purpose.

6. Impact

- 6.1 In line with Section 9 of the Statutory Instruments Act, 2013, the Roads Annuity Fund Regulations 2015 do not impose any additional cost on the private sector.
- 6.2 Regulation 4(b) provides that one of the sources of funds for the Fund shall be fuel taxes as assigned by an Act of Parliament. These Regulations, however, DO NOT impose the said levy – they simply state that an Act of Parliament *may* assign fuel taxes to this Fund. The assigning legislation is the legislation for which a regulatory impact statement will be a necessity.
- 6.3 Regulation 4(a) also states that the Fund shall consist partly of moneys appropriated by Parliament. To the extent that this introduces a new class of Exchequer expenditure, the net effect on the national fiscus is neutral since the roads sector will net-receive any Exchequer for roads development where the roads are included under the Programme.
- 6.4 Most importantly, the Regulations are not in any way addressed to individual rights and entitlements, and do not create offences.
- 6.5 Finally, the Regulations do not oust the jurisdiction of the courts, and do not make any right, liberty or obligation unduly dependent upon any non-reviewable decisions. In general, they are designed to accord with the principles of good governance, rule of law and administrative efficiency and justice.

6.6 In view of the foregoing, it is deemed not necessary to prepare a regulatory impact statement for the Roads Annuity Fund Regulations 2015 on account of their impact on the private and voluntary sectors of Kenyan society.

7. Monitoring and Review

7.1 The Roads Annuity Fund Regulations 2015 support the following anticipated positive outcomes –

- 7.1.1 Transfer of initial financing, construction, Operation and Maintenance and project completion risks to the private party;
- 7.1.2 Construction completed faster and less expensively than under traditional contracts (accelerated development of roads comprised under the Programme);
- 7.1.3 The annuity payment structure allows predictability of budget financing requirements;
- 7.1.4 The large fixed element of annuity payments significantly reduces the risk of contract renegotiation with the private party;
- 7.1.5 Substantial growth of domestic private sector capacity in the roads sector; and
- 7.1.6 With a focus on outputs and performance, a reduction in the cost and administrative burden to government for monitoring private contractors.

7.2 These success criteria will be comprised in the contracted performance standards of the developers, set out in the project agreements, and subject to continuous review, monitoring and evaluation in line with the statutory responsibilities of the contracting authorities and regular monitoring of the PPP Unit as required by law. That mandate requires the Unit to continuously rate, compile and maintain an inventory of PPP projects, support contracting authorities by ensuring that tendering processes conform to the Act, monitor contingent liabilities and accounting and budgetary issues related to PPPs, among other like responsibilities imposed under law.

7.3 Contracting authorities implementing PPPs are required, during the implementation phase of a project, to establish contract management and monitoring teams, and they are required to maintain project-related reports, and to make reports to the PPP Unit periodically on the performance of projects under their portfolio.

7.4 In addition, the Oversight Committee is obligated to routinely monitor the implementation of the Act, and the officer administering the Fund is obligated to prepare and submit periodic financial and non-financial reports to the Oversight Committee on the performance of the Roads 10,000 km programme in Kenya, as well as the level of compliance with the established legal framework and policy.

7.5 The PPP Unit is mandated to conduct research and gap analysis to ensure continuous performance improvement in the implementation of PPPs

8. Contact

8.1 For further information on this statutory instrument, one may contact **Eng. Stanley Kamau, Director of Public Private Partnerships Unit** at the National Treasury on telephone number 020-2252299 Ext 316.